BHEKI MLANGENI MEMORIAL LECTURES AT UNIVERSITY OF THE WESTERN CAPE

MICHAEL E. TIGAR

March 11 -13, 1991

Bheki Mlangeni was a human rights lawyer prominent in opposition to apartheid. He was assassinated in February 1991 by a bomb placed in a tape recorder that was sent to his home in Soweto.

Lecture #1: Three Myths

[At the time this lecture was given, the ANC was drafting a new constitution for South Africa. Some whit anti-apartheid figures, such as Justice John Didcott, argued that the new constitution should be modeled on the bourgeois democratic constitutions of, for example, the United States. They argued that the constitution should not protect economic and social rights, nor address environmental issues. I disagreed, and so did most of the ANC comrades. This lecture was delivered at the University of Western Cape Community Law Centre in Capetown. This Centre had served through the apartheid period as a sort of ANC "think tank," and its director Dullah Omar was one of Mandela's lawyers. When apartheid ended, key ANC figures who had been in exile came back to South Africa and worked at the Centre on issues relating to the transition to a multiracial society. I was invited to deliver lectures on the problems and questions they were addressing.]

I'm honored to be here and especially honored to be giving this first in a series of memorial lectures. It has been my privilege over the years to have acted for the families of victims of terrorism and so I think I understand in some measure the feelings that have been expressed this evening. It is sometimes a long road between an act such as the proof of one that has been described and the eventual rendering of justice.

Some of you might recall that Orlando Letelier, who was an official of the Allende government in Chile, was struck down and murdered in exile in the United States in 1976. I represented the Letelier family. It was not until five years later when we obtained a judgment against the perpetrators, and now in the intervening 10 years we are still attempting to collect that judgment based on reparations that the court awarded.

I trust that the path to obtaining justice in this case will be shorter and the vengeance will be swifter and in the end the perpetrators will be found and made an example. This is the first of three lectures that I'm going to be giving here. The other two will be at the noon hour on Tuesday and Wednesday. Those will be, I think, somewhat more informal. I'm going to talk about law practice and the role of lawyers in defending cases involving issues of human rights and then Wednesday turn to some detailed consideration about old judges and new laws. But you can see by way of introduction as a kind of overview I want to share with you some reactions to the sense of exhilaration and wonderment and uncertainty and hope that I have found here, on my third visit to South Africa.

If I happen to say anything that seems like a commentary on the political situation in south Africa, I hope that if you don't agree with it that you will simply discard it because this is not a struggle with which I have been personally engaged in the way that you have and I am

not qualified to speak about it. I am qualified to speak about it only in this sense: it is the case that the struggle in South Africa is the struggle of every human being in the world who cares about human rights. And although it is perhaps an unfair burden, the fact is that those who have shouldered the burden of making change in South Africa have shouldered it as well for all of us including those in the United States.

I want to talk this evening very briefly about what I have labeled, "Three Myths". I want these to expose and to set at rest three myths that I have observed being discussed. The first is the myth of the benign state. The second is the myth of neutral principles. And the third is the myth of legal process. I'm not going to do these strictly in order. There's going to be some interweaving and a great deal of reference to history – the history of the United States and Europe whose revolutionary movements I've studied and written about, and I hope to justify these historical references as I go along.

Everybody knows that South African state as it's presently constituted is not benign. That's not the myth that I'm talking about. I'm talking about the myth that a state that would be put in place after some fundamental social change in the South African tradition could at that point be benign, as if it had no interest, that one could at that point speak simply in terms of the state as a shield rather than as an active protector of human, social, economic, and national rights. In that connection I want to read something that I came across in a recent article. It's a quotation from Justice Didcott. I take nothing away from Justice Didcott who has been very brave in stating his principles. But he says, "A bill of rights is not a political manifesto, a political program. Primarily, it is a protective device. It is a shield, in other words, rather than a sword. It can state effectively and quite easily what may not be done. It cannot stipulate what shall be done."

This assertion by Justice Didcott, I respectfully submit, is flat wrong. It has the illusion of the state, in that post-transformation setting, as benign. It is very easy to see how one can come to such a view. If you've been laboring and struggling against a very hostile, repressive, and tyrannical state for all those years it must seem as a kind of refreshingly dialectical view to think of a new state that you would erect as being benign. Failing to recognize that the exercise of state power must often deal with the state's (unclear). But more basically, that unless the state actively takes steps to promote certain values and goals, the system of social relations which is already in place will see to it that those goals cannot be achieved. Now, that's a high-faluting way of saying something I think is pretty simple.

Let's take the most basic political right you can imagine: freedom of speech. In the United States freedom of speech exists. We have a Bill of Rights and the first article says that Congress shall make no law abridging the freedom of speech. The problem is that the freedom of speech has been defined, given the system of social relations in the United States, as the right of any person who can afford to own a newspaper or a television station or a printing press to get their ideas out into the public. The Supreme Court of the United States has gone so far as to say that the freedom of speech includes the unqualified right to contribute to political campaigns – money that is; that is, the unqualified right of people who have the right amount of money to buy up as much television time as they want to get

their political message across and that to interfere with the exercise of that right to spend money to make speech is a violation of the first amendment. So that those without money can effectively be cut off from the instruments of mass communication.

The benign state that says that the right of speech is a neutral right that prohibits people from interfering is an expression of concrete social circumstance. The circumstance is the private ownership of the means of production. And if the means of production and exchange include the means of dissemination of ideas, a neutral, benign state type principle simply reinforces the power of the reactionary over access to the instruments by which public opinion is shared. So therefore, I reject, on those grounds, the myth of the benign state and the myth that neutral principles that simply prevent the state from acting in certain ways are adequate to express and advance the ambitious and entirely proper set of demands that have been formulated over the decades of this struggle and are now being presented for consideration and embodiment in a post-apartheid constitution.

Well, we needn't dwell in the present to see the point that I'm trying to make. And without apology I'd like to turn to the past for a little bit. I recognize that that's a dangerous undertaking. It's always dangerous for lawyer to start talking about precedent because precedent in the hands of lawyers is often a means by which the infamy of today is justified by the infamy of yesterday. As Marx remarked, the law shows its *a posteriori* to the people as God to his servant Moses.

Properly understood, however, the lessons of history can tell us something. They can tell us, as Santayana commented that those who do not understand history are condemned to repeat it. Everybody knows that's true. I teach in a law school. I teach civil procedure. I tell my students that "those who do not understand civil procedure are condemned to repeat it."

Properly understood also, history tells us that there are some forms, some attitudes, some aspirations that have been built up over time and that a state that takes its place after a social transformation must honor and respect old attitudes provided that they do not in other ways interfere with the state's central objectives. The failure of post-revolutionary movements to take account of old attitudes and the attempt to eradicate them has in many cases resulted in a great deal of unnecessary suffering.

When I talk this way I want to make also clear that none of us, I think, and I can only speak for myself, I certainly can't predict the future course of events. I think I understand the theory of history that permits seeing a little ways into the future but none of us in the process of drafting a constitution should fall prey to the thing that we do in our personal lives in wanting to live forever. How do we know that we want to live forever? I'm 50 years old and have three children. I don't want to live forever because I'm always trying to get my children to make up for the things that I didn't get done and to impose my will on them in the future when I know that in the first place it's futile and the second place it's wrong. So as lawyers, as constitution makers, as thinkers, we ought to avoid the temptation to want to live forever in that sense. We can see as far ahead as our circumstances permit to ensure that we help to make the changes that are demanded by the situation that confronts us.

But let's take a look at the past. How is it that the Anglo-Saxon model constitution that is proposed by Justice Didcott as an example for us comes to be made? What was it that happened along the road and how do those things teach us that a certain idea of justice would have been right when defined 200 years ago but surely is not right when speaking today? The English transformation from feudalism to capitalism can be traced a long ways back but we don't have that much time and I can see everybody looking at their watches.

If I started back in 1200 or something I would fill up the time with the old law of torts or those other things they bore you with in the property course. So let's take a look at the coming to power of Henry VIII. Henry VIII was a magnificent king. Plays have been written. Portraits have been painted. Had there been photographers in those days they would have needed a wide-angle lens to get a picture of his legs and his rank. He was fat. He had an eye for women. He always said to his wives what we wish the lecturers would say to us on long evenings: "Don't worry, my dear, I won't keep you long." (?) [0:23:30]

But Henry VIII did something else that was fairly important. You may remember his iconic struggle with Sir Thomas More, his Lord Chancellor. The play, "A Man For All Seasons" was written about it and Thomas More was that person – cited as an example of courage. Courage because More confronted Henry VIII about matters of state. But what was the true confrontation between Thomas More and Henry VIII? We saw what the true confrontation was when we looked at Henry's order to seize the land of all the monasteries, all the churches in England. Why was that done? And in whose interest was it done? It was done because Henry needed the money. That was the first thing. And the properties immediately after being seized passed into the hands of the English bankers and the foreign bankers who had been paying Henry's bills all those years.

But were those lands simply stately buildings filled with Bibles and monks going about their business? Were those lands simply the picture postcard verdant English hills? No, those were the lands upon which the English peasantry had customarily exercised its rights to pasture their cattle, to raise crops, and to feed their families by an appropriation of a larger share of agricultural production that they could possibly have managed to obtain by the tilling of what little plots they might have had the exclusive rights to till.

The purpose of the confiscation of the monasteries was to destroy the customary rights of the peasantry with respect to land. You might say to yourself, well how in the world was that done? There are records. We know exactly how it was done. It was done brutally. It was done speedily. And it was done almost efficiently. I say almost because much later, in the 1720s it was necessary to drive the remaining peasants who existed by customary forms of tenure off their land into events that I'll get to in a moment. Tawney recites in one of his books those notable eviction scenes in which a peasant is being driven off land he was occupying under right of custom. 'Know ye not," he said, "they say that the king's grace has pulled down all the houses of the fat abbots and now is the time that we men of the city shall pull down the pots of such wretches as ye be."

