

Dennis Martin Davis

Born 1 May 1951 in Cape Town.

Educated at Herzlia School, Universities of Cape Town and Cambridge.

Married to Claudette with two children Liat and Joshua.

Employment

Old Mutual: Legal Advisor 1976-1977

UCT 1977-1990. Promoted to Assoc. Prof of Commercial Law 1984. Personal Chair in 1989

University of Witwatersrand 1991-1998 Prof of Law and Director of the Centre for Applied Legal Studies. From 1996-1998 joint appointment with UCT.

1998(April) appointed Judge of the High Court with effect from Oct. 1998.

Appointed Judge President of the Competition Appeal Court from 2000.

Publications

Author/coauthor of 8 books on insurance law, tax, estate planning, criminology, constitutional law, and South African political history.

Latest book **The South African Constitution: The Bill of Rights** with M H Cheadle and NRL Haysom

Over 100 articles published in academic journals/books on constitutional law, tax, insurance law, jurisprudence, criminal law, criminology, legal history.

Numerous op-ed articles in newspapers on politics, law, human rights, tax policy.

In press - Precedent and Possibility : the use and abuse of law in South Africa (with MMLeRoux) to be published in dec,2008

Other activities

Practiced as an advocate, specializing in tax law and constitutional law 1980 – 1998.

Presenter of three TV programmes shown on national TV; Future Imperfect and Constitutional Talk. 1993-1998; Judge for Yourself 2004.

Technical legal advisor to the Multi party negotiating forum and the Constitutional assembly which were the two fora in which the interim and final constitutions were drafted. (1992-1996)

Member of the Commission of Inquiry into the Tax Structure of South Africa 1993 – 1996.

Chair of Commission of Inquiry into Thor Chemicals 1995. Chair of inquiry into the ABSA Life Boat 2001-2003.

Consultant to SARB on Central Bank Act 2002 –2007

Consultant to the Corporate Law Reform initiative, initiated by the Department of Trade and Industries 2003 to redraft the Companies Act. 2003 –2008

Member of the drafting team of the Competition Act 1997 – 1998.

Hon Director Society for the abolition of the death penalty 1988 –

Chair person Jewish Board of Deputies (Cape) 2003 – 2005.

Hon Prof. at UCT 1998 – teaching tax and Constitutional litigation.

Visiting professorships Universities of Florida, Toronto ,Harvard ,NYU and Melbourne

Awards

Best Lecturer UCT 1993

Best Lecturer Wits law School 1991, 1993.

Distinguishes Research award UCT 1989.

Best TV presenter on SATV 1994.

The Truth and Reconciliation Commission: Did it deliver?

D M DAVIS

The South African constitutional “miracle” was constructed by means of two important transitional bridges. The first bridge comprised thirty four constitutional principles agreed to by the negotiators at CODESA during the early stages of constitutional negotiations. With agreement on these thirty four core constitutional principles, the impasse between the National Party and the African National Congress concerning the drafting and acceptance of a constitution for a democratic South Africa was finally broken. The National Party, for obvious reasons, had wished to conclude a new constitution prior to the first democratic elections; for similar reasons the ANC wanted the exact opposite. To break the deadlock, the negotiators agreed the contents of thirty four basic constitutional principles. An interim constitution would then be drafted prior to the first elections and it would form the grundnorm for South Africa until a final constitution could be negotiated. Once the elections had been conducted, the Constitutional Assembly would be free to draft a final constitution for South Africa, so long as that constitution complied with the thirty four constitutional principles previously agreed. The newly constituted Constitutional Court would then determine the measure of compliance with the principles.

The second bridge comprised the Truth and Reconciliation Commission (‘TRC’). The tragic and terrible abuses brutal excesses of apartheid had to be addressed if South Africa was to lift itself into democracy. South Africa did not experience a revolution; it witnessed a transition of power from the National Party to the African National Congress. It was a negotiated settlement between two forces, neither of which could administer a knockout blow to the other during the long struggle of the

apartheid period. Because it was a negotiated settlement, there was no possibility of a series of Nuremburg-style trials. But the brutal racism of South African history could not be ignored. Accordingly, a decision was taken to constitute a TRC as the chosen process through which South Africa would discover, explore, confront, and acknowledge its awful past.

