Quis custodiet ipsos custodes?
Lessons from Post-Régime Hearings on the Judiciary in Germany and South Africa

Marika Giles Samson

It is now uncontroversial that the judiciary played an important part in legitimising political repression in both Nazi Germany and South Africa under apartheid. The brutality of these régimes took many forms, not least of which being the instrumentalisation of the courts as instruments of repression. Once each régime had fallen, the reconception of courts and judges as purveyors of justice was essential if faith in the rule of law and its institutions was to be restored. One element of this reconstruction was the convening of specific hearings to consider the role of the justice system in perpetrating injustice: the so-called Justice Case brought by the United States in Nuernberg, and the Legal Hearings at the Truth and Reconciliation Commission in South Africa. These two processes will be compared and contrasted with respect to genesis, form, successes and failures.

This paper argues that, although being separated by over half a century, and displaying no obvious genealogical connection or procedural commonality, there are eerie parallels between the Justice Case and the Legal Hearing and their respective findings. Viewed in tandem, they present a compelling starting point for a deeper study of how repressive régimes instrumentalise their courts, and how that damage might be confronted and repaired. As such, and given the persistence of "judicial persecution" – the misuse of courts to marginalise political opposition - these two historical cases can offer significant insight to contemporary states in transition.

Table of Contents

Introduction .................................................................................................................................................. 2

The Justice Case: United States v. Josef Alstoetter et al. ............................................................................ 3
  Context: German Courts 1933-1945 ........................................................................................................ 3
  The Decision to Judge the Judges ........................................................................................................... 5
  Form of Proceedings ............................................................................................................................... 6
  Primary Critiques & Subjective Experiences ........................................................................................... 7
  The Role of Legal Positivism .................................................................................................................. 8
  The Defence of Judge Rothaug .............................................................................................................. 12

A Legal Hearing at the Truth & Reconciliation Commission .................................................................... 15
  Context: The Apartheid Legal Order ..................................................................................................... 15
  An Affirmation of Parliamentary Supremacy ......................................................................................... 15
  The Positive Role of the Courts in Political Repression ......................................................................... 16
  Legal Philosophy in the Apartheid Legal System .................................................................................. 17
  Interpretation and Judicial Choice .......................................................................................................... 18
  Hearings instead of Hangings: The Origins of the TRC ........................................................................ 19
  The Allegations Against the Apartheid-Era Judiciary ............................................................................ 20

Lessons & Consequences of the Judicial Hearings .................................................................................. 24

* Marika Giles Samson is an O’Brien Fellow and a doctoral student at the Centre for Human Rights and Legal Pluralism, Faculty of Law, McGill University.
Introduction

In this era of cultural relativism, ambiguous war, and environmental uncertainty, there is a pleasant nostalgia in looking to the twentieth century for some touchstones of absolute good and evil. For our parents and grandparents, the defeat of the Nazis in World War II was a victory unfettered by mixed feelings. And for my generation - teenagers in the horrifying final years of apartheid - the release of Nelson Mandela and his subsequent election as President in the multiracial elections of 1994 were experienced, often on a deeply personal level, as a vindication of the human rights that we had been raised to believe were universal.

In hindsight, it is tempting to think of these régimes as amorphous evil monoliths, and to imagine that they appeared on the historical landscape fully-formed, with horns and hoofs, bearing the mark of Cain. But of course, they were constructed incrementally (as, indeed, were our responses to them). And these régimes were systems, and the systems had elements – constitutive sectors of activity – each of which played a role in constructing and propelling the régime as a whole. And the functions of these sectors were performed by people, individual human beings who made choices and rationalised those choices. This superstructural reality was lost neither on the victims - for whom the cruelty of individual human beings was probably the only layer that mattered - nor on the victors or successors, who, in each setting, appreciated that the structures and all of its elements had to be dismantled and reprogrammed, literally and metaphorically, if the state in question was to progress in the desired direction.

One of the ways in which this dismantling occurred was by confronting and judging the past in ex post facto hearings into how different sectors - military, business, medical, bureaucratic – operated within the overall system. Although perhaps expressed differently at the time, it is clear that these hearings served an interconnected purpose of confronting the past in order to move forward. If “transitional justice” is a fairly new term of art, the echoes of these hearings loudly disclaim the novelty of the underlying project.

This paper is about the ex post facto investigations convened on the particular role of the judiciary in the atrocities committed by each of the régimes. In Germany, the inquiry took the form of the so-called “Justice Case”, criminal proceedings brought by the Allies against leading Nazi jurists under Control Council Law No. 10.1 In South Africa, it was the three-day Legal Hearing during the 1997 Truth and Reconciliation Commission (TRC).2 Each of these processes

---

1 These proceedings are detailed in International Military Tribunal, Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10, Volume III: “The Justice Case”, (Washington, DC: US Govt Print Off, 1949) [the Justice Case], which includes transcripts of Opening and Final Statements, documentary evidence of selected statutes, decrees and judgments issued under the Third Reich, extracts of other evidence, and the Opinion and Judgment of the Tribunal itself. Hereinafter, all references to The Justice Case will be to pages in this volume.

2 A transcript of proceedings can be found online on the website of the TRC at http://www.justice.gov.za/trc/special/legal/legal.htm (accessed: 2 December 2013) [Legal Hearing Transcript], and the results of the Commission's deliberations can be found in Volume 4, Chapter 4 of the TRC’s final report, also available online at http://www.justice.gov.za/trc/report/ (accessed: 2 December 2013) [Legal Hearing Report]. The first day of proceedings was focused on the judiciary. Further details and analysis are available in David Dyzenhaus’ excellent Judging the Judges, Judging Ourselves: Truth,
is fascinating from an academic perspective. The source material is rich and varied, from transcripts and case records to contemporaneous and retrospective commentary. Thus, we have an extensive record of how the judicial systems in question, and their decisions, were justified and experienced at the time and how they are considered in hindsight. Indeed, in a discipline in which judges’ voices are customarily heard only in judgments themselves, each of these hearings gave the judiciary a unique opportunity to explain how and why it acted the way that it did (albeit unwillingly). As such, these case studies, both individually and comparatively, are a rich resource for those of us interested in “guarding the guardians” of the rule of law.


The third of the sectoral trials conducted at Nuernberg was the so-called Justice Case, made famous in its fictionalised Hollywood retelling in Judgment at Nuremberg (1961). The sixteen defendants indicted in the Justice Case had all played lead roles in the administration of justice in Nazi Germany, whether in the Reich Ministry of Justice, the Academy of Law, or as prosecutors and judges in the special courts. The substance of the charges against the defendants was that they had “seized control of Germany’s judicial machinery and turned it into a fearsome weapon for the commission of the crimes charged in the indictment”.3

As with the other Nuernberg trials, the case did more than just establish the guilt of the accused (or, for four of the defendants, fail to do so). It endeavoured to establish a rich and detailed account of the legal system under the Third Reich, both in structure and in operation. Indeed, both the prosecution and the defence presented evidence in this regard, believing that context was crucial in understanding the particular acts of the defendants, for better or for worse.

Context: German Courts 1933-1945

Upon assuming power, Hitler and his legally-trained allies moved swiftly to radically reshape the politicolegal order in Germany. The dissolution of the Reichstag (for the purported purpose of calling an election), the subsequent Decree for the Protection of the German People (which allowed the police to unilaterally ban political activities, during an election campaign), and the blatant targeting of leading Communists and Social Democrats for arrest for having started the Reichstag fire signaled, within a matter of weeks, the start of an absolute repression of political enemies.4 The publication of the Reichstag Fire Decree of February 28, 1933, which declared a state of emergency and suspended the Constitution, “intentionally blurred the distinction between

---

3 Opening Statement for the Prosecution, The Justice Case at 40. All defendants were charged with a common design or conspiracy to commit and the commission of, war crimes and crimes against humanity. Some were also charged with membership in a criminal organization (the Nazi Party and/or the SS).

4 The claim that the Reichstag Fire was started by any of the accused has been discredited; see, for example, Müller’s account of the Reichstag Fire Trial in Chapter 4 of Hitler’s Justice: The Courts of the Third Reich (Cambridge, MA: Harvard University Press, 1991) at 27-35 (note especially the account of the independent commission at 30-31). Indeed, it has been speculated that the Nazis set the fire themselves to establish the emergency needed to seize power in the manner that they did: ibid at 28, 30.
criticism of the government and treason". The decree also prescribed the death penalty, and thereby provided the essential legal basis for the judicial persecution, and by threat of death, the terrorisation of the régime’s political critics.