But what did the state say about what it was doing? It announced that it was engaged upon an unprecedented land grab? No. It declared that it was protecting the neutral right of property. The city bankers had bought the land and if they bought the land they must have the right of property. The right of property to law students who read the Roman-Dutch law and all that other stuff that they make you read, would know – consists of a relationship called *dominium* between a person and a thing – a *res*. The *dominium* between a person and a thing is by its nature absolute. Isn't that what they teach in property? That's what they teach in both the civil and common law systems. Stated in that way it's ostensibly neutral. But the statement of the norm is that form, mutual and absolute, excludes the customary rights of the peasantry.

So the assertion of a neutral norm about property resulted in the wholesale dislocation of the peasantry. Later on the 1720s, the notorious Black Acts, which were a mechanism for driving the remaining part of the customary peasantry off the land, brought the criminal law to bear on those who wanted to exercise their customary rights. This pattern, the pattern of using neutral principles about property law to deprive people of their customary tenure and either reducing them either to the point of tilling the small plots that they had so they could not produce any kind of surplus or in the 1720s – and this was a goal that was more manifest – making them into candidates for joining either the urban or agricultural proletariat, is an important and often forgotten chapter in English history.

So when we look back we see that the origins of a neutral norm of property are not themselves neutral. I give you a second example. The English revolution of 1640 was designed to do away with the prerogatives of the king and it was that revolution that abolished most of the prerogative courts that the king had established whose judges served at His Majesty's pleasure. There were a number of exceptions to that abolition of the prerogative courts. One of them was the maintenance of the Court of Equity which played a vital role in the administration of English tangible and intangible properties. But the most significant was that principles of criminal law which had been forged in the infamous court of Star Chamber were also maintained. The Court of Star Chamber had been the principal means by which blasphemy, heresy, and political dissent were punished. The devices so familiar to criminal lawsuits in any Anglo English-based legal system – conspiracy, attempt and other inchoate type of offenses had their origins in the Court of Star Chamber.

When I first sat down to read about the criminal laws of South Africa I was amazed not at how different it is from the English and American systems but how much the similarities are there. In the process of a fundamental social transformation in Europe and America, in which human rights were proclaimed, the state maintained these instruments – the law of conspiracy and the power to punish people who were engaged in political dissent based merely upon their associating and meeting together. And having preserved that most important weapon, it lay always ready to act and no one should be fooled that the fact that it is not exercised under particular circumstances, means that it could not again be taken up by the state and put to full use.

A third neutral principle: the principle of contract. What is a contract? Well South Africa shares two legal traditions. That's a misfortune I think for most of us because you're

compelled not only to understand what the court of Kings Bench says in cases from 1601 about the English common law of contract in which the court said that every contract executory includes an "assumpsit" –- whatever the hell that is. In practical terms, you know what it meant. It meant that the English barristers could get a corner on the commercial business of their time and begin to live in the manner in which they wanted to become accustomed and they did that by getting all the contract cases in the courts in which they were licensed to practice. But that's another story. You also in the South African system study the contract treatises in the Roman-Dutch tradition. So you have both common law and civil law contract principes cited and discussed in South African law schools and institutions.

Well, what's a contract? Well, basically it's an agreement. What could be more natural and neutral than two people meeting together and agreeing on something and is it a benign and neutral thing for the state to do to enforce their bargain? That is the most basic and classic form of what in the civil law system is called the contract *bona fide*, which is the bilateral contract. In in the civil law system it's the contract of location, of hiring or renting -- specifically, the contract *locatio conductio operarum* -- the contract of the hiring of labor. And even if you don't want to dress it up in all the Latin terms the contract of hiring labor remains the means by which the system of social organization when private ownership is in the hands of the means of production. It perpetuates itself. And what can be more normal, natural and neutral and benign than to say that if: A – who owns the factory -- and B – who is at the factory gates, want to agree on the wages and conditions of work that the state should enforce that bargain. Well, everybody in the room, I think, as I look around, has got the idea that that's a very interesting application of the law of contract. That is the power to employ is in the hands of people who privately own the means of production and if all the rest of the people own nothing except their labor power, the contract to employ them is inherently unequal.

Someone asked me the question last night – "but don't you think it's a little strange for the state to intervene to try to redress economic inequality – to deal with economic inequality?" And I said, no, I don't think that's strange at all. The state has been doing it for years. The state has interfered in the field of contracts by enforcing bargains in the labor market that were not truly free of coercion and of unequal bargaining power. It has done so by presenting the organizations of free trade unions as long as it could, interdicting the coming together of black workers and white workers to negotiate about the terms and issues of employment and all of the measures that are designed to even up the process by which the contract for labor is entered into.

If we take these three ideas together to develop an historical understanding we can see something, it seems to me. The property norm is not neutral. If the ownership of the means of production and exchange are in private hands, the contract norm is not neutral under some circumstances. And the principles of criminal law – I won't bore you with a long excursus on the origins of the conspiracy standard -- to be enforced against people who begin to doubt the validity of those norms.

I'd like to put that aside for a minute – my analyses of these private law functions -- and pick up that thread later because there's one other thing that I'm going to do before I come to some conclusions here. Many people are pointing to the Bill of Rights of the United States as a document that is worthy of emulation. And certainly it is, for reasons that I'll go into in tomorrow's discussion in more detail. Those of us that are involved as advocates at the bar are vitally concerned that the rights enumerated in that Bill of Rights be protected to the maximum extent possible and I yield to no one in my view that it is important to make sure that these rights are kept. It is important because it is the duty of the advocate to see that the regime keeps whatever promises it makes to the people about rights however few and however inadequate those promises may be.

South Africa is at a time when there is this unparalleled opportunity to draft something new. To draft a Bill of Rights and a constitution that speaks to the terms as they exist today. What is the background of the American Bill of Rights? The American Bill of Rights was adopted some two years after the American constitution itself. It was adopted principally because there was substantial opposition to the constitution in a number of American states, most particularly in Virginia. The yeomen lawyers, philosophers, farmers of Virginia stood up and said that the constitution would be a terrible and inadequate document unless it made a detailed provision for the protection of certain enumerated rights along with what Justice Didcott called the Anglo-Saxon law. Who were the Virginia farmers and lawyers who stood up and made these speeches? Patrick Henry, John Marshall, Thomas Jefferson. We know some of their names.

But who are they? We know one thing. They all owned slaves and the moment that they stood to make these speeches their entire economic wellbeing rested upon the appropriation of the economic surplus from a slave economy. The body of the American constitution itself contained concessions to the slave owner. So that whatever rights it was that they wanted to save in this benign and neutral way did not extend to the Black Americans who were regarded as a form of property.

Now, it was peculiar. If you had the opportunity to walk up to Thomas Jefferson on the street and ask him, 'Tom, what the hell were you thinking about? Tom, you made all these speeches in the Virginia Constitutional Assembly and yet you went home at night to your plantation being tilled by slaves – what were you thinking about?" One doesn't know what he would have answered. But I think that he would have spoken in terms that would be familiar to anyone who has read Engels' Essay on Slavery.

Jefferson's definition of himself as a free yeoman able to participate in the political process in terms that were reminiscent of Athens in its assembly required as a matter of self-definition that he be able to appropriate some of the economic surplus from somewhere. The very image of the yeoman farmer in the southern part of the United States in 1791 was tied up with the notion that the yeoman farmer's freedom to participate in public affairs rested upon the institution of slavery. That indissoluble connection required the bloodiest war in American history to break.

In reading and re-reading Engels' Essay on Slavery recently and some articles about it, I was struck by what I found to be the similarities between the ideology of the American slave owners and the ideology of a great part of the white South African ruling class. This is a class that has defined itself by virtue of its ability to extract an extraordinary amount of surplus value from a subjugated Black majority -- that seems to be an important political truth. It is important at least for the following reasons:

First: these parliamentary institutions that have been erected have been built upon that precept.

Second: the white minority in South Africa has been learning. It has listened to all of the words and read all the books about legality, and it has succeeded in trivializing, marginalizing, and discrediting the ordinary institutions of judicial review. I have lived a great part of my life in the criminal courts of the United States. I have not lived very many days or been very many days in the criminal courts of South Africa but I have a perception of a country in which 85% of the cases involving serious charges are prosecuted to judgment without the accused being represented by counsel. And I ask you – exactly what kind of a trial is that?

But I also ask you – what do the mass of people think about a judicial institution that can condemn someone to a lengthy term of legal servitude without respecting the most ordinary of the rights that that person is said to possess? What can people think about a judicial system that was simply a cover for the wholesale appropriation of such lands as the majority of South Africans have the right to occupy? When you think about the process of building a constitution it's necessary it seems to me to confront the reality that Anglo-Saxon type institutional structures come into play bearing a heavy burden of skepticism, cynicism and perhaps outright disregard.

Today, some of those issues, the issues involving the carnage of American's experience with chattel slavery are still being fought out. Even after the Civil War in the United State, the most that was offered to the former slaves was a vision of freedom based upon the neutral application – "neutral" in quotes, I would think by now – of the principles of property, contracts and criminal law. That is to say, the former slaves would have the right to sell their labor to owners of the for the farms planting cotton and other crops, to enter into a sort of free relationships with contracts, but "free" recognizing that they have confronted an economic system in which economic power was wielded by that same group of people who had formerly owned them in slavery.

