

HRP

Transformation
of the
South African
System of Justice



The Honorable Abdullah Omar
South African Minister of Justice



The Edward A. Smith Visiting Lecturer
Human Rights Program
Harvard Law School

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Harvard Law School and its Human Rights Program have benefited from a generous gift to the School by Edward A. Smith of the Cla. The gift has made it possible to bring to Harvard for several days lecturers whose commitments and experience speak to such issues as social responsibility and the moral dilemmas facing the legal profession.

Each of the Edward A. Smith Visiting Lecturers invited by the Human Rights Program has amply met the lectureship's criteria. All have been engaged in prominent work related to the human rights movement and its efforts to develop and protect international human rights. All are people of deep commitment and moral vision. All have "made a difference." The past lecturers were Neelan Truchelvam from Sri Lanka, Ntsebesa from South Africa, Tania Petovar from Yugoslavia, Asma Jahangir from Pakistan, Ian Martin from the United Kingdom, Gay McDougall from the United States, Louis Sohn from the United States, and Radhika Coomaraswamy from Sri Lanka. The Program remembers Mr. Smith with deep thanks for making possible this fruitful series of talks.

The Program's most recent Edward A. Smith Visiting Lecturer was Hon. Abdullah Omar, Minister of Justice of South Africa. This program grows out of the lecture that he delivered at Harvard Law School on 9, 1997. Through his work as lawyer and advocate, Abdullah Omar has worked for many years among the leaders of the anti-apartheid movement. His present awesome task, the dimensions of which are sketched in this lecture, amounts to nothing less than the transformation of a legal system committing a gross violation of human rights to one based on justice and the rule of law. It was a great privilege for the Human Rights Program to welcome Minister Omar to Harvard to give this illuminating lecture.

- HyJ3 Steiner

*Jremiah Smith, Jr. Professor of Law
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The Harvard Law School Human Rights Program, founded in 1984, fosters coursework; the participatic of students in human right through practical involvement as well as scholarly research and and assistance to the worldwide human rights community. The Pro forges cooperative links with a range of human rights workers, and organizaticns from all parts of the world through its student internships, visiting fellows (scholars and activists), speaker research and clinical work. HRP also plans and directs roundtab conferenaes on human rights issues and publishes the resulting and analyseš. These publications, together with a brochure desc HRP's activities, its newsletter and other related documents, a at the HRP web site (indicated below) or upon request.

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Ladies and gentlemen, friends, and comrades,

It is a particular privilege for me to be here today to deliver the Edward A. Smith Lecture. In fact, my visit to Law School is rather belated. Nearly two decades ago, I was accepted as a student in the LL.M. program. For well-known political reasons, I was denied permission to leave my country and hence was unable to attend. I apologize for the delay.

I would like to take the opportunity of this talk to thank those of you who contributed in different ways to the liberation struggle of South Africa. The struggle against apartheid enjoyed international solidarity as has no other struggle in the world. A heavy responsibility now rests on the shoulders of South Africans to ensure that democracy is real for all of them; there is meaningful change to provide a better life, and human rights are enjoyed by the millions of our previously disempowered men, women and children.

The transformation of South Africa and its justice system is a huge and complex topic. Everyone speaks of the "South African miracle." In a way there has been one. We were at the end of a violent conflict without any apparent way out. Yet, we succeeded through negotiated elections in climbing out of the morass, due largely to the outstanding leadership of the National Congress (ANC) - in particular President Nelson Mandela and then ANC president, Oliver Tambo.

In the light of these achievements, I would like to im

some of the exuberance and enthusiasm that the previously excluded people of South Africa feel today. At the same time, we should not fool ourselves. Elections did not bring about the fairytale ending to the story. For those who enjoyed privilege during the apartheid years, it was hoped that these elections would mark the end of the transformation process. But for those excluded by the apartheid regime — denied the right to vote, humiliated and treated as non-citizens in the land of the free — the process of transformation has just begun. Elections are only a first step. I, myself, fall in the latter category. I do not want to see the elections of April 1994 not as the end of transition, but rather as the beginning of a process of radical transformation which must take place in our country.

Overcoming the Legacy of Apartheid

Although apartheid has been banished by our constitution and removed from our statute book, its legacy lives on. Millions of our people still live in squatter-camps. Millions remain unemployed, many unemployable because of the effect of the Bantu education system that reigned supreme for such a long time. The process of emancipation has just begun.

The apartheid state inculcated a culture of violence and divisiveness that is also our legacy. The stark contrast between the opulence in which some few people lived and the poverty and degradation of millions produced bitterness and hatred. This unrest was suppressed through violence inflicted by the State against all who challenged its order. Brutalization and dehumanization became the order of the day.