This was the first of several overlapping phases in the Third Reich’s dismantling of the Weimar - or indeed any recognisable - constitutional order. Next, came the formal suspension of virtually all civil rights (including habeas corpus, freedom of expression, freedom of assembly, the right to be free from search and seizure, and property rights, and restrictions on rights), much of which was included in the Reichstag Fire Decree and then further specified in subsequent laws and decrees. All branches of the legal system were then ‘coordinated’, with undesirables purged from the law schools and legal academy, the bar associations, the Justice Ministry and the judiciary. The administration of justice, which had been largely delegated to the states (länder), was consolidated in the central government. And by 1942, whatever vestiges remained formally separating the legal profession from the Nazi agenda were swept aside, with the new Reich Minister of Justice announcing that the German Academy of Law’s activities “relating to the formulation of law must be coordinated with the aims of political leadership” and the distribution of “Judges’ Letters” designed to assist judges and prosecutors in administering justice “uniformly according to National Socialist doctrines”, which was inevitably utterly biased and merciless.

But even that was not enough: while the right of appeal was severely curbed or eliminated for defendants, prosecutors (or party officials) who felt that a sentence imposed was too lenient could seek an ‘extraordinary appeal’, and later nullification, and secure a second trial. To avoid further uncertainty of outcome, these latter trials were then held in one of the ‘special courts’, specialised tribunals created to handle particular categories of crimes and proceedings and structured in order to guarantee politically desirable results. Political crimes considered to be contraventions of the Reichstag Fire Decree were heard by the Special Court (Sondergerichte), established in 1933. The People’s Court (Volksgerichtshof), established in 1934, was composed of panels of two judges and three loyal members of the Nazi party and/or armed forces and heard most treason cases – treason being very broadly defined – including retrials of cases where unsatisfactory acquittals or inadequate punishments had been registered by the ordinary courts. And with the right of appeal curtailed, punishment, often death or deportation, could be meted out expeditiously.

5 Müller, supra n 4 at 29. See also Karl Loewenstein, “Law in the Third Reich” (1936) 45(5) Yale Law Journal 779 at 790, n 30.

6 Following the passage of the “Enabling Law” on 24 March 1933, the executive could issue decrees with the force of law (Opening Statement of the Prosecution, The Justice Case at 35). This permitted the wholesale circumvention of the Reichstag (where Hitler had failed to win an outright majority), thus fully and finally empowering Hitler’s dictatorship.

7 See Müller, supra n 4, who details this process in chapter 5 of Hitler’s Justice. See also the description of the activities of the Ministry of Justice in The Justice Case at 36-37, and the account of the judges’ dismissal at 43. The chronology of events is also set out in detail in The Justice Case at 96-100.

8 The Justice Case at 35.

9 The Justice Case at 52.

10 The Justice Case at 53.
The Decision to Judge the Judges

One of the first acts undertaken by the American Military Government (AMG) in Germany was the immediate closure of all existing courts (and especially the Special and People’s Courts) and the immediate repeal of all “peculiarly Nazi” legislation. The Potsdam Declaration set out the objectives in this regard: “The judicial system will be reorganized in accordance with the principles of democracy, of justice under law, and of equal rights for all citizens without distinction of race, nationality or religion.” The goal of the AMG was, through denazification, to re-establish a functioning liberal democratic legal system in Germany. But mere lustration would not suffice for some of the more enthusiastic and highly-placed participants. They would be criminal defendants in Allied war crimes prosecutions.

While highly relevant, it is beyond the scope of this paper to revisit the well-worn territory of how war crimes trials came to be held generally. Ultimately, only one was heard by the International Military Tribunal made up of the Allied Powers, that of the so-called “Major War Criminals”. Subsequent proceedings, including the Justice Case, were brought by particular Allied governments in their own zone of occupation pursuant to Control Council Order No. 10. The Justice Case was brought by the United States, led by Chief of Counsel (head prosecutor), Brigadier General Telford Taylor.

The main trial had endeavoured to include defendants representing many facets of the régime, including the party leadership, members of the military and diplomatic corps, industrialists, financiers and gauleiters. These included, as it happens, a former Minister of Justice, Hans Frank, and the chief legal technician of the Third Reich, Wilhelm Frick. The diversity of defendants was not merely symbolic. Coming from a common law system, the American prosecutors believed that an initial conviction of the individ

---


13 Loewenstein, supra n 11, at 445-447. But many commentators, including Loewenstein himself, doubt that efforts at denazification were particularly successful, or even possible: Loewenstein, supra n 11, at 447-454. See also Müller, supra n 4, at 202-203, 208-216.


15 For a detailed account of Frick’s role in the Third Reich, see Davidson, supra n 16, at chapter 9. Both Frank and Frick were convicted and sentenced to death by hanging.
the criminality of the organisations in question — the leadership of the Nazi Party, the SS and the Gestapo — having been established at the main trial.\textsuperscript{16}

If the main trial provided an overview of how the Nazi system as a whole operated (indeed, it was a case largely based on the conspiracy of the accused), the later trials allowed for more detailed and sector-specific explorations. They also provided a forum for the prosecution of other significant figures in the Third Reich, many of whom had been in custody since the end of the war and would otherwise simply be released.\textsuperscript{17}

As for this sector in particular, the \textit{Justice Case} had been planned “nearly from the beginning”\textsuperscript{18}, unlike some of the other subsequent proceedings, which came together as evidence emerged. As General Taylor explains:

\begin{quote}
The very nature of the Third Reich was totally incompatible with any “law” worthy of the name, and German jurists bore a heavy share of the blame, both for what they did and what they failed to oppose, for the excesses of dictatorship.\textsuperscript{19}
\end{quote}

Throughout the transcripts and documents, one gets the impression that this case was personal for the prosecuting lawyers involved (and perhaps even the judges), that their investment was far greater than a general desire to obtain a conviction against the accused. Rather, it seems that the prosecution were aiming to vindicate a certain vision of the rule of law and reassert the ethical obligations of those involved in the legal system. Whatever else was being tried in the case, this was lawyers and judges judging their own, often on the basis of unspoken norms of conduct, and finding them obscenely wanting.

\section*{Form of Proceedings}

The proceedings took the form of a criminal prosecution of the sixteen individual accused (of which only fourteen made it to verdict). Nine were members of the Reich Ministry of Justice and the remainder were judges and prosecutors with the Special and People’s Courts. All were charged with war crimes and crimes against humanity; seven were also charged with membership in a criminal organisation (namely the SS and/or the leadership of the Nazi Party). The use of the “irregular” courts and secret trials, the denial of judicial process, perversion of the criminal law, the discriminatory revocation of citizenship and forfeiture of property, aiding and implementing the unlawful annexation of territory, and unlawful confinement and executions were among the facts detailed in the indictment.\textsuperscript{20}

\textsuperscript{16} Although some have their doubts as to whether subsequent proceedings were, in fact, simplified by this prior conviction: Smith, \textit{supra} n 14 at 249-250. In the \textit{Justice Case}, only three of the seven defendants charged with membership in a criminal organisation were convicted.

\textsuperscript{17} Indeed, as the Office of Chief Counsel for War Crimes, headed by Telford Taylor for all of the subsequent proceedings, rolled out its indictments, those prisoners of war who were not to be indicted were released. This process is detailed in Telford Taylor, \textit{Final Report to the Secretary of the Army on the Nuremberg War Crimes Trials under Control Council Law No. 10} (Washington, DC: Government Printing Office, 1949 (NMT)) at 51-57.

\textsuperscript{18} Taylor, \textit{supra} n 17, at 78.

\textsuperscript{19} \textit{Ibid.}

\textsuperscript{20} Indictment, \textit{The Justice Case}, at 15-26.
With the particular form of proceedings came certain limitations. Evidence and argument had to be relevant to the facts alleged in the indictment and to the conduct of the individual accused. Evidence was necessarily rolled out sequentially and selectively. The defendants testified in a predominantly self-(pre)serving manner. Some of the most importantly players were not present: two had been tried in the main trial, and many others had either not survived the war or had managed to escape Germany before being captured. The express purpose was not to get a complete picture of the legal system as a whole on the historical record, but rather to build an account of the defendants’ participation in that system.