The American constitution was amended after the Civil War. It was amended to provide that there should be equal protection of the law. It was amended to abolish – formally – the institution of slavery. But I want to focus on that American provision of equal protection of the law. I think I know what that meant. Those words, "equal protection of the laws" were purchased at an enormous price in human lives. President Abraham Lincoln said shortly before his assassination, that without the respecting of those rights, all that would have been in vain. The agreement of the former rebel states to those constitutional provisions was required as a condition of their re-entering the Union. Anyone who takes the slightest

time to study American history -– first the adoption of the constitution and its recognition of slavery, then Frederick Douglass's attempt to get the constitution interpreted even as it stood to abolish slavery, then the benign assurance by Justices of the Supreme Court of the United States that a judicial reaffirmation of slavery would solve the problem, and finally, then, the Civil War -- anybody who reads that knows that equal protection of the law doesn't mean anything unless it means that the ravages in human terms committed by the institution of chattel slavery and all of their remnants would have to be eradicated.

And yet today we have conservative, reactionary political figures and judges who read the words of that classic Anglo-Saxon text, the Constitution, in "neutral" principles, the Constitution as a shield not a sword – in Justice Didcott's words. Equal protection of the laws? Well that means that if you should give a preference to a black applicant for a job as a means of atoning for past discrimination that you have denied white people the equal protection of the law and therefore you are forbidden by the Constitution of the United States to do that.

I give you an example. Two months ago in a way that I was personally involved with. At the University of Texas Law School we have a program making sure that they admit black and Hispanic applicants in great numbers. Texas is in area that is very close to Mexico and a number of Hispanic people live there and those in Hispanic communities along the border that aren't lawyers and we're trying to do our best. An officer of the Justice Department of the Bush Administration declared that our efforts to provide educational opportunities for black and Hispanic applicants violated the Constitution because we were discriminating against white people and we better stop it. Fortunately, all hell broke loose and the President of the United States said that his employee didn't really mean that. However, the debate goes on.

The point is that this is one of those things in which it seems to me that the question shouldn't even need to be argued. That is to say that we shouldn't be required to argue against an interpretation of these "thou shalt not" principles as mere readings of the words without a sense of their historical context. It would have been better for the constitution makers if indeed after the Civil War they had expressed their evident intention clearly, to have said in no uncertain terms that would have left no room for the kind of debate about which we are speaking.

Now I know that it's not fair to talk about the progress and change in human rights without references to Eastern Europe and the Soviet Union. Here is my obligatory reference. I say that it is clear that the socialist governments of Eastern Europe and the USSR made some serious errors. They made some errors in underestimating the ability of state power to carry forward under certain circumstances. Made some errors with respect to human rights issues. I will say this. The interests of the United States and the other metropolitan countries in what's going on in Eastern Europe can now be measured with great precision because there is damn little rhetoric about human rights in Eastern Europe now and a great deal of rhetoric about the privatization of industry with the resulting massive unemployment that has happened in the wake of the changes there as people are being thrown out of work for the application of these neutral market forces.

Now, let me talk about my third principle and then try to tie this together because I know that you may have questions for me. I've already talked, I think, about the idea of the myth of the benign state. I've talked to some extent about the myth of neutral principles. Let me talk about this notion of the myth of legal process. What do I mean by that? I mean what the hell am I doing talking about the "myth" of legal process. I'm a lawyer. For me, one would think, this process is not a myth.

I came to law school in 1962 because I thought that my commitment to civil rights was an important one that I could best carry forward if I had the right audience in the courts. After all, the American courts were at that time poised, or so it seemed, to make even greater gains. They were attacking the structure of racial injustice that had been built up for all these years. If I were a lawyer I could participate in that. Shortly after I got out of law school, I began to observe what I thought were some very disturbing things.

That is, that the emphasis by lawyers on the importance of *their* work was being used as a means of stifling the initiatives of the movement itself. The lawyers were assuring me that if you file a lawsuit demanding that the schools be desegregated, or that the police department be directed to take certain steps to protect civil rights, then judicial judgments could be obtained that would achieve these goals. And, because judgments could be attained achieving these goals, the movement could cool its heels for a while. That view was, I think, a terrible mistake.

Fortunately, there was a great deal of debate about that idea and in the end; the notion did not entirely prevail. Suddenly, well, actually, not suddenly, in the late 70's and especially the 80's, the pendulum swung back the other way. Reactionary administrations appointing reactionary judges. It became very, very clear that the courts would not, in fact, fulfill the agenda of the movement for social change. To some of us, I don't want to say that I am the only one, but to some of us, it seemed that was always the case. The courts could never fulfill that agenda. Then the hammer swung back. When the reactionaries reacted, they confronted a movement that had been weakened by its excessive reliance upon what could be accomplished in the legal process.

I want to be very clear about this. I am not taking the position that lawyers' view and work are worthless and you should disregard them, or that going to court to defend rights or negotiating to defend rights is a form of capitulation. I don't think that. I think that thinking that is terribly wrong and unproductive. I will say this and I say it to those who are lawyers. We are servants. It is inevitable that we will be servants and the only question is who shall we serve? That is not a new thought. Marx wrote a brief essay, Theories of Surplus Value, in which he pointed out that lawyers, because they appropriate surplus value, don't make things themselves. He said that they are by and large destined to be "servants of the 10,000," by which he meant the owners of the means of production and exchange.

Lawyers don't expend their labor power in the way that wage workers do. But that said, Marx recognized that lawyers had played an important role in social change. When he began to study and to write, he had before him this great spectacle of the lawyers who had

defied their class interest and participated so brilliantly and so bravely. You had the revolutionary movement from the 10th Century to the French Revolution and beyond. The eloquence and perception of jurists was one of the things that drove the movement forward.

But that work was done by paying attention to and serving movements for change. We must not forget that, and that we have decided we will serve the movement for change and not the 10,000

It is not our job to dictate the terms on which change shall take place. It is our job to understand the traditions and structures of which we have been a part for the hundreds of years that have gone before us, and then to understand the claims for justice that are being made by our clients, whether they are individuals or a movement as a whole. Then, we must take those claims for justice and translate them into concrete provisions, to understand how state power is exercised. And when the state has made certain form guaranties, , we seek to ensure that those provisions are respected. When we confront hostile state power, we remind those who exercise power that the consequences of turning aside or blunting the people's claims for justice are more formidable than perhaps the wielders of state power have assumed. [00:13:00]

So, where does this lead us? It leads us I think to understand first that in a transformation we must think about how the exercise of state power will be structured. We must not be bashful in understanding that the state must possess the power to make sure that it carries out the task assigned to it and is able to protect itself against its enemies. To believe that the state can retreat from that responsibility behind the facade of mutual thou shalt not statements of right is to deceive one's self.

That self-deceit will result I think in the crushing of any newly formed constellation of state power by its enemies or, perhaps worse, leading to a long slide into tyranny by those who want to take advantage of the state that has weakened its power to preside over social change. Now, the second thing that they tell us.

Bluntly put, when the frame of government is being erected neutral principles don't have much of a place because in fact there are no such things. We know rules cut for or against the interest of this class or group or the other, and it is an error to say that neutrality is the appropriate sense when neutrality leads in the hands of private wielders of power the means to undercut the fundamental goals upon which the transformations occur.

That's the lesson about property at this time. The frame of government it seems to me ought to say and must say a great deal more than this customary, this sort of Anglo Saxon model. The frame of government must recognize that there cannot be some artificial official distinction between private law and public rights. The frame of government must erect and make decisional and enforceable a whole set of rights that guarantee the people the most basic rights without which the exercise of all others doesn't mean anything and that is the right to appropriate and determine the appropriation of the economic surplus. Now, that

statement, the right to appropriate and determine the appropriation of economic surpluses at the root of the ANC in a number of ways.

It is at the root of the idea about the rights of working people. It's at the root of the idea about the right of the family because the notion of the destruction of the family in the course of the capitalist rise to power and thereafter is well documented. It's at the work of the ANC to protect the environment because it only by consistently limiting the profit drive that one can accomplish those sorts of social goals. Unless that notion is enshrined in the frame of government and put past arguing that just as sure we are sitting here that there will be people who will argue about it. There are already enough arguments about moving forward without the being raised by people. I'm a servant. We lawyers are servants.

In working for change, we have always been with people and with their movement for change and we lawyers must humbly and without arrogance accept that fact. That's where I come back to where I began. The assassination of Bheki is just one in a long series of terrorist acts directed at people who have chosen a path, a path of attempting to articulate and carry to action the people's claims to justice. So, perhaps the way to see what we as lawyers ought to do is to remember, as we are this evening, that example of courage.

To do that is not so unusual after all. Remembering our march is not done for any purpose other than strengthening our own resolve. After all, that has been a tradition in every revolutionary movement of which I know.

William Butler Yeats wrote of the Easter martyrs of 1916 in that vein when he said
Too long a sacrifice can make a stone of the heart.
O when may it suffice?
That is Heaven's part, our part
To murmur name upon name,
As a mother names her child
When sleep at last has come
On limbs that have run wild. . . .
I will write it out in a verse—
MacDonagh and MacBride
And Connolly and Pearse
Now and in time to be,
Wherever green is worn,
Are changed, changed utterly:
A terrible beauty is born.

In that is the dialectic The beauty is the beauty of the movement for change. What Yeats meant by terrible is only the needy whose voice is raised will be heard through us, their servants. Thank you.

[During the question period, the recording of which is not complete, one questioner asked in effect whether the ANC draft constitution mandated socialism, and whether I had said that it did or should. Another questioner wanted to know how I thought the negotiations

over a new constitution would proceed. I replied that social change works itself out over a longer period than one might think, and I cited Law and the Rise of Capitalism in this context. I have paraphrased my answers below.

I noted that on this dialectic it is important to remember that the present institutional structure of South Africa apparatus has a number of allies around the world that are also to be taken in to account. I said that the results of the process of change are in the hands of the people present at this lecture.

On the issue of "socialism," I did not say that the ANC draft mandates socialism. Rather, it speaks of rights – of women, disabled people, children, and of environmental, economic, affirmative action rights. These provisions cannot be brought into effect without the state disposing over a portion of the economic surplus in order to see that those rights are respected. That is, these rights mean that you need to appropriate economic surplus in a particular way. That is a decisive characteristic that takes it beyond the formulation that Justice Didcott would prefer.