This legacy affects both Whites and Blacks, but in different ways.¹ The privileges of the apartheid state are deeply embedded. Those who enjoyed them during the apartheid years continue to enjoy most of those privileges today. Despite our commitment to build a non-racial society, South Africa remains highly race-conscious and race-divided.

One step in the process of overcoming the legacy of apartheid is to make our institutions representative of the population. We inherited the institutions of the apartheid order including the army, police and government bureaucracy. Despite our efforts during more than two years, these institutions are not representative. In any event, it is not enough simply to change the personnel. The institutions of the state were designed to serve apartheid. They imbibed its values. They developed and implemented the attitudes of domination, superiority, and contempt for women and people of color. Indeed, not only racial but also the domination of men over women were part of the official culture.

Those attitudes do not disappear overnight. They require systematic programs to bring about a change of culture, a change of ethos and attitude within the institutions. Reversing the process of dehumanization and brutalization takes time. How much time depends on our new programs and the success with which we are able to implement them.

One of the biggest challenges facing the democratic government has been to transform the administration of justice in South Africa. During the time of apartheid, the Department of Justice was effectively used to implement it. Opponents were frequently brought before the courts and invariably convicted and sentenced to long prison sentences or execution. Not

quently, the Department of Justice was responsible for ensuring that apartheid and repressive laws were drafted, enacted and enforced. Courts were virtually segregated with one part serving the so-called homelands, while the other served the Republic of South Africa (RSA). The difference was not only in the kind and quality of services given, but also in the very infrastructure to dispense justice. While courts and other structures administering justice in the RSA were in many respects near first-world standards, the homelands were left virtually their own and forced to operate with inadequate and often outdated resources and technology. The lack of representativeness - particularly in the senior echelons of the Department - continues to cloud the legitimacy of the administration in

Unfortunately, even today we act under severe constraints. While we seek to transform the State, the very forces unleashed by apartheid threaten those efforts. One much discussed example is violent crime, and the widespread perception that it is rising. In fact, crime has been part of the apartheid state from the beginning. As our Truth and Reconciliation Commission is helping people to understand, agents of the State themselves fomented and participated in crime. There has been and continues to be participation in crime among elements of the police of the past, people who did meritorious work for the apartheid regime, even while committing abuses and killing people, and received promotions. That has come to an end. Nevertheless, the legacy now undermines our transformative efforts. Fighting crime is thus high on our agenda.

The New Constitutional Order: Democracy, Transparency and Participation

Before focusing on the transformation of the justice system, I would like to review some of the broad changes that we implemented since the end of apartheid.

Our starting point was elections. In April 1994, South Africa held its first non-racial, democratic election in the country's history. We now have a national parliament consisting of two houses, a National Assembly and a Senate. In contrast to the prior regime, the Parliament has developed a democratic and participatory culture. It is a far cry from the all-white parliament that existed before 1994. During apartheid, the parliament observed only superficial democracy: All committees were chaired by representatives of the majority party and closed to the public. It is ironic that we who fought for majority rule changed that tradition by opening committees to the public, making their procedures transparent, and offering other political parties the opportunity to appoint committee chairs. We dramatically changed the gender balance; ensuring that one-third of all MPs of the ANC are women.

Another important change has been the devolution of power from the national to the provincial level. Legislatures have been elected in each of the nine provinces defined in the Interim constitution. In each of those legislatures, one-third of the representatives are women and the open democratic culture established at the national level has been replicated.

The same is true at the local level where we had the first elections for local councils. These, in particular, have created a whole new class of previously disenfranchised citizens.

Men and women, some of whom cannot read or write, now serve on local councils, deciding matters relating to localities and amenities. There is a lot to learn. Council members have to address housing matters, water, electricity, streets, libraries and swimming pools - which of course are non-existent in Black areas.

In addition, we recently completed a widely participatory process to develop the permanent constitution. For the past year and a half years, we have been operating under the Interim Constitution, the product of negotiation among political parties.² As a result of its negotiated nature, we argued that the Interim Constitution did not enjoy the legitimacy of a constitution developed and adopted by a democratically elected body. The Interim Constitution, established a Constitutional Assembly, composed of all members of Parliament sitting together and required the Assembly to draft a permanent Constitution within two years. It also laid down a series of binding guiding principles to which the new Constitution had to conform, and charged the new Constitutional Court with the task of certifying compliance with those principles. The result has been two years characterized by intensive national debates as well as some initial reservations. In 1996, the Constitutional Court certified the Constitution, which eventually certified the Constitution late in 1996. Now we have a truly South African Constitution reflecting and responsive to the peculiar characteristics of South African society, needs and aspirations.