Nonetheless, in the particular circumstances of the Nuernberg proceedings – in which the prosecution had virtually perfect access to the extensive and meticulous records of a defeated régime – a fairly comprehensive record was compiled. The Tribunal, in its judgment, documents the Nazi overhaul of the legal system during the Third Reich in some detail. Moreover, if the case was formally directed at the particular defendants, it is clear that, substantively, it was the legal system as a whole that the Prosecution had in its sights. The essence of the allegations against the accused in the *Justice Case* were described as follows:

“But the defendants are not now called to account for violating constitutional guaranties or withholding due process of law. … [T]he defendants are charged with judicial murder and other atrocities which they committed by destroying law and justice in Germany, and by then using the emptied forms of legal process for persecution, enslavement, and extermination on a vast scale.”

The unusual term “judicial murder” encapsulates the idea that, just as the law had provided no protection to the victims of the Third Reich, neither would it be a shield for the accused in Nuernberg. An accused need not have directly perpetrated the murders in question to have blood on their hands. As Chief Counsel Telford Taylor specified in his Final Report on the subsequent proceedings, “the indictments were specific with respect to the conduct of the defendants, but general with respect to the murders or other atrocities resulting therefrom.” In its judgment, excerpted in the Final Report, the *Justice Case*’s tribunal summarised the charges as follows:

“… The charge, in brief, is that of conscious participation in a nation-wide governmentally organized system of cruelty and injustice, in violation of the laws of war and of humanity, and perpetrated in the name of law by the authority of the Ministry of Justice, and through the instrumentality of the courts. The dagger of the assassin was concealed beneath the robe of the jurist. …”

**Primary Critiques & Subjective Experiences**

The critiques of the Nuernberg trial generally are well known, and come from many angles: legal, political, philosophical, historical, military. The most famous, of course, is that these were cases of victors’ justice, in which the conduct of only one side of a bloody conflict was scrutinised. Many also took issue with the selection of defendants, arguing that it was either underinclusive or overbroad or both. Many jurists (including many of the defence counsel)

---

22 Taylor, *supra* n 17, at 72-73.
24 General Taylor goes into considerable detail in his Final Report about the selection of defendants, *supra* n 17, at 73-85; on the selectivity issue in particular, see 83-85.
have taken issue with the legal basis for the charges, arguing that the criminal law being applied had been newly created for the purpose of the hearings and was thus being applied retroactively.

But the most interesting critique from the perspective of transitional justice is the question of whether by judging these accused in a legal context alien to their own, the prosecutions were necessarily unfair. How could one judge how people behaved under the Third Reich unless one considered the particular political and legal context? This was a particularly compelling question in the context of judging the conduct of judges adjudicating in the particular legal circumstances of Nazi law. To understand how they rationalised their conduct, it is essential to consider the role of positivism in German legal philosophy.

**The Role of Legal Positivism**

The conventional explanation for the confidence – if not outright enthusiasm – with which the judiciary enforced Nazi law is a positivist one: the law was what it was, and the role of the judge was to apply the law, not to question it. The loyalty of jurists to written law resulted from their ‘positivistic training’, it was alleged, combined with the limited role of the courts in the German constitutional order. When paired with arguments about the practical limits on freedom of action in a dictatorial régime, and allusions to the physical intimidation of judges, any critique of the legal system should lie more comfortably with lawmakers than with the courts. Indeed, this was the precise approach taken by the defendants in the *Justice Case*: an emphasis on the importance of positivism in the German legal system and the inflexibility of German law.

There is, of course, considerable evidence that positivism had played a significant role in legal thinking in the years preceding Hitler’s rule. On the other hand, some scholars question the extent of positivism’s influence, or whether this is simply a convenient *ex post facto* justification for plainly illegal acts. One contemporary commentator opined that early amendments to the penal law had the effect that “the judge is freed from positive law wherever the criminal code offers no basis for conviction”. Even in private law, the judge was “encouraged to deviate from the written law when, in his opinion, the positive statute-law obstructed the enforcement of

---

25 Per, for example, Hubert Schorn in *Judges in the Third Reich*, cited in Müller, *supra* n 4 at 219.

26 See, for example, the Expert Opinion by Defense Witness Professor Jahreiss concerning the Development of German Law, *The Justice Case* at 257-258.

27 Such as that found in the Opening Statement of the Defendant Rothenberger, *The Justice Case* at 146-147.


31 Loewenstein, *supra* n 11, at 791, citing the relevant legislation.
National Socialist legal values.\(^{32}\) Notably, in *Hitler’s Justice*, Ingo Müller denies that positivism was a significant feature in German legal philosophy even before Hitler came to power,\(^{33}\) and flatly rejects as absurd the suggestion that judges in the Third Reich were influenced by positivism:

Placing the judiciary under a strict obligation to follow the letter of the law would have been an impediment to the ‘legal order’ of the Nazi regime and would have limited its power; for this reason, judges were required to declare their loyalty to the Führer rather than to the law itself. Any appeal to the letter of the law was dismissed as ‘moral and legal thinking typical of Jewish liberals.’ No less an authority than the Grand Criminal Panel of the Supreme Court presided over by President Bumke exhorted German judges to recall that ‘the judiciary … can fulfill the task imposed on it by the Third Reich only if it does not remain glued to the letter of the law, but rather penetrates to its innermost spirit; the judiciary must do its part to see that the goals of the lawmaker are achieved.’\(^{34}\)

The case that Müller makes is compelling, and it leaves one with the impression that the invocation of positivism as a defence by the jurists of the Nazi era was as disingenuous as it was convenient. But that view is difficult to reconcile with the account of the contemporary German legal philosopher (and former Minister of Justice in the 1920s) Gustav Radbruch. Widely regarded as a positivist in the pre-war period, Radbruch, drawing on his experiences during the Third Reich, in 1946 published “Statutory Lawlessness and Supra-Statutory Law”, in which he argues that positivism had gone too far:

Positivism, with its principle that ‘a law is a law’, has in fact rendered the German legal profession defenceless against statutes that are arbitrary and criminal. Positivism is, moreover, in and of itself wholly incapable of establishing the validity of statutes. It claims to have proved the validity of a statute simply by showing that the statute had sufficient power behind it to prevail. But while power may indeed serve as a basis for the ‘must’ of compulsion, it never serves as a basis for the ‘ought’ of obligation or for legal validity. Obligation and legal validity must be based, rather, on a value inherent in the statute. … [L]egal certainty is not the only value that law must effectuate, nor is it the decisive value. Alongside legal certainty, there are two other values: purposiveness and justice. In ranking these values, we assign to last place the purposiveness of the law in serving the public benefit. By no means is law anything and everything that ‘benefits the people’. Rather, what benefits the people is, in the long run, only that which law is, namely, that which creates legal certainty and strives toward justice.\(^{35}\)

Indeed, this led Radbruch to posit limits on the force of unjust positive law, and dismiss much of the law of the Third Reich as invalid.

Of course, both positions assume that positivist interpretation was even possible. As early as 1936, one contemporary observer noted that, compared to precise and formalistic legal drafting in the pre-Nazi era, “legal formulation under National Socialism is vague, and at the same time flamboyant. … Vagueness in terminology allows for indefiniteness in application of the law,\(^{36}\)

\(^{32}\) *Ibid* at 803. Although Loewenstein goes on to say that, once the law was established to be the Führer’s command, blind obedience to the law was required.

\(^{33}\) Müller, *supra* n 4, at 219-221.

\(^{34}\) *Ibid* at 220 (footnotes omitted).

while in the interpretation of the statutes, the courts are instructed to guide themselves by legal
value-judgments no less vague and ambiguous. Thus, the complicity of the judiciary in the
Nazi legal order necessarily went well beyond mere compliance with the law: National Socialist
philosophy suffused judicial interpretation of statutes and the judicial response to executive
action. This approach was succinctly set out in a statement by the then Undersecretary of the
Reich Ministry of Justice (and defendant in the Justice Case), Franz Schlegelberger, in 1936:
“[a]ccordingly there can be no doubt that now the moral order and ideology [Weltanschauung],
as recognized in the Party program, has to be taken into consideration in the interpretation and
application of every norm of the existing law.” Indeed, loyalty to the régime and its goals
regularly informed interpretations (or invention) of the facts, where particular findings were
necessary to justify a charge, conviction, or sentence, as was seen in a case study highlighted by
the prosecution in the Justice Case, the infamous trial of Leo Katzenberger.