In response to question about adjustment of property rights, I noted the historical evidence that such adjustments can be complicated and difficult. I cited examples that I had used in Law and the Rise of Capitalism about the intractability of property rights adjustments in revolutionary France. I noted that this issue will be the subject of an ongoing struggle.

Lecture #2: The Advocate and Social Change

Hello again. I see some familiar faces here. Tonight, this is somewhat more informal talk than last night and I'm going to leave more time for questions and discussions.

I want to talk about what it means to be a lawyer, or more precisely, an advocate. That term is used in South Africa [as the equivalent of the British term barrister], keeping in mind that even though you're not an advocate you do plead before magistrates and so on. So, we're talking about anybody who goes to court to defend for somebody else's rights. It's fairly easy to see that the role of the advocate that goes before a tribunal is a difficult one.

From that observation, some people go on to say that there really isn't any use in mastering the craft of advocacy, or indeed appearing in court at all, given the systematic and predictable denial of rights. So what is the justification for learning to do and then doing this work? For someone like me who has spent the last 25 years appearing before tribunals who did not, in many cases, seem ready or willing or able to protect the rights of clients I was representing, what did I think I was doing all this time? Did I think it made any difference?

We all come at this from a common tradition. The role of the advocate in revolutionary times has been fairly constant to create a constant if we look across the history of social change. For example, in the United States there was, in 1735, a celebrated prosecution of a newspaper editor named John Peter Zenger. Now that's a famous case. Zenger published a newspaper that displeased the British colonial authorities. After a controversy over who

was going to represent him, his trial was convened in the City of New York in 1735 and he was represented by a man named Alexander Hamilton, a lawyer from Philadelphia. Hamilton was William Penn's lawyer.

In those days, in the British colonies, there was a jury system which is an important part of this story. I understand the distinction that in South Africa there is no jury. It became clear that the judge was ready to find Zenger guilty on the spot, but the jurors who had in mind the role of the free press and their own oppositions to the Governor acquitted him. He was found not guilty. After the Zenger case in 1735, the authorities never dared move against the colonial newspaper editor for fear that the favor of such a prosecution would discredit...

And so the case became famous as an example of lawyers and their clients standing up to public authority. There are some other examples that I want to put on the table. The Irish protest against English rule stretched out over more than 100 years. And the great thing about reading the speeches in court by Irish advocates is they have their own way of dealing with a language that wasn't their own in terms that must sound familiar to many of you. The official language of the courts in Ireland was English and Irish advocates were forbidden to speak in the Irish language and, indeed, there had been a wholesale English prohibition of any teaching at all of the Irish language. The English had at least the virtue of being consistent wherever they were in the world and they forbade the teaching or carrying on in any language except English.

We take yet from the Irish advocates the denunciation of the state sponsored inforer and looking back over the speeches of Irish advocates in political cases we find notable examples of rhetoric that is relevant even to this day. For example – there is Dan O'Connell, famous Irish advocate, who said this about an informant who was testifying on behalf of the state.

> I speak not now of the public proclamation for informers, with a promise of secrecy, and of extravagant reward. I speak of what your own eyes have seen, from the box where you are now sitting; the number of horrid miscreants, who acknowledged, upon their oaths, that they had come from the seat of government -- from the very Chambers of Dublin Castle -- where they had been worked upon, by the fear of death and the hope of compensation, to give evidence against their fellows. Oh, yes, the mild, the wholesome, the merciful councils of this government are perched over catacombs of living death, where the wretch that is buried a man, entombed till his heart has had time to fester and dissolve, is then dug up a witness!

Whenever you read a lawyer talk like that you put down your book and say, "I wish I'd said that." Here's another example.

> "If it was not known by unfortunate experience, and particularly in many recent instances, it could scarcely be conceived that such abominable turpitude could find place in any human being. It could scarcely be conceived, that any being, imbued with a rational and immortal soul, would deliberately come forward to forswear himself in a court of justice when if he is believed the life or liberty of the accused

> will be forfeited. Look at him. He admits to treason and proudly carries the pardon in his pocket. Yes, his pardon in his pocket, so that he will not be executed as a traitor. And more, his bribe -- not yet in his pocket. Yes, yielding up the tie of friendship, to watch the steps of his friends for the bribe of government. I have heard of assassination by sword, by pistol, and by dagger; but here is a wretch who would dip the Evangelists in blood; if he thinks he has not sworn his victim to death, he is ready to swear, without mercy and without end: but oh! do not, I conjure you, suffer him to take an oath; the hand of the murderer should not pollute the purity of the gospel: if he will swear, let it be on the knife, the proper symbol of his profession!

In the first year that I came to South Africa, in 1988, we were in a trial advocacy teaching program based upon a hypothetical case file about an ANC comrade. And our effort was to help to train advocates to deal with the cross examination of informant witnesses in political cases. The main prosecution witness was someone who had sworn on direct examination presented by state that she knew a number of U.S. leaders, that she had been with them, that she knew the accused and they were involved in running guns and she had worked in that capacity. Later on she had been arrested and after a decent interval at KOMPOL [security police headquarters]had seen the light – that classic light: "I confess – they did it." And she had decided to become a government witness and in consequence of her willingness, to be maintained in an apartment in Johannesburg.

As I thought about the case, what struck me was the similarity between that use of informer testimony and the situation that we had very often confronted in the United States and the Irish advocates had confronted, the English advocates had confronted – the similarity, that is, and not the obvious differences. And so I suggested a cross examination that would be designed to point out to the presiding officer the weaknesses in that testimony, to permit the advocate to argue at the end of the day that there ought to be a reasonable doubt that the state had not borne the onus of truth if all that it could summon up were witnesses who had been put through that kind of a process and who had come to court with that kind of experience in custody. I tried a cross examination that sounded like this.

> Q. Of what country are you a citizen?
> A. South Africa.
> Q. Will you tell His Lordship, what is the penalty for treason in your country?
> A. Death.
> Q. Will you tell His Lordship, please, whether in your examination in KOMPOL you admitted doing a number of acts and if you were convicted of them the result would be that you'd be sentenced to death.
> A. Yes.
> Q. Now, I want you to look around the courtroom and tell His Lordship who has the most to say about whether you will be prosecuted for that offense that carries the death penalty.
> A. Those people at that table.
>
> Q. Well, that's the prosecutor, isn't it?

A. Yes.
Q. Well alright, now that we understand that, will you tell His Lordship, please, whether you want to be put to death?
A. No.
Q. It was also the case when you were first arrested you denied to the police that the accused here had anything to do with running guns, isn't that right?
A. Yes.
Q. And you deny that you had anything to do with running guns, right? But now you're here to tell us that that was a lie.
A. Yes.
Q. So His Lordship will understand, when you've denied that you were running guns you were trying to protect yourself, weren't you?
A. Yes.
Q. So now His Lordship is to understand that you are someone who will lie to protect yourself.
(Laughter)
A. Yes.
(Laughter
Q. And at the time you were arrested, the accused were your friends, right?
A. Yes.
Q. And you are now telling us that you lied to protect your friends, right?
A. Yes.
Q. So His Lordship understands you also lied to protect your friends.
A. Yes.
Q. Well, so that we don't have any doubt, who is your best friend in the world?
A. I don't understand the question.
Q. Well, suppose you and the accused were in an airplane that was going down and there was only one parachute. Who do you think should have the parachute?
A. I should.
Q. That's right because you're your own best friend, right?
A. Yes.
Q. Well, since that – I notice that you are very well dressed today.
A. Thanks.
Q. And you live in an apartment in Johannesburg.
A. I do.
Q. Who pays the rent?
A. It's my mother's apartment.
Q. I didn't ask you that. Who pays the rent?
A. Well my mother pays part of it.
Q. Who pays the rest of it?
A. The state helps me out.
(Laughter)
Q. Were they helping you out when you were telling them that neither you nor the accused had done nothing against the law?
A. No, they weren't. They started helping out afterwards.

Well, what's the purpose of all that? Let's take that cross examination, that confrontation of an informer in a court and ask yourselves a question about it. Some folks came up to me last night and asked about the Critical Legal Studies movement in the United States, which some of you may have read about. And for those who asked those questions and raised those, this is my comment about that subject as well. Some of those associated with the Critical Legal Studies movement Those members say that the actions of advocates in courts don't make any difference because talking about rights is currently useless as a practical matter. [See my essay, Essay, "Crime-Talk, Rights-Talk and Doubletalk," 65 Tex. L. Rev. 101 (1986).]

Based on the examples that I have given I want to make a claim about the role of the advocate in court and about the rhetoric of the advocate who talks about rights. An advocate stands up in court and says, "Your Lordship, I contend that the accused in this case must be acquitted because the state has not borne the onus of truth." Or, "I contend that the state should not be free to offer this item of evidence for this, that, or the other reason." Or, "I contend that the accused in this case was simply exercising the ordinary rights of a citizen." What is the advocate doing? I'm very conscious of the fact that there is only one entrenched right remaining in the South African Constitution – I think. That is the right to speak English or Afrikaans as you choose.

(Laughter)

But all that aside, there are statutory provisions and common law provisions that supposedly confer on the accused certain things that are called rights. When the advocate stands up, in my view the advocate does not by going to court admit the legitimacy of the state apparatus, does not admit that the apparatus of rights as declared is adequate or would be adequate for some future form of society. Nor does he or she admit by standing up in court that whatever judgment the tribunal might eventually render is going to be good, or going to be proper, simply because the tribunal rendered it. What does the advocate do? Let's move to some criminal cases because those are easy.

The criminal defendant doesn't have any choice about whether he or she is in court. Arguably, if you bring a civil case you are asking the state for something. There may be an argument about doing that. The criminal defendant doesn't have any choice. In my view, what the advocate is doing is three things. He or she is persuading, measuring and predicting.