This Constitution effects one major change in the manner in which government is constituted. It no longer requires a government of "National Unity." Under the Interim Constitution, any political party enjoying a certain minimum percentage

support had the right to be part of the executive of the The National Party (NP) and the Inkatha Freedom Party (IFP) both participated in the National Unity Government. The N.F.W. de Klerk withdrew at the time the new Constitution was ratified, because it could not accept majority decision in the cabinet.⁴ The IFP remains in government. But with the elections, this beast called "Government of National Unity" come to an end and the majority will have the right to form the executive of the country. The process culminating in the Constitution demonstrates the step-by-step approach that we have taken to arrive at majority rule in the country.

The constitutional Court and Independent Mechanisms

We made one fundamental change to the justice system in the country: the establishment of a Constitutional Court. The Court acts as final arbiter on all Constitutional matters including the enforcement of the Bill of Rights. In the previous there was no Bill of Rights and no court with authority to overrule the legislature. But the courts, tainted by the apartheid system, lacked the confidence of the majority of the population necessary to act as arbiters of the Constitution. We thus adopted for the European model of a Constitutional Court, with a number of judges selected from outside the existing judiciary sitting for an extended but fixed term. In addition, like the European model, courts now certify constitutional questions directly to the Constitutional Court for final disposition. In very short time the Constitutional Court has established

enviable reputation for independence and wisdom. It has already begun to give new direction to jurisprudence in our country.⁵

Our experience with the Constitutional Court prompted to set in place a new judicial infrastructure. The center is the Judicial Services Commission. During the apartheid years all judicial appointments were political. Judges were appointed by the President and the Minister of Justice. Now, all candidates must be recommended by the Judicial Service Commission, consisting of 15-17 persons, including judges, lawyers, parliamentarians and even a trade unionist.⁶ The result has been a permanent end to political appointments.

In addition to the Court, the Constitution established independent mechanisms intended to guard against the abuse of power, malfeasance and violations of human rights. The most prominent are the Human Rights Commission and the Public Protector. The Commission is composed of ten Commissioners serving seven-year terms. It has a broad mandate, extensive powers of investigation and the authority to bring proceedings in court on behalf of a wronged individual or group. In addition, it is charged with promoting respect for human rights and monitoring the implementation of the Bill of Rights, including economic, social and cultural rights, by government ministries. The Public Protector has the role of ombudsman, with primary responsibility for monitoring and preventing malfeasance and abuse of power. Both institutions are independent of the government and benefit from extensive powers of investigation. In establishing the two bodies, we drew from international experience, promoted legislation in parliament and created the necessary infrastructure

More recently, we put into place a Gender Equality Commission, which has been entrusted with ensuring that steps are taken to promote gender equality. The Commission works through such methods as monitoring and commenting on legislation to ensure that gender concerns are addressed. For example, during the constitutional negotiations there was a major debate on the question of indigenous law that was of particular concern to women. Many so-called traditional leaders argued that the Bill of Rights should not be applicable to their situation because it interferes with their traditions. But our women's organizations were also quite powerful, particularly the ANC women's league. They would have none of that. Ultimately, it was agreed that the Bill of Rights trumps anything else.

Nevertheless, the Constitution does leave an important space for indigenous law and the affirmation of South Africa's diverse and formerly repressed communities. It provides for the creation of an independent commission for the promotion and protection of the rights of cultural, religious and linguistic communities. Apartheid fragmented and divided our country. Our goal is to create a united country. At the same time, we are aware that we are a people who speak many languages, enjoy many different cultures and practice different religions. This commission is designed to provide a platform for people who speak different languages and practice different cultures and religions. Its mechanism is designed to give to varied groups the opportunity to take those steps necessary to promote such languages, cultures, and religions.

The question of language alone well demonstrates the dilemmas that we face. Our Constitution makes provision for

eleven official languages. Many people, including constitutional experts, poke fun at this. But for us, it was a new path of liberation. During apartheid, there were two official languages, English and Afrikaans, both of which were imposed through colonial and apartheid domination. Our new path is an expensive proposition, but what alternative did we have? Maintaining English and Afrikaans as the sole official languages would have meant maintaining a principle of apartheid. The only other choice would have been an arbitrary selection among the indigenous languages. We were not prepared to do that.

Transformation of the Justice System

The result after two and one half years is a constitutional framework of mechanisms and procedures that should enable all our people to participate in the political and public life of the country. Hopefully, it will help to reverse the culture of fear by giving people other means to make their voices heard. With that in mind, I now turn to our reforms that specifically affect the Justice Department and the justice system in general.