The Prosecution of Leo Katzenberger

Leo Katzenberger, a Jewish married man in his 60s, was a leader in the Jewish community in Nuernberg. He
lived in the same apartment building as a 30-year old German married woman named Irene Seiler, with whom he
had a long-standing friendship (he had been a friend of her father’s). Both maintained under interrogation that
nothing sexual had ever occurred between them. Nonetheless, in March 1942 Katzenberger was put on trial in the
Special Court, accused of violating the 1935 Law for the Protection of German Blood and German Honor (which prohibited marriage and extramarital sexual activity between Jews and “German nationals of German blood”), as well as the Decree on Asocial Elements, often referred to as the “Decree Against Public Enemies” (which prohibited the exploitation of wartime conditions to commit a crime). This latter charge was necessary both to invoke the jurisdiction of the Special Court and attract the death penalty. Katzeberger was convicted and sentenced to death, and Seiler was convicted of perjury in the same proceeding (bizarre in itself, as it precluded her from acting as a witness for the defence).

The totality of the evidence relied upon in convicting the accused was the following:

- Seiler had admitted to kissing Katzenberger, and sitting on his lap, although she had no sexual feelings
  and “always thought that Katzenberger’s feelings for her were purely those of a concerned father”. Katzenberger confirmed that “his relations with Frau Seiler were of a purely friendly nature”. The court concluded that an innocent interpretation of these exchanges “is contrary to all experience of daily life”, and that “in view of the character of the two defendants ... the court is firmly convinced that sexual motives were the primary cause of the caresses exchanged.”
- “Proof” of the alleged affair consisted of the other residents of the apartment building thinking that Katzenberger was exploiting Seiler in return for small sums of money that he gave Seiler when she ran

36 Lowenstein, supra n 11 at 781.
37 Ibid at 804-805.
38 Cited in the Opening Statement for the Prosecution, The Justice Case at 42.
39 According to the testimony of Friedrich Elkar, assistant to Rothaug, “Rothaug achieved the final result by interpretations of existing laws, as he boasted to Elkar he was able to do.” The Justice Case at 1155.
40 Partial translation found in The Justice Case at 180 (hereinafter the “Blood Protection Law”).
41 The Justice Case at 657.
42 The Justice Case at 658.
43 The Justice Case at 658. As the Tribunal in the Justice Case concluded: “Many assumptions were made in the reasons stated which obviously are not borne out by the evidence.” The Justice Case at 1153.
into financial difficulties. Admitted into evidence (and apparently relied upon, given that it is mentioned in the judgment) was a conversation between two witnesses, fellow residents of the building, where one opined that Katzenberger was “getting a good return for the money” that he had given Seiler.\footnote{The Justice Case at 659.}

- Further “proof” of the affair included eyewitness accounts of (i) the two waving to each other through windows; (ii) Katzenberger showing fear when being discovered leaving Seiler’s apartment; and (iii) Seiler failing to protest when someone called her a “Jewish hussy” (translated by Müller as “Jew’s tart”), and giving no credible explanation to the court for her restrained reaction;\footnote{The Justice Case at 659-660.}

- From this, the court concluded that the 10-year relationship between Seiler and Katzenberger had been of a “purely sexual nature”.\footnote{The Justice Case at 660 (emphasis mine).} The decision continues: “This is the only possible explanation of the intimacy of their acquaintance. As there were a large number of circumstances favoring seduction no doubt is possible that the defendant Katzenberger maintained continuous sexual intercourse with Seiler.”\footnote{The Justice Case at 660 (emphasis mine).}

The apparent determination to sentence Katzenberger to death was evident in the manner in which the court established the required causal link between the alleged acts and the circumstances of war: having found that the alleged sexual acts had occurred, and that they had occurred during wartime, the court simply asserted that Katzenberger had taken advantage of Seiler’s husband being conscripted and had made use of the blackout to sneak into Seiler’s flat after dark. But the absurdity of the court’s logic was laid bare when a motion was brought to have Seiler’s husband testify: in denying that motion, the court held that since the blackout visits “served at least the purpose of keeping relations going”, “[i]t [did] not matter whether extra-marital sexual intercourse took place or they only conversed because the husband was present.”\footnote{The Justice Case at 662 (emphasis mine).}

But the most obvious bias in the court’s interpretation of the applicable laws was found in its reasoning for imposing the death penalty:

Katzenberger had precise knowledge of the viewpoint of nationally minded Germans on the race question; he was well aware that his behavior was a slap in the face to national sentiment. Neither the National Socialist revolution of 1933 nor the proclamation of the Blood Protection Law in 1935, neither the action against Jews in 1938 [the so-called \textit{Reichskristallnacht} or “Night of Shattered Glass”] nor the outbreak of war in 1939, sufficed to change his ways. The court holds that the only possible response to the defendant’s frivolity … is the imposition of the death penalty.”\footnote{Müller, supra n 4 at 115 (Müller’s own translation).}

This last analytical technique is what was later called, by the prosecution in the \textit{Justice Case}, the “artifice of punishment by analogy”,\footnote{The Justice Case at 86.} and it was described as follows (from an affidavit from a co-defendant, Hans Petersen, who had been a lay judge of the People’s Court):

The sentences of the People’s Court can be understood only if one keeps in mind the intent underlying the penalties. This was not primarily that of imposing punishment in accordance with normal ‘bourgeois’ conceptions of crime and punishment, but rather annihilating an opposition which could become detrimental to German aims. … Hence, after a defendant had been brought before the People’s Court because of some act or utterance, his actual deed was of no particular
importance in the determination of the punishment within the framework of the law. The important thing was whether the man had to be exterminated from the community of the people as a ‘public enemy’ because of his personal attitudes and his social or anti-social tendencies.\(^{51}\)

Indeed, this statement suggests that a conviction – on any basis – might itself be quite beside the point, let alone any concerns about the nature of the particular crime, in determining whether an accused should be executed.

Some of the interpretive liberty demonstrated by the Katzenberger case was, ultimately, enshrined in legal form: the régime amended the code of criminal procedure and issued decrees to the effect that the law should be no bar to successful prosecution. But by this point, the forms were utterly devoid of legal content. For example, Hans Frank’s pronouncement, “[i]n the future, criminal behavior, even if it does not fall under formal penal precepts, will receive the deserved punishment if such behavior is considered punishable according to the sound sentiment of the people”\(^{52}\), obviously violated the *nullum crimen sine lege* principle, common to virtually all legal systems. Violation of this precept fundamentally untethers the judicial act of pronouncing sentence from any legal justification. Such acts, however justified by statute or edict, were fundamentally incapable of being legal acts.

Moreover, the Special and People’s Courts lacked even the pretense of objectivity or judicial independence. Objectively, these were not courts in any normal sense of the word, so much as extra-judicial tribunals designed for maximum persecutory impact.\(^{53}\) But whatever their authentic nature, the Special and People’s Courts were experienced as courts by all involved, and those presiding over their proceedings believed themselves to be acting as judges. In the Katzenberger case, however tortured the reasoning, the Special Court based its decision on sentence on the facts of the crimes as it had found them, and purported to draw its conclusions on Katzenberger’s “personal character” from those facts.\(^{54}\)

*The Defence of Judge Rothaug*

This leads us back to the *Justice Case* and, in particular, the defendant Oswald Rothaug. Rothaug was a notorious judge of the Special and People’s Courts, and presided over the Katzenberger case. Rothaug’s defence provides insight into the reasoning of a presiding judge in a fundamentally unjust system, and further insight into the system’s functioning emerged from the

\(^{51}\) *The Justice Case* at 86 (emphasis mine).

\(^{52}\) Hans Frank was a leading minister in the Third Reich, and was one of two lawyers to stand trial in the main International Military Tribunal trial at Nuernberg. This quote is taken from the Opening Statement for the Prosecution, *The Justice Case*, at 46. As for its source, it is likely drawn from a July 5, 1935 article in the London *Times* reporting on the promulgation of the Penal Code Amendment Act by the German Reich Cabinet, cited in CH Mcllwain, “Government By Law”, (1936) 14(2) Foreign Affairs 185 at 187.