Persuading. Judges swear an oath to uphold the law. There are many judges who will have a lot to answer for in the next life by having taken that oath.

(Laughter)

The judicial function in bourgeois society is exercised by people who are nominally independent of the system of social relations. And sometimes those judges really do try to find the open spaces in the law and enforce it. Sometimes those judges can be persuaded. We all know of cases in which there has been an acquittal or a denial of some application by

the police. Or, consider the decision by the Appeal Court on the kidnapping of someone to come and stand trial in South Africa, invoking a principle of international law that -- with South Africa having accepted it, it leaves only the United States and Israel claiming that it applies.

I was surprised to see that decision, but the judges applied the rule. How did they decide to do this? They decided to do it because the advocates in front of them were talking about the rule in a persuasive way. Not as supplicants –"Oh please, Your Lordship, will you do this?" – or "Come on, Your Lordship, get it right." No, indeed. They got it because as advocates they were prepared, they were thorough, they were persuasive in the ordinary sense of that word, and I have a feeling increasingly, that they embodied a certain notion or ideal of justice that the judges -- or some of them -- feel that without the periodic monitoring of which, they themselves would have to see that they delegitimized.

On this view, a right that might appear in a statute, or a decided case, or a common law principle, is nothing more nor less than a promise that the regime makes to the people. And the advocate's attitude as he or she stands up is not that that promise is enough, not that it's a particularly good promise, not that in some future society some other kind of promise will be made, but that it is nonetheless a promise and the advocate is here to collect on it. Thus, the advocate persuades but at the same time maintains that critical stance that is necessary to the other requirements of rights rhetoric.

In order to be able to persuade one must be prepared in the sense of having the academic training and research and thorough consultation with clients that's necessary before you go into court. But, I don't minimize the fact that you also have to have a certain amount of courage. The advocate who is prepared at all times to go into court and persuade on behalf of the oppressed is going to have to take some risks. I'm here to tell you I think there's some satisfaction when the risks pay out and the taking of those risks brings a kind of contentment of its own. But there are risks. The reason the Memorial Lecture last night is called a Memorial Lecture underscores the fact of courage. So the first function of the advocate is to persuade, using rights rhetoric.

The second function of the advocate's rights rhetoric is that it measures. It measures in two senses: how far the state falls short of redeeming even the promises it makes and how far even those promises all short of meeting the people's needs. You are fortunate because you do not accept the assumptions upon which the state rests its power. You question those assumptions. You can't use rights rhetoric to measure unless you stand someplace from which you question the dominant assumptions of the state.

What do I mean by "measured"? Let's take the first sense. Measure how far the state falls short. You have a special role as an advocate and again I suggest that tonight. That special role is to represent the people – to represent your clients.

Your clients, many of them, are not even mildly aware of the rules and the statutes and all of it. For them the court – the place where you do your work as an advocate – is a distant, forbidding, objectifying, discredited place. It certainly is all of those, if you're an accused in

the dock. But you at least have a key. You have the right of audience there and you can stand up and translate this reality for your clients and attempt to bridge the gap between the state's indifference and the client's needs.

So the first job of measuring for you as a lawyers is to say, "Wait a minute." For example, there is a procedure by which a confession of the accused is supposed to be made admissible. The procedure of getting the confession and going to the magistrate and doing all those things that are set out in the journal of procedure book. Again, I have enough experience in South Africa, having only been here on three occasions and having read a number of decided cases and talked to lawyers, to know that that procedure has all come apart. Police misconduct is rife and that the magistrate procedure is often used as a cover-up for what happens at KOMPOL.

You as the advocate have the rightful job of measuring, of standing up in court and persuading the court how far short the state has fallen of keeping its promise with respect to the confession of the accused and also to say to your client immediately and to the mass movement more broadly, how far the state has fallen short. Because you with your skill and training are the only people who can do that kind of measuring, who can point out the gaps between the promises the regime has made to the people and its actual record of performance on those promises.

But then there's the second thought. That second thought to be measured. That second thought to be measured has to do with something that I call in my book, "the jurisprudence of insurgency". This kind of measuring has to do with your sense of what must be done. You go out to a township. You go out to one of the so-called homelands. You go into any inner city. You can see what tasks lie there. You can see how difficult those tasks are. You can see that the passing of a statute and the pouring in of some money simply would not solve the difficult problems having to do with people's expectations, needs and desires. So you started the process with a little humility about what the law can do. But you can also see that there must be changes and that those changes must be reflected in a new set of promises that a state constructed on new principles will make in a free and democratic South Africa.

The content of those promises and carrying them out is inevitably the job of the lawyers who have listened to the needs of the people. But inevitably lawyers will be involved in that process so how do I describe that as measuring? You know that in the system that exists today, you would say to your clients, that even if you win the litigation, you have fallen short. You admit to your client – an individual or a trade union group, for example – that the present law gives us only as much as it can, as it was designed to give. And your clients say, well that's not very much.

Some lawyers might reply, "what do you mean it's not very much? I got you everything that the law provides." The honest lawyer would say, "I know it's not very much. I know it's not enough. So now we the lawyers and you the people, our clients, are going to have to forge this alliance to get a new set of rules in here that will satisfy the people's claims for justice."

The nature of those new rules cannot be something that lawyers go up onto some tower and talk to other lawyers about. It's all very interesting to sit around with other lawyers and talk about things that a year or two ago were strange. Have you noticed that when you go back to people in your family who are not lawyers and start talking about all the things you learned in law school, how they look at you like something alien has taken over your body? (Laughter)

It's because you're saying all these strange things. And I think it happens every place. That's a reminder to lawyers that we often forget in whose interest we're supposed to be lawyers. The job of thinking about the future is not a job that we lawyers can do all closeted up with ourselves. No, indeed. It's one in which we work with our clients who are going through this process making plans for a kind justice that some present-day decision does not satisfy -- to see what a new set of rules might look like.

The third way in which rights rhetoric is relevant is that it is, or can be, predictive. This is related to the second kind of measuring – assessing the distance between what is given and what is desired. That is, the lawyer who is involved with clients in litigating on their behalf, standing up in court and arguing, must try to describe what a newly constructed society might look like -- a society that paid attention to people's needs.

Again, that is the debate that is going on in South Africa and the discussion that started out last night, and about which I shared a few thoughts .

All of us hope that when we have a theory of change that permits us to see a ways down the road, I hope none of us deceives himself or herself in the belief that we can anticipate every zig and zag in the process of historical development. None of us deceives himself in thinking that the other side, the reactionary, aren't going to be battling back. In that dialectic there's going to have to be some adjusting and learning and trimming of sails. But in the broad outline we can predict. And, with respect to a minimum program of claims for justice -- the minimally acceptable set of demands that are now being made -- or are going to be made in the future we can surely have some confidence that our training and experience as lawyers equips us -- if we'll just listen, to heed the voices of our clients.

This notion about the relationship between struggle and daily work is one that has been borne out again and again. And every society in the process of change faces not only wonderful opportunities that lead to a sense of exhilaration but also faces the terrible risk that in the process of formulating the new standards, the lawyers will at some point stop talking to the people and start talking just to themselves. When that happens the lawyers are courting a terrible danger and sowing the seeds of their own undoing. It's going to be important for this generation of lawyers to read about these earlier generations of lawyers in other revolutionary situations whether it be France, the Soviet Union, England, Ireland, or wherever. Try to heed those lessons and avoid the temptation to move too far away from those voices on whose behalf you have persuaded and measured and predicted. Those voices and aspirations it has been your job to translate into claims for justice that have some expectation of being satisfied.

That's all I came prepared to say. I thank you and let's open it up to questions.

(Applause)

QUESTION (inaudible):

TIGAR: That's a good question [about the risk of lawyers being isolated]. Two thoughts: The first is to avoid the error of a large part of the Critical Legal Studies movement in the United States which simply says that talking about rights doesn't make any difference. The court system is corrupt. We're going to stay away from it. And so they're not members of the bar, they don't go to court. . . . I guess it just sort of proves itself. You can tell I'm mildly contemptuous of that attitude. But it really is the classic intellectual attitude, right? To sort of retreat, okay? 'Well, I don't really care,' you know? It's the attitude that the poet, Federico Garcia Lorca during the Spanish Civil War expressed in a poem that begins

He cerrado mi balcón
Porque no quiero oír el llanto
Por detrás de los grises muros
No se oye otra cosa que el llanto

I have shut my balcony
Because I do not wish to hear the weeping
But from beyond the grey walls
Nothing else is heard but the great weeping."

So that's the first "isolation" of the question.

Now the second kind of intellectual isolation happens because the lawyers either came from a certain place to begin with or forget that they've got roots in the community. And that's the sort of mind game that gets played by people who imagine that all you need to do to have a good idea is just think of it. That ideas are separate from practice. Ideas are separate from reality. And that sort of isolation can lead – and here all I'm talking about what other people have written – it can lead to a kind of super-leftist isolation or it can lead to a kind of defeatist isolation.

Now, to answer the practical question: how do you do it? Well, I think the way to do it is to listen to your clients. That is, it takes more time if you're going to represent a labor group to get out there and talk to the workers. But I'll tell you something. That time is well rewarded. I can remember one of the greatest cross-examinations I ever did was of a reactionary lawyer for a reactionary trade union leader and the way that I did it was that my clients who were rank and file steel workers had read over the material and found out that this guy didn't know what he was talking about. He'd gotten so far away from the workers that he didn't know what he was doing. And then the next thing we did in this lawsuit was we put one of our rank and file worker/leaders on – a Black steel worker from Youngstown, Ohio. He got up on the witness stand and we had worked and we had listened

and we were prepared. And the other side, the lawyers for the reactionary leadership for the steel companies thought he was just a steel worker. And so they started asking questions. And it turned out that he knew how to run that steel plant because he'd showed up there for work every day for 20 years. And that impressed the judge. Now, what he had was a tremendous sense of nervousness about getting into the witness box in a courtroom. We lawyers can work with that, but we never would have had these great ideas if we hadn't gone down there into Homestead, Pennsylvania, and the steel mills of Gary, Indiana, down around the steel mills of Chicago and Cleveland and so on and talked to the people who were our clients.