The Promotion of National Unity and Reconciliation Act 34 of 1995 provided for the creation of the TRC. The commission would be appointed by the President in consultation with the Cabinet. The TRC was mandated to establish the complete picture of the gross violations of human rights committed between March 1960 (the time of the Sharpsville massacre) and 10 May 1994 by means of hearings and investigations. It was also charged with facilitating the granting of amnesty, the recommendation of reparations to the victims of human rights abuses and the preparation of a report containing recommendations for measures to prevent any future violation of human rights.

The work of the TRC eventually included 140 hearings across the country, with about 2 400 victims testifying and the names of some 27 000 victims having been recorded. The final tally of 21 519 victim statements containing evidence of 30 384 gross human rights violations. The commission made more than 15 000 findings before it passed the baton to the government to follow up on recommendations ranging from redress to retribution, in the form of further investigation and prosecution.

Critical to the entire process envisaged by the Act was the amnesty committee, staffed by three judges and two commissioners. It was empowered to consider applications

for amnesty which it could grant if satisfied that the applicant committed an act that constituted a gross violation of human rights, made full disclosure of all relevant and material facts and the act to which the application related was “an act associated with political objectives committed during the course of conflicts of the past”. In terms of section 20(7), a person granted amnesty by the committee would not be criminally or civilly liable in respect of that act.

Criminal Justice System v TRC

But the TRC process did not completely exclude the criminal justice system.

Prosecutions of those who did not apply for amnesty, or who were refused it, would be possible. Several prosecutions did in fact take place. The most high profile of these were the criminal prosecutions of apartheid apparatchiks Eugene de Kock and former head of South Africa’s chemical and biological warfare programme, Dr Wouter Basson, and the plea bargain entered into by Law and Order Minister Adriaan Vlok for the attempted murder of Rev Frank Chicane.

The different outcomes in the De Kock case (successful prosecution and conviction) and the Basson case (acquittal after a trial lasting 18 months) starkly outline the debate about which vehicle – a trial or the TRC hearings – ultimately revealed more of the details of the apartheid government’s murderous methods. In essence, both processes searched for the ‘truth’ to establish ‘what happened’. The TRC linked this in its quasi-theological style to forgiveness and cathartic confession, while, in general terms, retributive justice remained the claimed goal of a trial. However, the TRC process has been criticized for producing a linear, ‘just-the-bare-facts’ narrative that

never grappled with or sought to explain the underlying pathologies and normative explanations for apartheid,

Posel and Simpson perceptively explain how this happened:

“The limits of the ‘history’ written by the TRC in turn inhibit its ‘cathartic’ and ‘healing’ qualities. With its powers of explanation stunted, the TRC cannot produce a consensus about why the terrible deeds of the past were committed. The increasingly familiar refrain among white South Africans that apartheid was merely a ‘mistake’ for which no one was responsible, that somehow the system propelled itself impersonally, may be one of the more ironic, unintended consequences of the TRC’s rendition of the past.

To the extent that the report does venture into historical explanation, its consequences may once be deeply ironic. The report’s only answer to the question of why the country was subjected to such a violent and abusive past is itself in need of explanation – the prevalence and intensity of racism. But in the absence of an explanation for racism itself, the report fails to suggest any plausible grounds for transcending the racism of the past. If racism was part of the warp and woof of South African society, how can it be undone? The fact that it is embedded in the social fabric is also a measure of its tenacity. If we do not understand the conditions under which racism was produced, reproduced and intensified in South Africa, taking account of its interconnections with other modes of power and inequality such as gender and class, how can we transcend it?

In contrast, the trial records developed during the prosecutions of De Kock and Basson arguably offer more insight into the apartheid mindset.