\(^{53}\) See Loewenstein, supra n 11 at 808, on this point; he describes the People’s Courts as “disguised revolutionary tribunals of the Star Chamber type, intended to influence public opinion.”

\(^{54}\) Robert Rachlin, for example, notes that both the People’s and Special Courts “observed the forms and externalities of law and orderly procedure, however inevitable the outcome”, issuing judgments carefully divided into sections, for example. Robert D Rachlin, “Rolan Frielser and the Volksgerichtshof”, in Alan E Steinweiss & Robert D Rachlin, eds, *The Law in Nazi Germany: Ideology, Opportunism, and the Perversion of Justice* (New York, Oxford: Berghahn, 2013) at 73.
testimony of Criminal Court Judge Groben who first investigated the case (and would have dismissed it for lack of evidence), Hermann Markl, a prosecutor on the case, and both of the associate judges who had sat with Rothaug on the *Katzenberger* case: Karl Ferber and Heinz Hoffmann. Most of the specific allegations against Rothaug were the products of the testimony of these witnesses. Here are some highlights:

- **The Joint Trial Issue**: In response to the critique that the defendants should not have been tried together, Rothaug testified that it was the prosecutor who had filed a combined indictment\(^{56}\), and joinders were used “purely a means of expediency”.\(^{57}\) This is not to say that the judge thought it to be inappropriate: in his view, as “both cases … had to be decided on the basis of the same facts”, “a joinder was altogether natural and corresponded to the customary treatment such as was applied in other cases as well.”\(^{58}\) This is likely untrue, however, as Judge Groben and the prosecutor Markl noted that the joinder of the cases was “contrary to established practice”.\(^{59}\)

- **Presumptions of Guilt**: To the critique that the court had clearly assumed Seiler’s guilt (of perjury) and that this was used as the basis for the conduct of the joint trial, Rothaug stated that he had examined her thoroughly and that this was a “case of circumstantial evidence”.\(^{60}\) This is as close to an admission of presumed guilt as one could hope for: had a presumption of innocence been applied to either defendant, it would have taken more than (weak) circumstantial evidence for their direct fact evidence to be completely disbelieved.

- **The Actual Bias Issue**: The Tribunal in the *Justice Case* found that, upon hearing that the arrest warrant against Katzenberger was to be vacated by Judge Groben, Rothaug specifically ordered that the case be moved to his court. Once there, Rothaug “dominated the prosecution”\(^{61}\). All of this would certainly give rise to an apprehension of bias before trial proceedings had even begun. In fact, the situation was as bad as the defendants likely feared: it is clear that long before trial, Rothaug had told the prosecutor, and others, that he was convinced that there had been sexual intercourse between the defendants and that he intended to condemn Katzenberger to death.\(^{62}\)

---

\(^{55}\) Two decades after *The Justice Case*, in 1968, a German court convicted both Ferber and Hoffmann of manslaughter in the execution of Katzenberger. *AJR Information*, June 1968, at 9.

\(^{56}\) *The Justice Case* at 747-748.

\(^{57}\) *The Justice Case* at 748.

\(^{58}\) *The Justice Case* at 748. Nor should it be implied that the judge occupied, in law or in fact, a subordinate role to the prosecutor in the conduct of proceedings: according to Markl’s evidence, Rothaug “dominated the prosecution”, and that the indictment was drawn up “according to the orders of Rothaug.” (Judgment, *The Justice Case* at 1151.)

\(^{59}\) *The Justice Case* at 1152.

\(^{60}\) *The Justice Case* at 753.

\(^{61}\) *The Justice Case* at 1151.

\(^{62}\) *The Justice Case* at 1152, referring to the evidence of the prosecutor, Markl.
• **Judge as Ideologue:** Rothaug largely denied that he made anti-Semitic statements while presiding over the trial (and indeed many other trials), but did admit to making public speeches at many trials in order to educate and to “warn” the population about the new laws, and explain them “from the point of view of the doctrine of the State”. However, observers of the trial noted that Rothaug not only gave a lecture on the Jewish question, he actively encouraged witnesses to make statements incriminating the defendants and often interrupted witnesses to express his own opinions. At the conclusion of trial, he met with the prosecution to advise them to seek the penalties ultimately imposed, and even made suggestions for argument.

• **Deliberately Creating a Misleading Appearance of Justice:** As for the result, there was, apparently, no disagreement among the judges in their deliberations (in Rothaug’s words: “the entire occurrence, as far as the facts were concerned based upon the statements of the defendants and on what the witnesses testified to, had developed into such a clear picture that there could not have been any differences of opinion”), and the decision was arrived at so quickly that the judges “extended the time for deliberations so that the impression should not be given that we wanted to pronounce a hasty decision.”

In summary, Rothaug’s testimony describes a system in which trials are steered to proceed as direct and expeditiously towards a death sentence as possible, including by means of manifest unfairness. Trials are pedagogical opportunities, which is to say venues for effectively terrorising the general population and further persecuting the marginalised. Consistency of process and outcome is lauded as a virtue and a justification, despite the fact that what is consistent about the system is its ruthlessness. Nonetheless, the appearance of justice – of serious, balanced adjudication – is desirable, even if it is merely a façade.

This last point is an interesting one, as this need to be perceived as a ‘real judge’ is replicated in South Africa. Where the two examples differ is the degree to which the judges themselves believed their own hype, and the point at which that self-image fails, as will be seen.

---

63 *The Justice Case* at 751-752. The Tribunal in the *Justice Case* characterised Rothaug's comments as “a National Socialist lecture on the subject of the Jewish question.” *Ibid* at 1152.

64 *The Justice Case* at 1152.

65 *The Justice Case* at 1152.

66 *The Justice Case* at 753.

67 *The Justice Case* at 753.
A Legal Hearing at the Truth & Reconciliation Commission

In contrast to the Justice Case, the exploration of the role of the judiciary in apartheid at South Africa’s Truth and Reconciliation Commission (TRC) was very much an afterthought. David Dyzenhaus describes the catalyst as follows:

In late 1996, Krish Govender, a human rights lawyer, made a submission at a Victim Hearing. Using the TRC’s standard form, he filled in under “Victim” “The South African People”, and under “Nature of Violation” “Injustice under the Apartheid Judiciary”.68

This was not a prosecution of individual judicial figures, where the specific could stand in for the general. Rather what was explicitly being called for was a systemic review of the judicial system as it operated in South Africa during apartheid, with the starting hypothesis being that it had dealt in widespread injustice.

Context: The Apartheid Legal Order

The web of laws enacted in an effort to suppress dissent in South Africa is far too complex to describe here, but it is notable that, having disenfranchised the majority of the population, and thus a vast number of the natural political opponents of the system, these laws were able to be enacted through fairly conventional legislative means. Unlike the Third Reich, it was not the executive branch that was supreme, but rather the legislature. Rule was not by decree, but largely by statute.69 Indeed, parliamentary supremacy would be the dominant legal force throughout the apartheid years: courts had no constitutional authority to enquire into the validity of an enactment.70

An Affirmation of Parliamentary Supremacy

Nonetheless, as the National Party began to roll out its policies, it encountered judicial resistance. In a series of cases in the early 1950s, the Appellate Division, the highest court in South Africa, which was still predominantly composed of more liberal English judges, relied on British common law doctrine to strike down discriminatory measures in public services that did not provide equal (albeit separate) facilities to all races absent explicit statutory authority.71 The government reacted by passing the Separate Amenities Act in 1953, providing the required statutory authority.72 Then, when the Appellate Court challenged the government’s passage of legislation to disenfranchise the coloured people of the Cape Province in Harris v. Minister of

68 Dyzenhaus, Judging the Judges, supra note 2 at 36.


70 While Parliamentary supremacy had been long-recognised, and established in effect as described in the next paragraph, both the supremacy of Parliament and the incompetence of the courts to pronounce on the validity of legislative enactments was explicitly entrenched in section 59(2) of the 1961 constitution: South African Constitution Act 32 of 1961.