So. It sounds simple, but there it is. You've just got to get out of the office.

(Laughter)

QUESTION (inaudible):

TIGAR: I understand the position that someone might have saying, "I refuse to cooperate with the Court." However, the experience in the United States has been that that sort of refusal has ultimately been unproductive because it was tried by the Industrial Workers of the World defendants in the wake of the First World War who all stood mute in their sedition trial. And it's been tried in a few other cases and the problem with it is that it doesn't give a basis for mass organization around racism issues and the injustice issues. [See also Kenneth Broun, *Saving Nelson Mandela*, for a discussion of the tactics in the Rivonia trial.]

Now, what do I mean by that? In other words, if an advocate goes to court every day and the accused decides to be tried in a court, the advocate can stand every day and object to the procedures that are going on, right? Now, some cases are closed to the public. I understand that. But where there is a public trial which is the case in many of these political trials, I think the organizational possibilities are much greater by standing up in the court forum every day and objecting to what's going on. Also, it may be that the judge will give a little here and there and then you'll find out more. . . .

I remember in the Angela Davis case I stood to argue that the charges should be dismissed. I knew that we were not going to get the charges dismissed. I just knew that. But I knew that the press was listening and I knew that Gov. Ronald Reagan had appointed his Special Prosecutor who really looked greasy. He looked like George Scott with a bad hangover, you know?

(Laughter)

And so I started by saying, "May it please the court? I intend to show that with Albert Harris as the engineer, the Marin County Grand Jury is America's only working railroad." (Laughter.) Now that is not a legal argument. But that's an argument that I could make. The great thing about being an advocate in a criminal case is not that you're permitted to confront the state but that you're required to do so. Isn't that wonderful? Think of another

place in South African society where you actually get dressed up and your job is to confront the state. (Laughter) So, I don't mean to trivialize what you have said. I understand the position and I debated it through with many clients and have come to the view that you shouldn't lose your opportunity to do this measuring function in the act of trying your case.

QUESTION (inaudible) concerning winning on a "procedural" ground:

TIGAR: Did everybody hear the question? First off you need to see this at a human, personal level. I didn't get into this business because I like to lose. I like to win. I really do. And therefore – and sometimes it happens, for example, that we'll be pleading a case that has substantial human rights issues and suddenly it will appear that the state has made a procedural mistake so that we could win the case but it will be on "technical" grounds. The court will not recognize our human rights points expressly. That's fine. I'll take that. Because when I step outside and am asked why did you win, I'll say it's – well the judge was not willing to publicly acknowledge the human rights point, so he chose this other one on which to base the decision and we regard that as the people's victory.

Now, I think it's a people's victory for the following reasons:

First: Anytime and particularly in a highly sensitive, criminal matter, that the state is compelled to keep any of its promises is a good thing. These so-called technical rights and procedures are not technical but the life and liberty of the accused may sometimes depend on them.

Second: I think it's going to happen as it's happened in the past and it may be happening more frequently in the future that judges will be inclined to reach a good result but unwilling to state the very broadest reasons for that result. That very often happens in a transitional period. Either in a progressive direction or a regressive direction. And so I'll take those victories.

For example, during the Vietnam War, if you were between 18 and 35 you had to carry a card that showed your draft status, your conscription status and if you didn't carry the card you could be put in the penitentiary for five years if you were found not to carry it. It was kind of a dumb law, but there it was. Young men protested the Vietnam War, and burned or tore up their draft cards rather than carry them. Rather than prosecute some of these young men, the government simply ordered that they were simply immediately inducted in the Army under what were called the "delinquency" regulations. And some 3,000 of them were already in the federal penitentiary when I argued the case to the Supreme Court of the United States to invalidate that legal provision. [We won the case, not on the constitutional issues that were clearly present, but on a fairly narrow administrative law ground. That winning argument] was so technical that I can't even repeat it right now.

(Laughter)

The result was that 3,000 young men who were against the Vietnam War came marching out of federal prison where they'd been sent. And so I'm willing to take that victory. And

everybody thought of it as a setback for the war. The victory became more important than the technical reason. But I think there are cases in which your clients are going to say, 'no, no, I just this defense made. I don't want this kind of defense made,' and we have to listen to that. But in general, I prefer to win and then step outside and explain why before the judge gets the chance.

QUESTION (inaudible):[0:01:28]

TIGAR: First, most advocates are officers of the state. Let's not kid ourselves about that. But as soon as that part of South Africa's population that is now the majority has its share of the lawyers, then maybe a different story will start to unfold. Yes, the lawyer has this peculiar dual role. And the judges keep saying, you know, you're an officer of the court, remember. You owe the court an obligation, right? Well, as a matter of fact, I'm going to argue a case before the Supreme Court of the United States in April about a lawyer who was disciplined for representing an unpopular client and we're going to argue it on constitutional grounds. But there is the other side. The great advocates in our tradition have always insisted that their obligation to represent their client diligently triumphs over whatever obligation they may have to the courts.

Lord Brougham in the [famous English] trial of Queen Caroline shocked the nobles in the House of Lords by saying, that he would separate the duties of the advocate from that of a patriot if need be. He said "It is the duty of the advocate to press on even if it should be his unhappy lap by representing his client, to plunge his country in confusion for his client's safety's sake." Pretty strong stuff, right?

Then sitting in the House of Lords was Lord Erskine who while at the bar had represented a number of political defendants in the latter part of the 18th Century and is famous for his confrontation with Judge Bullington. "If you persist I shall be compelled to proceed in another manner." To which Lord Erskine said, "Your Lordship may proceed in whatever manner he wishes. I know my duty as well as Your Lordship knows his."

And then there's the great Irish advocate of the 19th Century who looked up at the English judge who said, "Mr. Curran, if you continue in that vein, I shall be compelled to commit you for contempt." And Curran said, "Ah yes, and then Your Lordship and I shall both have the satisfaction of knowing it won't be the worst thing Your Lordship has committed."

(Laughter)

Lecture #3: Old Judges and New Laws

[At the time, there were 100 judges in South Africa, with life tenure. 99 were men, and 99 were White. So this was an issue that I was asked to address.]

MODERATOR: I do know that in our country we have a huge problem when it comes to the question of the judiciary in a new South Africa. I am not able to talk much about it. I think I express the view of large numbers of people in our country. I express the view of many .. .

human rights groups that in South Africa the judiciary as a whole is illegitimate and does not enjoy the confidence of the majority of the people in our country. The question is: what will happen to the judiciary in a new South Africa? Are we going to be sitting with the same judiciary? If so, what can we expect from that judiciary? And of course, I'm over-generalizing, but it's not for me to comment on this. I need to ask Professor Tigar to speak about this.

TIGAR: When I talk about old judges and new laws I am very conscious of the fact that the references to a Bill of Rights are designed to stir up a feeling about tradition. And whenever we talk about tradition it's very important to separate what is real about it from what is not. I had a lesson in this nearly two years ago my wife's family on her father's side who came to the United States in the 19th Century from Scotland. So when my wife's younger brother decided to be married he wanted to be married in Scotland on the site of St. Andrew's Cathedral which is in the far north. And he wanted to be married in June because that was a tradition. And he wanted all the members of the wedding party to wear Scottish formalwear, the kilt and the socks and so on. And so there I stood on a cold June day dressed in this skirt and I don't know but I think the fellow who invented the kilt went on to invent the wind tunnel. But I began to reflect on what was happening, and what was happening is, of course, the kilt, the highland garb, is an invented tradition, manufactured by Quaker industrialists beginning probably in the 19th Century. And it doesn't have anything to do with the real lives of Scottish people during long centuries in which Scotland occupied an important place in the commerce of Europe. So that's my first observation.

I touched yesterday upon the Zenger case in United States history and the prosecution of the dissident press, and in that process I talked about the role of judges as having taken an oath to uphold the law. Today I'd like to take up four particular themes, more bodies of doctrine, to make more comments about the present situation in South Africa. In this process I'd like to deconstruct in an intellectual sense the framework within which these questions are being decided.

The Bill of Rights in the United States, about which so much has been written, is itself a species of tradition. Americans look back fondly to that experience and sometimes forget the reality of the early years of the application of the Bill of Rights. And they also forget some important events that happened thereafter, that I'll get to in a little while. It is important, I insist, that when we, as citizens, lawyers and judges, step down from the tableau of ritual into the theater of action, that we begin to focus on elusive truths that have real consequences.

In the early years of the Bill of Rights it was clear that the federal judges who some had thought would be the warmest friends and swiftest supporters of this limited charter of freedom, were to be no such thing. Beginning in 1798 the federal judges who were fearful of influences from the French Revolution were fearful that the Federalist Party was about to lose hold of the reins of government, that the party of George Washington was about to lose hold of the reins of government. So the judges sat by while the Congress enacted legislation directed at alleged sedition and against so-called alien ideas. The Sedition Act

passed into the hands of the federal judges and they began to instruct grand juries who were indicting dissenters.

And so a member of Congress, Matthew Ryan, who happened to be a Jeffersonian, was jailed for writing a criticism of President John Adams. Two hapless citizens of Denham, Massachusetts were imprisoned for erecting a sign that said, "No Stamp Act, no sedition, no alien bills, no land tax – downfall of the tyrants of America – peace and retirement for the President". And not a single word of dissent was raised from among the ranks of these judges who had been alive at the time of the American Revolution and who had so recently taken an oath to support and defend a constitution that included these provisions of the Bill of Rights.