The Scoreboard

Most certainly the TRC process failed to communicate a shared understanding and critique of the apartheid system as the primary source of the overwhelming majority of human rights violations and criminal activity which had taken place during the apartheid era. In an extensive study undertaken in 2000 and 2001, the overwhelming majority of the 3700 respondents of all races acknowledged that apartheid was a crime against humanity but the majority of respondents from all races reported that the abuses were due to evil individuals and not to state institutions.

The failure to deal with institutional culpability has continued to haunt South African society. Fourteen years into democracy the judiciary, for example, has come under a sustained attack including accusations from senior members of the ANC that judges are 'counter revolutionaries', are untransformed and seek to subvert social progress. The reasons for these outbursts are numerous but the legitimacy of the judicial institution was not promoted by the omission of the judiciary to come before the TRC and be subjected to a proper enquiry and analyses of judicial culpability during the apartheid era.

The basic reason judges gave for the refusal was that they feared their independence would be compromised if they had to account for their actions. By contrast, in its extensive memorandum to the TRC, the National Association of Democratic Lawyers took issue with the absence of judges from TRC hearings and concluded: 'Social

justice will depend, to a great extent, on judicial development and implementation of the rights and values entrenched in our Constitution. It is somewhat ironic that with the advent of democratic government we have acquired a Constitution incorporating a Bill of Rights and the unelected judiciary has become its guardian. Many of the judges so compromised by their part in implementing apartheid are now vested with the power to shape these rights. It is essential that the people of South Africa should have confidence in the judiciary and in judges' commitment to promoting and upholding the values in our Constitution. Ultimately this is a confidence which will depend upon judicial performance, but also extremely important is the transformation of the racial and gender profile of the Bench, the openness of judicial officers to learning about cultures and conditions outside their own experience, and their willingness to examine their own social attitudes and prejudices. Judicial independence is a crucial element of public confidence. Our legal system requires explicit and open debate on the concept of judicial independence, which has in the past been used to justify passivity in matters of great importance.'

Reconciliation: Was it brought about by the TRC?

A most important question is whether the TRC facilitated greater reconciliation between black and white South Africans. In an extensive study conducted during 2000 - 2001, Prof. James Gibson revealed the continuation of stark racial divisions. Nonetheless, Gibson contended that the TRC process had helped to create a common understanding of the nature of apartheid and thereby helped to foster reconciliation among people of different racial groups. By contrast, Hugo van der Merwe and Audrey Chapman argue that Gibson's 'characterisation of the TRC's "truth" is very thin' i.e. that both the government and ANC committed violations and that both were

equally comprised. They also argue that “when Gibson tried to measure the effect of what he characterises as truth acceptance of TRC’s findings on racial reconciliation, his analyses shows that among blacks acceptance of the TRC’s findings... does not lead to reconciliation; nor does reconciliation lead to truth acceptance’.

Conclusion

It is probably fair to conclude that, viewed in terms of increased positive attitudes towards ‘the other race’, the TRC achieved little. But a history of racial conflict that occurred over almost three hundred years and involved thousands of deaths and hundreds of thousands, if not more, of casualties cannot simply be dismissed and fused into a rainbow of reconciliation within a decade. Nor can a TRC, operating within a short period and with limited resources, address and resolve deep seated social, economic and political divisions created over so a long period of time.

In short, the TRC produced little ‘truth’. It did however afford an opportunity for thousands of victims to confront their torturers and human rights violators in open and transparent circumstances. Thus, it did promote a principle of public accountability. But it failed to focus any significant light on the role of the leaders of the apartheid regime and the institutions which underpinned the entire process of racist rule. Similarly it did little to promote long term reconciliation within the country. However and arguably most important, it constituted a bridge over which the society could be transported en route to the establishment of a constitutional democracy which continues to hold possibilities for the long term achievement of that which was so boldly proclaimed in the TRC enterprises: truth, justice and reconciliation

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