72 Separate Amenities Act 49 of 1953.
the Interior, Parliament passed legislation that instituted a “court” consisting of members of Parliament to review any judgment of the Appellate Division that declared legislation invalid, which immediately reversed the Appellate Division’s decision in Harris. When this decision was challenged, the Appellate Division, not surprisingly, held that the new ‘High Court of Parliament’ violated the division of powers between the legislative and judicial branches set out in the 1909 Constitution. This led Parliament to deliver the coup de grâce: it increased the size of the Appellate Division from five to eleven, filled the empty seats with Afrikaner judges loyal to the governing party, and required a full quorum for any hearings on the validity of legislation. This effectively struck a death knell to the effective judicial review of apartheid policies at the highest level.

Other than the enlargement of the Appellate Division, the National Party did not change the structure of the court system in any substantial way during apartheid, and judges did enjoy a measure of formal independence. Appointments were for life, and no judge was ever removed for political reasons. Rather, politics were a factor on one’s way on to the Bench: by 1978, at least half of all judges serving on South Africa’s superior courts could be described as supporters of apartheid.

The Positive Role of the Courts in Political Repression

Obvious from the foregoing, there was no political outlet for the opponents, or victims, of the apartheid system. Non-whites could neither vote, nor seek election. The courts were unwilling or unable to offer assistance. As opponents of the régime persisted in organising, striking and protesting, increasingly repressive laws and policies were adopted by the government in an effort to quell dissent, leading to ever more ferocious suppression efforts, and providing ever more fuel to the fire of political opposition.

---

73 1952 (2) SA 428 (A). "Coloured" people in South Africa refers to a specific group of racially mixed people in the Cape Province.

74 High Court of Parliament Act 35 of 1952.

75 Haynie, supra n 71 at 35.

76 Minister of the Interior v. Harris, 1952 (4) SA 769 (A), relying on the South Africa Act, which had been passed by the then-sovereign British Parliament in 1909. The South African Parliament would rewrite and repatriate the constitution in 1961, when it converted the state into a republic: South African Constitution Act, supra n 70.

77 While their exact political credentials are not known, the new judges’ “qualification for promotion could not be detected by the legal profession.” Sydney Kentridge QC, Free Country: Selected Lectures and Talks (Oxford: Hart Publishing, 2012) at 50.

78 Appellate Division Quorum Act 27 of 1955. Other types of appeals only required a quorum of five judges, and, criminal appeals, only three. Dugard, Human Rights, supra n 69, at 10.

79 Although there is some evidence that judges may have resigned voluntarily on the basis of political incompatibility. Two such cases are noted in Edwin Cameron, "Nude Monarchy: The Case of South Africa’s Judges" (1987) 3 South African Journal on Human Rights 338 at 339-340.

80 Dugard, Human Rights, supra n 69 at 11.
Following the Sharpeville Massacre in 1960, the government declared a state of emergency, arresting or detaining 18,000 people and banning both the Pan-African Congress and the African National Congress. 81 This massacre of peaceful protestors and its repressive aftermath also caused the ANC to include violence in its plan of action, which only made it easier for such political activities to be deemed criminal. Political opponents frequently faced trial for treason, long prison sentences or execution, with much of the repression sanctioned through the courts by way of criminal law proceedings, thus maintaining the “aura of legitimacy” desired by the architects of apartheid. 82

Legal Philosophy in the Apartheid Legal System

One final element of context is necessary: the dominant legal theory of apartheid South Africa. Unlike the debates about the Third Reich’s approach to law, South African jurists were trained to be strict legal positivists (and old-school Austinian command theory positivists at that). 83 This was the approach drilled into law students 84, and the approach which led Dugard to remark in 1978: “South African lawyers are peculiarly prepared to accept as law anything that calls itself by that name or is printed at government expense in the Government Gazette.” 85

As for the source of this approach, it seems more relic than deliberate choice, resulting from a general lack of interest in legal theory. As it was not studied or debated in the universities 86 it simply never came up in the law office or the judges’ chambers. And without a critical mass of legal philosophers driving the debate, the South African academy would have been isolated from the academic debates occurring in the rest of the world during the apartheid years, including the evolution in thinking about positivism itself.

81 Unlawful Organisations Act 34 of 1960.

82 One of the findings arising from the Legal Hearing was that this “aura of legitimacy” was part of the reason for the longevity of the apartheid regime: Legal Hearing Report, at para 32. The Report goes on, at para 38, to find that:

“In a sense, those both inside the country and abroad who might have been embarrassed by the gross racism and exploitation of apartheid could seek some comfort in the semblance of an independent legal system. This ‘justification’ would not have been possible had even a strong minority of the legal profession united to strip the emperor of his clothes.”

83 For a deft account of the (non)-evolution of South African legal theory, see Dugard, Human Rights, supra n 69, at 393-397. The characterisation of the prevailing orthodoxy as “Austinian” can also be found in Christopher Forsyth, “The Judges and Judicial Choice: Some Thoughts on the Appellate Division of the Supreme Court of South Africa since 1950”, (1985) 12(1) Journal of Southern African Studies 102 at 102. However, Van Blerk argues that Dugard’s positivism explains judicial neutrality, while Forsyth’s simply serves to conceal “the choice [made by the judge] from the reader of the judgment”: Adrienne Van Blerk, Judge and Be Judged (Cape Town: Juta & Co, 1988).

84 See Dugard, Human Rights, supra n 69 at 394: “Positivism dominated legal education: lawyers were trained to concern themselves with rules of law alone and their mechanical application and to avoid any speculation about the law as it ought to be.” (footnote omitted)

85 Dugard, Human Rights, supra n 69 at 393.

86 Ibid at 395.
Interpretation and Judicial Choice

In 1961, in *Political Justice*, German-American political scholar Otto Kirchheimer suggested that positivism could play a potentially useful role in South Africa: judges could, while maintaining that their interpretive approach was strictly legal, ignore the plainly unjust purpose of a law and find for the “victims of the system”. But even Kirchheimer had to admit that this would only work “in the admittedly diminishing number of cases where there are ambiguities” in the statute in question. And the South African government, as we have seen, was particularly adept at swiftly filling any loopholes identified by the courts.

Indeed, by 1961, the newly expanded Appellate Division had started saving the legislature the trouble by filling loopholes itself. In overturning a decision that had challenged the discriminatory effect of a statute without express authorisation, the Court accepted that the power to discriminate was clearly implied by the statute in question. This was the beginning of an interpretative trend of filling gaps in statutory language in accordance with apartheid ideology.

Unlike the Third Reich, ideological coordination was possible in South Africa without the purging of undesirables: to avoid any problems, liberals could be deliberately outnumbered on the Bench, and no person of colour appointed to judicial office. Nor did the courts of South Africa play as fast and loose with the *nulllem crimen sine lege* principle. But where there was judicial choice available, the courts almost invariably chose the most repressive interpretation, as this would be more likely to accord with the intent of the legislature.

An example of this latter phenomenon is the case of *Rossouw v. Sachs*, in which Albie Sachs (later a judge of the Constitutional Court) was arrested in accordance with the terms of the notorious 90-day law. During his detention, his counsel sought a declaratory order that he be permitted reading and writing materials and allowed out of his cell for some exercise, rights routinely granted to other non-convicted persons in custody. The statute was silent on the conditions of detention.

The order was granted at first instance, on the basis that the deprivation of those rights would amount “in effect to punishment” and that it would be “surprising to find that the Legislature

88 Ibid at 210.
89 *Minister of the Interior v. Lockhat*, 1961 (2) SA 587 (A). For Forsyth, this is the clearest rebuttal to claims that the judiciary’s hands were entirely tied by the legislature: Forsyth, *supra* n 83 at 105.
91 1964 (2) SA 551 (A). This case is discussed at length in Dyzenhaus, Hard Cases, *supra* note 108 at 90ff.
92 The 90-day law, s 17(1) of the *General Laws Amendment Act 37 of 1963*, allowed for the detention of suspected members of banned political organisations or suspected saboteurs to be held for interrogation for up to 90 days without the need for an arrest warrant, nor the possibility of judicial intervention (s 17(3)).
intended punishment to be meted out to an unconvicted prisoner”.

This reasoning reflected the “common law approach” often urged as a liberal alternative to more restrictive, positivist interpretation. This was the approach deployed by the Appellate Division in the early days of the apartheid régime, and was based on the idea that South African common law contained certain presumptions – such as the presumption in favour of individual liberty – that should inform judicial interpretation.