In the later years of the 19th Century, scholars and activists such as Frederick Douglass began to examine the constitutional text with an eye to seeing whether it could be used to support an argument for the abolition of slavery. Once again they found that the judges, far from being willing to take up these words from the constitution that spoke generally of freedom, in order to strike at the institution of chattel slavery, rested instead upon a kind of interpretive mode. They say that the most important part of the constitutional structure was not the general principles having to do with freedom, the general principles having to do with state as neutral as leaving a large sphere of private action, but rather those principles that were based upon the idea of federalism and here the Constitutional Convention decision to have a federal union instead of a unitary state rose up with a vengeance to prevent the antislavery forces from invoking the provisions of the constitution in order to get at the institution of chattel slavery. Specifically, it was noted that the concept of federalism had decreed a devolution of power over important matters back to the states and that since those state governments were at the time of the adoption of the constitution and were at the time that these challenges were raised repositories of slaveholders, slaveholder power and slaveholder interest, that the constitutional document itself could not be invoked on behalf of the national general government in order to disembed the slaveholder institutions.

So this United States experience teaches us, it seems to me, a couple of very important lessons. First – that the judges will continue to identify with dominant groups in the society from which they are drawn even if they have been recently appointed in the wake of some sort of a social transformation. So how much more could you expect them to look to those groups for guidance if they have been sitting all along and have survived the social transformation?

The second point about this experience is that it may very well be fatal to the declaration of rights to leave substantial blocks of power in the hands of local authorities under any sort of a scheme, whatever they call it. Whether it be federal or local autonomy or whatever, that these powers in the hands of social groups that have an interest in perpetuating reactionary forms. So my first example with that – it is a cautionary one, is drawn from the American experience with the Bill of Rights.

The second example is drawn from Europe at about the turn of the century. Everybody who has studied sociology is made to read, at least read about Max Weber who wrote a lot of things about sociological theory and bureaucracy and so on. Not too many people know – although I suppose there are a lot, that one of Weber's brightest pupils who did not rise as far as he might have in the ranks of the academics was Robert Michels. Michels didn't rise so far because he was a socialist and Weber was all the time trying to protect him. Michels was a member of a political party that was later to denouce colonialism, notably in a famous speech about the colonial rule of Belgium in Africa which concluded with the notable words, "The work of civilization, as the gentlemen call it, is an enormous and continual butchery."

Michels also wrote something else. He wrote a book called, "Political Parties," in which he pointed out the inherent bureaucratic tendency of the modern state that was coming into being at the turn of the 19th Century and the beginning of the 20th. And he noted the tendency of relatively reactionary and backward looking forms to embed themselves in the form of bureaucracy. He noted how intractable the bureaucracy could be. Michels was one of those people who was looking towards some sort of socialist electoral victory in Europe and as he examined he saw that the bureaucratic structures that had already been erected would pose a tremendous barrier to the politically victorious democratic socialist movement from carrying into operation the program upon which it was elected.

This is not a novel observation. When I cite Michels' book about it I don't mean to say that's the only thing that was written. That, indeed, had been the British experience that the permanent civil service has exercised with respect to labor governments ever since labor has begun to be able to command parliamentary majority, a significant conservatizing influence that has prevented labor governments from carrying forward even the modest programs that form part of their political platform.

When I say that it is not a unique observation to Michels, I would also recall the experience of the Norman Conquest. When William the Conqueror triumphed in 1066 at the Battle of Hastings -- a battle we all know about -- he was not the only Norman who was busily engaged in gobbling up territory. His half-brother, Robert Guiscard, had managed to do the same thing in Sicily, putting into place institutions which still survive in some form to this day. Now, law students have some connection with the development of the English land law. For these purposes, the important thing is that William saw the necessity of putting into place even at that time in the 11th Century a rudimentary bureaucratic structure and so over the next two centuries the story of English land law is the story of the bureaucratic embedding of a system of feudal tenure that reinforced William's authority as the King of England and gave his imprimatur to the feudal authority over discrete and defined areas of land. Hence, the things that law students don't like to look at – all those writs and royal warrants and "tenants in capite" and such, really teach us something about the nature of social organization.

So that's the second observation that we can draw from history is the danger of an entrenched bureaucracy that will always seek, albeit on it proclaims to be neutral principles to maintain things as they are.

The third area that I think one can look to for a set of examples to bring to bear on the present situation in South Africa, is the history of the American Labor Movement. Now the American Labor Movement's history is rather like that of labor movements in all countries including South Africa. It consists of a series of struggles directed at winning the right of the labor organization which has power because it has the power to shut the factory down, or the farm, to represent all of the workers and thus to equalize the bargaining relationship between labor and capital.

In America, "the strike" – that is, the organized withholding of labor following the English practice, was in the 19th and early 20th centuries prosecuted as an ordinary conspiracy in restraint of trade, that is, the workers were prosecuted for the offense, the common law offense of a conspiracy of getting together to collectively withhold a good – their labor – from the marketplace. The first battle that labor had, therefore, was to win the right to strike and to get these laws declared invalid or to render them inoperative in some way. To be sure, there were other sorts of attacks on the right of labor to organize such as trumped up charges of sedition, the misuse of the judicial process in other ways, at times simply the summoning out of the National Guard or the military forces to drive striking workers off into the distance.

When Franklin Roosevelt became President of the United States and commanded substantial Congressional majorities, American labor policy took a new turn. After an experimentation with economic programs that were declared unconstitutional by the Supreme Court, finally the Roosevelt administration secured the passage of the Wagner Act which eventually after some constitutional tests, began to take effect in 1937. It was again amended in what was called the Taft-Hartley Act in 1948. But what did the Wagner Act do? It recognized the right to organize and to bargain collectively. It recognized the labor organization's power to speak on behalf of all of the workers. It recognized the right to strike in support of the obtaining of a contract representing all of the workers – a right that had been foreshadowed in the earlier Norris-LaGuardia Act. The same law said that during the term of one of these contracts between management and labor as to the terms of conditions of work, there could only be strikes on very limited grounds. And an administrative agency was set up – a bureaucratic agency – the National Labor Relations Board to police the bargaining process.

So on the one hand, the workers have the right to organize. On the other hand, if there were any disputes about organization, there was this administrative process through which one had to go. And the right to strike, although it was recognized, was recognized only in a limited way. Well, for 20 years or so this process worked alright. That is to say, American Labor made some significant organizational gains. But when political reaction began to set in, the administrative agency that had been set up theoretically to be the worker's friend began to erect all sorts of barriers to the worker's organizing. And the administrative process, the bureaucratic process of defending worker's rights became a kind of interminable maze. So that, for example, in the American South in the 1960s and 1970s, when workers' organizations, black and white, eventually came together as a single organization representing all the workers at a particular spinning mill, clothing factory, the

black and white workers simply were not recognized as a legitimate union by management. Many refused to bargain with them. And the only option was to have to resort to this bureaucratic process to compel the company to recognize the worker's rights.

The bureaucratic process was slow, it could be manipulated by management by dint of their superior access to legal talent and in the end the outcome of the process was far from certain. So that the process of making an arrangement whereby a whole important set of rights were taken off the streets and out of the hands of a mass movement and the right to strike limited and structured in a bureaucratic way, turned out to be in the end, one of the instruments by which the American Labor Movement has been weakened in succeeding years. This is not to say that it is impossible to construct structures that respect the rights of workers or of anybody else, but simply in doing so there are times when one has to look very carefully at the trade-offs looking down range at the time when the bureaucratic structure may fall into the hands of the people who are hostile to the fundamental goals of process.

Now as a fourth example: in the wake of the Second World War, the statesmen, statespersons in Europe began to think about what had now become the European Economic Community. Now the European Economic Community with its financial power poses a great challenge these days not only to other large entities in the first world, but in the second and third worlds as well because that concentration of economic power under a regime that permits cartelization to an extent not known, for example, in the United States, means that great concentrations of capital are, as we speak, coming together as never before. Their power is going to be exercised in ways that I think many people in this room could predict better than I.

But one of the consequences of the European Economic Community has been the European Court of Human Rights which sits in Strasbourg. It's a very interesting court founded as a result of a treaty. Member states of the European Economic Community are not required to sign that treaty nor are they required to submit themselves to the jurisdiction of the European Court of Human Rights. But many states have.

I'll pause a minute to take up the example of England. England has no written constitutional tradition. The Parliament is sovereign. It is a state in which attempts to control the actions of the police have met with a notable lack of success. It is a state which has, according to the undisputable record, systematically tortured members and suspected members of the Irish Republican Army. Its behavior towards these political prisoners has been extensively documented and yet, the English institutions right on up to the House of Lords, have professed themselves unwilling to do anything about it. If that sounds like a familiar scenario, I rather suspect that it is. The spectacle of judges who wear robes and wigs and speak in these peculiar ways the judges have and explain patiently to the accused that there is nothing that can be done about the fact that he had been maltreated by the police is one for which I suspect some people in this room, at least, are familiar.

The interesting thing about the European Court of Human Rights is that it began quite early after the English had acceded to its jurisdiction to hear these cases. Members of the Irish

Republican Army who were being held as prisoners would present a case to the Commission -- which is an administrative body that studies the facts, conducts an investigation and determines whether the case is within the jurisdiction or power of the court. Thereafter, the Commission would present the matter to the European Court of Human Rights. And in decision after decision after decision, judgment after judgment after judgment, the European Court of Human Rights held that the English had violated the treaty; that they had systematically violated human rights.

And the problem, of course, was that after one judgment would hold in a particular practice with respect to political prisoners was unlawful, the English would do something like the same thing again and the court would have to return again and again and again. The effectiveness of the European Court of Human Rights is perhaps a matter of debate, but one measure of its effectiveness is that reactionary English judges and scholars had become so frustrated that they have urged England to withdraw from and disaffirm the treaty because they regard the presence of this supranational overarching law as inconsistent with their idea of English sovereignty. They are very happy to be in the European Economic Community in order to take advantage of capital improvement devices that have a kind of familiar sound to them. But they are not anxious to have this overseeing Court of Human Rights that applies principles of a constitutional character, based upon a written treaty which is the equivalent of a written constitution and bill of rights to English police officers, and English judges and English institutions.