The Appellate Division overturned the Provincial Court, in a decision set out in detail in David Dyzenhaus’ Hard Cases in Wicked Legal Systems. Ultimately (and after quite a long and tortuous path through the limited text of the statutory scheme) the Court concluded that the purpose of the provision was to allow the state to induce the detainee to speak, and that where state security was at issue, this would trump the more restrictive common law rule of interpretation. The Court distinguished the security detainee from an unconvicted prisoner on the basis that the statute explicitly limited the detainee’s rights. Thus unfreedom was piled on unfreedom.

Overall, the South African approach was certainly more subtle than the Third Reich’s establishment of special courts and issuance of directives that judges should not let the law be a bar to the realisation of National Socialist aims, but the distinction is perhaps more one of degree than of kind. Outward appearances undoubtedly mattered to this régime, and if one didn’t know (or didn’t care) that the apartheid legal system had been constructed on the foundational disenfranchisement of the majority of the population on the basis of race, one could make the argument that the enforcement of legislation by the courts was operating in a coherent and consistent way.

**Hearings instead of Hangings: The Origins of the TRC**

As appalling as the crimes of apartheid had been, the transition to multiracial democracy was a surprisingly (but by no means entirely) peaceful one. This was not dumb luck, but rather the result of a series of conscious policy choices made by Nelson Mandela and his African National Congress (ANC) party, both during the pre-election negotiations and after. Archbishop Emeritus Desmond Tutu sets the scene as follows:

In the early 1990s, a peaceful transition in South Africa was by no means an inevitable outcome. There was a very real risk that the country would stumble down the path of bloody and prolonged conflict, as has been the experience of so many nations struggling to overcome internal divisions. With the eyes of the world on this country – and under the leadership of then President Nelson Mandela, a living icon of magnanimity and humanity – the people of South Africa initiated the Truth and Reconciliation Commission, eschewing revenge and violence in favor of truth and forgiveness and, ultimately, the reconstruction of our country.

---

93 Quoted in Dyzenhaus, Hard Cases, supra note 108 at 90.

94 See, for example, Dyzenhaus, Judging the Judges, supra note 2 at 15.

95 Dyzenhaus, Hard Cases, supra note 108 at 91-98.

The *Promotion of National Unity and Reconciliation Act*[^97], passed as a cornerstone piece of legislation shortly after the multiracial elections of 1994, established the Truth and Reconciliation Commission (TRC). The main objective of the TRC, as set out in section 3(1) of the Act, was

... to promote national unity and reconciliation in a spirit of understanding which transcends the conflicts and divisions of the past by-

(a) establishing as complete a picture as possible of the causes, nature and extent of the gross violations of human rights which were committed during the [specified] period ... including the antecedents, circumstances, factors and context of such violations, as well as the perspectives of the victims and the motives and perspectives of the persons responsible for the commission of the violations, by conducting investigations and holding hearings;

(b) facilitating the granting of amnesty to persons who make full disclosure of all the relevant facts relating to acts associated with a political objective and comply with the requirements of this Act;

(c) establishing and making known the fate or whereabouts of victims and by restoring the human and civil dignity of such victims by granting them an opportunity to relate their own accounts of the violations of which they are the victims, and by recommending reparation measures in respect of them;

...

This statutory context is essential: almost without exception, those who testified at the TRC with respect to past acts benefited from the amnesty provisions of the Act, which provided immunity from civil and criminal liability in exchange for full and frank disclosure of the facts and circumstances of those acts. Thus, the position of those testifying at the TRC was entirely different from the defendants at Nuernberg, with such witnesses being largely insulated from the legal consequences of their alleged criminal acts. But this protection was frankly irrelevant in the case of the Legal Hearing as no judge was being called to account in any way whatsoever: their testimony was invited purely for information. Nonetheless, no past or sitting member of the South African judiciary chose to appear at the hearings (although a number did make written submissions), provoking fury among the Commissioners and the South African public.

However, Dyzenhaus, who both testified at and attended the Legal Hearing, admitted that the general atmosphere of the Legal Hearing was “like a trial”[^98], although it is unclear whether this is because the judges’ failure to appear provoked fury, or a feeling that the hearing was one-sided, or whether that was part of a broader and challenging dynamic.

**The Allegations Against the Apartheid-Era Judiciary**

Racism and bias in South African courts was considered to be endemic and notorious. As the TRC found in the Legal Hearing:

... the courts and the organised legal profession generally and subconsciously or unwittingly connived in the legislative and executive pursuit of injustice. ... There were ... many parts of the

[^97]: *Promotion of National Unity and Reconciliation Act* 34 of 1995.

profession that actively contributed to the defence of *apartheid* through the courts. … [For example:]

…

The judiciary, which unthinkingly allowed judicial policy to be influenced by executive dictate or white male prejudice; which was intent on maintaining the status quo; which willingly participated in producing the highest capital punishment rate in the ‘Western’ world by the mid-1980s and an execution-rate that impacted overwhelmingly on poor black male accused. …

Remarkably, despite the explicitly systemic mandate, the Legal Hearing, like the *Justice Case*, relied heavily on a particular example (indicating perhaps that injustice on a mass-scale is almost incapable of meaningful description except through individual stories). In the case of the TRC, the case study in question was the sentencing of Andrew Zondo, raised in the initial submission that triggered the debate about having the Legal Hearing (and then again by human rights activist Paula McBride in her testimony at the Hearing).

Andrew Zondo was 19 when, in 1985, as part of the armed wing of the ANC, he planted a mine in a shopping centre that killed five people. He was convicted of murder and sentenced to death. He was ably represented by counsel of his choice. At that time, a death sentence was mandatory for murder, absent extenuating circumstances. The trial judge found none. While he did recognise that Zondo was young when the crime was committed, he did not find this sufficiently compelling to warrant a different sentence. When Zondo sought leave to appeal on that issue, it was denied, first by the trial judge and then by the Appellate Division. Zondo was hanged shortly thereafter, at the age of 20.

Govender had two main complaints about the case: the apparent “steamrolling” of the accused through trial to execution “at an unusually rapid pace”\(^{100}\), and the failure of the judge to find extenuating circumstances. The TRC forwarded Govender’s submission (which included the totality of his complaint, not only his concerns about the *Zondo* case) to the then-Chief Justice of South Africa, Michael Corbett for comment. In response, Corbett filed a memorandum arguing against the convening of the Legal Hearing (the “Corbett Memorandum”).

The Corbett Memorandum is fascinating\(^{101}\), as it takes two incompatible tacks. First of all, it objects to the holding of what would become the Legal Hearing on practical and constitutional grounds. Corbett presumes that a Legal Hearing would necessitate a detailed examination of countless court judgments over decades, an overwhelming task, and one entirely inappropriate given the principle of an independent judiciary: judges simply could not be expected to be called to account for their decisions in individual cases.

There is an undercurrent here that such an inquiry is incompatible with the dignity of the Bench, which is consistent with the high opinion that the South African judiciary had of itself, even after

---

\(^{99}\) Legal Hearing Report at 105.

\(^{100}\) Govender Submission, quoted in Dyzenhaus, Judging the Judges, *supra* n 2 at 42.

\(^{101}\) Here I should admit that I have not read the Corbett Memorandum myself, as the materials submitted to the TRC are not readily available. I am relying on the fairly detailed description of the contents of the memorandum in Dyzenhaus, Judging the Judges, *supra* n 2 at 37-52.
the end of *apartheid*. Superficially, the TRC’s purpose to promote accountability is contrary to the principle of judicial independence. But it is an argument that rests on certain rather questionable assumptions.

The first is that judicial independence is absolute, that it cannot be balanced against other social values, such as the need for a society in transition to fully confront and understand the failings of the past. This is bound to be a sore point where the court’s primary defence for past acts is Parliamentary supremacy: that the court was, by law, subordinate to the will of the legislature. That it now asserted its independence in refusing to subordinate itself to the summons of an inquiry duly constituted by a new, democratic legislature risked accusations of opportunism, at best.103

Moreover, the claim also assumed that judicial independence is monolithic, and thus any assault on the principle is a fatal blow. I would suggest that there is a great deal of difference between calling an individual judge to account for his/her decision in a particular case, and the hearing and questioning of judges on their view of the operation of a now-former legal system, which was the true subject-matter of the Legal Hearing.104 And judges, even those acting as witnesses, would be particularly well-placed to be able to thread that kind of needle. To do so, however, would be to confront one of the dominant myths of the *apartheid*-era judiciary in South Africa, and one that affected the most liberal judges as much, if not more, than the *apartheid* true believers: that the courts of South Africa maintained considerable international respectability during the *apartheid* years. This proposition, which was attributed to “many of the submissions we have received from the judges”105 was put to Professor Lennox Hinds at the TRC Legal Hearing, and quickly dismissed as “wholly unsubstantiated”.106

But perhaps most fundamentally it was indicative of a failure to appreciate the level of mistrust toward the judiciary that resulted from almost half a century of *apartheid* rule. The judiciary was an institution entirely alien and alienated from the majority of the people of South Africa, primarily down racial lines. This alienation certainly played itself out in the courtroom. Consider the following statements:

> A former judge once told me that one of the things that he learned on the Bench was that he had no knowledge of the lives of black people, of their feelings, their loyalties, or the pressures on them.107

---

102 And that is, of course, ignoring the notorious fact that the Bench was largely appointed on the basis of political allegiance: Dyzenhaus, Judging the Judges, *supra* n 2 at 38.

103 In her submission to the TRC on this point, the Dean of the Law Faculty of the University of Witwatersrand, Carole Lewis, noted that Parliament had not exempted the judiciary from the moral and legal duty to testify at the TRC. “By taking the stance that they have no such duty,” Dean Lewis continued, “judges place themselves, however unintentionally, above the law.” Dyzenhaus, Judging the Judges, *supra* n 2 at 47.

104 A point made by the TRC itself, Legal Hearing Report, *supra* n 2 at 106, para. 44a.

105 Legal Hearing Transcript, *supra* n 2 at 18.


107 Kentridge, *supra* n 77 at 56.
I listened to the Prosecutor and I saw that he did not have any ideas about us. He was ignorant of our ways and feelings. I looked at the Judge and the prosecutor and the thought came to me that they were ants and in engaging with them we were dwarfing ourselves.\footnote{A quote attributed to Andrew Zondo after he was sentenced to death, from Paula McBride’s Submission to the Legal Hearing. Quoted in Dyzenhaus, Judging the Judges, supra n 2 at 1.}

In order for the Courts to take their place in the new South Africa, there was clearly much work that needed to be done. In this context, it must be recalled that, unlike the process of denazification, in which all members of the German Bench were removed from office (even if many were ultimately reinstated), the “old guard” of the South African Bench remained in office in the new South Africa. There was change in personnel, no break with the past and, in her testimony at the TRC, Carole Lewis, Dean of the Faculty of Law at the University of Wittwatersand, argued that while the proceedings might be undignified, this concern needed to be balanced against the existing reputation of the judiciary, which sorely needed improving.\footnote{Dyzenhaus, Judging the Judges, supra n 2 at 47.}

But added to that balance should be Dyzenhaus’ speculation that the true reason for judges – even newly appointed judges like Mohamed and Chaskalson – did not testify was that this would likely cause a major rift in the collegiality between the old order and new order judges, collegiality that was considered essential in establishing institutional legitimacy.\footnote{Ibid at 38-40.}

One can only imagine that it is this collegiality that compelled Corbett – who had just alleged that a review of apartheid-era jurisprudence to be both impractical and inappropriate – to go on to defend the judiciary’s record, both in general and in the Zondo case in particular, in his Memorandum to the TRC. In general, Corbett pleaded parliamentary supremacy, indicating that “the court had no option but to apply the law as they found it, however unjust it might appear to be.”\footnote{Corbett Memorandum, quoted in Dyzenhaus, Judging the Judges, supra n 2 at 44.}

And then, in the same vein, Corbett defended the judge who had presided over the Zondo trial, Ramon Leon:

\begin{quote}
At the time when this case was decided (1986) the law imposed a mandatory death sentence upon a person eighteen years of age or older convicted of murder where no extenuating circumstances were found to be present. The Court had no choice in the matter. The onus of establishing extenuating circumstances rested on the accused. In deciding the issue of extenuating circumstances the Court … had to assess the accused’s moral blameworthiness taking into account all the circumstances, including the personality of the accused and the nature of the murder and the manner of its commission.\footnote{Ibid at 42 (emphasis in Dyzenhaus).}
\end{quote}

This claim, of “judicial disempowerment”, will sound familiar as the justification of many jurists in the Third Reich (albeit not Judge Rothaug, who was, at heart, a true believer in the Nazi cause) and any number of other repressive régimes. But it is susceptible to challenge on its face and, indeed, even Corbett was not absolute in his defence of choicelessness, explaining that … generally speaking, our courts did, by a process of interpretation ameliorate in many instances the effect of harsh laws. It would be foolish for me to contend that they always did so; or to seek
Setting aside the fact that this claim is likely objectively untrue, this passage illustrates the reckoning for any judge who had worked in a repressive régime: what could I have done differently? In many respects, these hearings, and this paper, are searching for the full range of tools available to courts in these situations. In the process, they are exploring both the extent of courts’ potential to deliver justice or, where they have failed to do so, their moral culpability.

Lessons & Consequences of the Judicial Hearings

Perhaps the question of moral culpability would have been purely academic had there been a clean sweep of judicial personnel following the collapse of the Third Reich and apartheid. It was certainly a moot point for a man like Oswald Rothaug, an unrepentant Nazi who knew that he would never preside over a court again. For Rothaug, the law was a show to be performed in order to fulfil a lawless purpose: the law was simply a tool, like a gun, or a train, or a fence. The substance of the law itself was irrelevant, except to the extent that it empowered the judge to achieve his ends. As such, his testimony does little to illuminate the subject at hand.

By contrast, Corbett’s perspective is more typical of most ‘old order’ South African judges (and indeed, most of the jurists of the Third Reich). Law is portrayed as a restraint on the judge’s freedom of action, and by implication, on his moral culpability. It is the challenge to this claim posed by the TRC that the South African judiciary were unwilling to confront. Perhaps because ultimately the claim is not truly a legal one, but rather a human one: in the face of evil, why did you not resist?

There are those who did not see the system as evil, and so their duty to their conscience and the law was not in conflict. But for the rest, the question is a vexing one. Robert Cover, in his fascinating famous account of judicial conduct during slavery in the antebellum United States Justice Accused, more accurately characterises this vexation as cognitive dissonance, and has charted what he calls “judicial response patterns” that justify choosing law over justice. And others, too, have found judges’ efforts to excuse their role in repression by resort to the dogmas of legal positivism or parliamentary supremacy or both hard to swallow. Given the latter-day assertions of judicial independence, it is argued, judges are uniquely and absolutely ineligible for the excuse that they were just following orders. Corbett himself admitted to some interpretive freedom, and others have suggested that even where interpretive space was limited, judges were always free to critique the system. Moreover, by bearing the burden of the moral dilemma

113 Ibid at 45.
115 See, for example, Dyzenhaus, Judging the Judges, at 28.
116 Submission of LWH Ackerman to the Legal Hearing, at 4-5. Cited in Dyzenhaus, Judging the Judges, supra n 2, at 79. Justice Ackermann had resigned from the Bench in 1987 in order to take up an academic position, in large measure because of his ethical and religious objections to apartheid.
themselves, judges in effect let Parliament off the hook: perhaps judges were duty-bound to persistently question

That is what we have learned from the result of these processes, but what about the processes themselves. Undoubtedly, all of the judges that served under these régimes would rather have left the past in the past, so perhaps the question to be asked is: what’s so wrong with that?

Well, there is, of course, the rather legal ideas of standard-setting and precedent-setting. If we are to allege that the judiciaries of the past have failed, we should do some with some precision, if not only for the sake of condemnation, then to set a clear and appropriate standard of conduct going forward.

And it bears recalling that these standards were, in large measure to be set out for precisely the same body of judicial personnel. In both Germany and South Africa, it became clear that a wholesale sacking of the judiciary in favour of a clean slate would be, if not inappropriate, entirely impractical. Given that the faces on the bench were so very familiar, and linked to widespread injustice, the reconception of the judiciary as purveyors of justice in both countries had to be done in some other way. Even if there was a real risk that hearings risked tarnishing the institutional reputation of the courts - and perhaps even the principle of the independence of the judiciary – this assumes that the judiciary wasn’t already starting at zero. These hearings, even if only symbolically, signified a fresh start and thus gave the new courts the best possible chance of a new image, and, it would seem, a new mission.