What can we draw out of these four examples that I have given you. I say the first lesson is a fairly obvious one but perhaps it bears repeating. Bureaucracy in the sense of administration is a powerful constituency that in any social transformation must be regulated. The members of the bureaucracy have the power to block new institutions. For these purposes the bureaucracy certainly includes the police. A bureaucrat, after all, is someone who is someone who is face to face with the people. A bureaucrat confronted with a command from on high to change his or her behavior surely knows about the command but also knows something that's very much more important. The bureaucrat knows that the particular person with whom he or she is dealing right now is going to have to go through a very complicated process to change that bureaucrat's decision. This is a matter of a theory of administrative law – the problem of overarching commands filtering down to the level where they make a difference.

When we consider that the bureaucracy can include the police and also the military forces we can see that addressing straight on the problem of bureaucratic structures is important. One can note the experience of Chile in which a democratically elected Salvatore Allende, because of an entrenched bureaucracy that was supported by and included and led by the military and secret police apparatus, did not long survive. And today the future of a Chile that has rejected the junta, rejected General Pinochet, is still in doubt, still in doubt as we speak because of President Patricio Aylwin's fear about alienating the military and because of the very narrow majority that the democratic forces enjoy in the Chilean Senate where there is an even greater concern about what will happen if the military and the secret police suddenly decide that they will not respect the new arrangements to which their consent, after all, is regarded by them as coerced and involuntary.

The situation in India where a bureaucracy left over from the English Civil Service poses problems that are known, is particularly acute when it comes to such things as redress for organized civil wrong. There, the bureaucracy, which had grown up around the judicial institution, has so continued and so magnified, that the backlog of important cases in the Indian Supreme Court would take years to unravel even if there were no new petitions in the court as of today if the members of the court got to work and started disposing the cases as quickly as they could. This is a pretty weak picture so far I suppose, but let me try to describe what might be done. And this is an idea that I put down knowing that I'm not familiar with circumstances in South Africa.

But I want to focus specifically upon the ANC draft Bill of Rights and the references in it and in the introductory material to a constitutional court. I want to focus on the idea of a constitutional court as at the least, an interim measure. It is clearly going to be necessary to reform and restructure the administration of justice from the top to the bottom. But the important thing in a new constitutional system, the important thing in a new democratic government is going to be to see that the institutions of power do not use that power to destroy, to blunt and to undermine the victories that have been won and that have embodied these doctrines. And so I would see a constitutional court as having several advantages.

First – because it is a new court it would have to have new personnel. Its members would not be drawn from the ranks of those who are already judges as a new process of choice.

Second – the structural place of a constitutional court reflects by virtue of structure the place of a new kind of legal rule, an entrenched and enforceable constitutional right. That is to say, the constitutional court would have the principal job of interpreting these new provisions and would be a court of last resort with respect to them in ways that I'll get to in a few moments.

The importance of this structural point, I do not think can be overemphasized. Let us understand, I think I do and if I get it wrong I know I'll be corrected – the process by which the National Party consolidated its rule. It consolidated its rule by a series of systematic attempts to undermine the role of the rule of law. And when the slightest opposition to striking the voters from the rolls, and to the new structures the National Party was putting into place was voiced by the Supreme Court the National Party was undeterred. Rather than bow to the rule of law it went back. It reconstituted the Senate. It expanded the number of judges. It did everything that it possibly could to make first parliamentary and then later, presidential-parliamentary sovereignty, to impose the dictatorship by emasculating, by trivializing, by marginalizing the power of a judiciary to do anything with respect to the enforcement of rights that had been entrenched in the constitution to the point where as I said the other day, I think that the only entrenched right in the South African constitution today is that you have to speak English or Afrikaans since your election in official proceedings.

So that the creation of a constitutional court signals that there is to be a constitution, that it does contain certain rights and that those rights are to be enforced for real. And the reason this is integral, it seems to me in the anti-apartheid movement is that is represents a reminder that it was the National Party that cynically and systematically dismembered whatever there might have been in South Africa that even appeared to be on paper a system that looked like the protection of rights.

Now the third part. What kind of a procedure would a constitutional court employ in a country in which there are so many demands for justice whether it be mine or yours or anybody else's. It is vitally important that there be access to places where claims for justice can be heard and decided. And it seems to me that a constitutional court might have two bases of jurisdiction in a transitional period. The first would be an appellate jurisdiction. That is to say the constitutional court would be a court rather like that in separation of power states such as the United States or you could choose others in which a judgment given by any court in the land after being appealed through the process that there existed, could to the extent it drew into question the validity of the statute or other action or any other claim based upon the text of the constitution and bill of rights, could be taken to the constitutional court and that constitutional court decided finally and authoritative. The second would be an original jurisdiction, to prevent the lower courts from frustrating access to justice.

This, you see, completes the cycle. Here is a court that is newly formed, a court that is formed with new members and the jurisdiction it's given sets it on top of these existing institutions. That's the model of the European Court of Human Rights, so that you have even Lord Flubberdub, you know, whoever is in charge of the House of Lords, having to know that his judgments are going to be second guessed by somebody in Strasbourg, who, by the way, speaks a different language. You know, like some terrible people like the French and so on, of whom he has always been suspicious. And that his judgment is going to be corrected for him under the terms of a newly enacted, supranational or super law or meta-law as some of the jurisprudential folks would have it that is written down and ascertainable and verified. That is what I would see as the appellate jurisdiction of this court.

Now, somebody's going to say to me right away, well suppose the judges do what the American judges did. Suppose they kick over the traces. You know you can't trust these judges. They get robe fever. You know? They put on a robe and all of a sudden they begin to imagine themselves as better than everybody else. And if you don't think that's so, then examine history for a while. You know, it really doesn't matter. But word is, as soon as they get up on that chair they become very difficult.

The answer, it seems to me, is that in a system of government in which various branches of government are to exercise different powers, the judiciary, although it may be appointed on some kind of lengthy tenure, perhaps for life, can nonetheless, be impeached. And during the early part of the 19th Century, some of the more vigorous excesses of these federal judges were restrained by the fact that the American House of Representatives could prefer charges of behavior in violation of the constitution such as not respecting

rights and that those charges could be tried by the senate and by two-thirds of the majority a judge could be removed. Now, as it happened, no judges were removed under those circumstances. But the House of Representatives did prefer some charges and there were letters and anxious discussions and big debates about preferring charges in other cases. And the result was a chastening one for the judges. They were made to understand that they were the law's servants and not its masters. That they did not own the law and did not invent the law. That they were simply appointed for the purpose of taking care of it on behalf of the people who do own it .

I don't say that's a perfect solution but the idea of checks and balances, putting some power and respect for the judges somewhere else, does seem to have some merit. And the second aspect of judicial jurisdiction that I think is worth exploring is a direct one.

Now, in American Civil Procedure, there is a device known as a class suit. I'm not familiar with South African civil procedure, so I can't talk about it. A class suit is one in which a group of representative plaintiffs comes to court and pleads that he has suffered a wrong and that the wrong has also been suffered by a large group of people too numerous all to bring before the court. And that this class of persons has all been affected by a single wrongful act or series of wrongful acts, that the factual issues pose a significant overlap and that the legal issues are virtually identical. Under those circumstances that group of representatives sue on behalf of all those who are similarly situated.

The class suit device has been a principle mechanism for enforcement of civil rights in the United States so that one or two or three Black parents in a community bring a lawsuit on behalf of themselves and all others similarly situated, saying that the school system must be desegregated or that the police department must be reformed in a certain way. A group of workers, three or four in number, can sue on behalf of all workers who suffered a similar indignity. The class suit advantage is that it permits adjudication in a single proceeding of rights belonging to a large number of people. It is particularly appropriate when what is sought is not money damages but rather a declaratory judgment that certain conduct by authority is wrong and that a certain injunctive type remedy should be granted for it. So here, the notion would be that a constitutional court would perhaps be equipped with a commission – that is to say, a body that would take, receive and study complaints and that the court would in that sense have an original as well as an appellate jurisdiction.

And so it is particularly appropriate when what is sought is not advisory, but rather a declaratory judgment that certain conduct by authority is wrong and that a certain injunctive-type remedy should be granted for it. So here, the notion would be that a constitutional court would perhaps be equipped with a commission, that is to say, a body that would take, receive and study complaints and that the court would in that sense have an original as well as an appellate jurisdiction. The original jurisdiction so as not to burden the court with so many cases that it would never decide, would be limited to petitions or complaints presented by representatives on behalf of an entire group and that once the court had decided on behalf of the entire group the constitutional issues and laid out the future course of proceedings and in judgment it could remand the matter to the ordinary trial court for the assessment of individual damages if the conduct had been harmful or for

the addressing of other individual questions that remained after the joint and constitutional issues had been resolved. In that way if the constitutional court had that form of jurisdiction one could be sure that there would be a forum for the adjudication of constitutional matters that did not require the exhaustion of remedies through the ordinary appellate process with all the expenses and delays involved.

Is this going to work? I don't know. I only believe that it is important to study these examples from the past in order to have a structure that does not attempt to accommodate the unaccommodating ways of old to the practices and ideas of the new. I think it is important to have and to insist upon a structure that as written dignifies the rights and demands that have been made and in practice provides a way whereby one does not have to continue to resort to a tradition whose role and function, I repeat, was trivialized in the process of the consolidation of the apartheid regime in the late '40s and early '50s.

The important thing is, of course, that as these institutions are built and as those of us elsewhere in the world watch and participate, that you preserve and defend the victory that your struggle has won.