During the time of apartheid, the Department of Justice was used to enforce and implement unjust laws. As a department responsible for the administration of courts, it played a role in upholding the legality of many apartheid laws, and ensuring that the opponents of apartheid were detained or imprisoned. This naturally affected public perception of the department. To the majority of South Africans who were disadvantaged by apartheid, it became the very embodiment of

oppression. Thus a major challenge of the new government has been to restructure and transform the department in order to ensure a uniform system of justice that guarantees equality.

One of the first steps was to consolidate the eleven apartheid-based departments into one Department of Justice.⁸ This took place on October 1, 1994. The new Department consists of a staff of approximately 13,900 people in 540 suboffices throughout the country. The Mission of the Department, which has been revised to reflect the new constitutional order, aims to:

- Establish and maintain, in the spirit of the Constitution, through a democratic process of transformation, a legitimate administration of justice which is efficient, accountable, just and user-friendly, as well as representative of the South African society.
- Exercise and perform administrative powers, duties and functions in an efficient, cost-effective and transparent manner that will ensure that mechanisms are always in place to serve justice.
- Incorporate and expand community participation in the administration of justice.

One crucial requirement for transforming the administration of justice is to create a system that not only responds to the diversity of our entire society, but is also representative of it. Moreover, the adversarial nature of the legal system has long been characterized by unequal access to legal services. Thus, one challenge of the transformation process has been not only to make institutions of justice accountable

also accessible and affordable to all of our citizens. This initiative requires creative and innovative approaches towards constitutional reforms. Courts need to change their image and become user friendly. At the same time, the Department's internal structures have had to be evaluated with a view to increasing their capacities to meet the challenges of the new democratic order.

Representativeness and Accountability in the Courts

I have referred to the Judicial Services Commission, an innovation. But it applies only to the High Courts, and does not affect the Magistrates Courts that handle the overwhelming majority of criminal and civil disputes. Under the apartheid regime, magistrates were treated as civil servants, with none of the trappings of judicial independence. It goes without saying that the vast majority were white.

In the last months of the regime a law was passed, guaranteeing judicial independence to the Magistrates under the control of a Magistrates Commission composed entirely of appointees from the former regime. The effect was to protect the magistracy from any efforts to diversify the magistracy and to inhibit its representativeness. We have recently passed legislation to create an enlarged Magistrates Commission, modelled along lines similar to the Judicial Services Commission, that will supervise the magistracy and insure its independence from any political authority. The Magistrates Commission appointed in the coming months will reflect our population

The problem of representativeness is a sensitive one to face throughout the system. We do not believe in quotas. We view the concept more broadly. Eighty-five percent of the population is black. Yet, there is not one black chief prosecutor. We are not saying 85% of our prosecutors must be black, so that the prosecution department must be broadly representative to command a measure of legitimacy and confidence. Whether the eventual figure is 80%, 75%, or 90% is not relevant. Merit, however, is — although it cannot be reduced to technical competence. There are many magistrates, judicial officers and others, who are very good in a technical sense, but who know nothing about human rights. They know nothing about human values. In fact, they have used their technical expertise to enforce apartheid.

Those who have enjoyed privilege over the years naturally stress merit and efficiency. But we are trying to make our system sensitive to human needs and the dignity of people. This is an essential element when considering standards for appointment. We have found that those Blacks whom we have appointed as magistrates have brought about greater confidence in our courts. They have established the courts' legitimacy. Communities are happier. As a result there is less tendency to take the law into citizens' own hands. Thus, technical competence alone does not necessarily enhance justice. If we have access to justice, it may not matter so much that in one respect, the new people do not now have the technical expertise of their predecessors.

This is not to say that we have appointed unqualified people, but rather people with qualifications as lawyers who lack the experience that the prior law prevented them from

obtaining. We shouldn't punish them for this lack, though we must take measures to ensure that they develop the experience. The Magistrates Commission will take responsibility for training magistrates to understand the values of the new Constitution, and to balance the guaranteed rights of the individual with the need to maintain law and order.

We have succeeded over the past two and one-half years in appointing large numbers of magistrates from communities that were previously underrepresented. In a dramatic break with the past, the new chief magistrate of Johannesburg, Africa's largest city, is black. The chief magistrate of Durban is black. The chief magistrate of Port Elizabeth is black. A former heartland of Afrikanerdom, Bloemfontein, the chief magistrate is today black. What used to be an exclusively white High Court is increasingly becoming representative. Since April 1994 Blacks have been appointed as permanent judges of what we call the Supreme Courts. In addition, for the first time the Chief Judge is also black. We have just appointed Ismail Mohammed to head the Appeals Court in Bloemfontein.

We also face the problem of creating accountability in our courts. Perhaps this problem confronts other countries as well. How do you make courts accountable? In South Africa, at least there is no sense of accountability, and no body charged with investigating complaints. As a result, the public sends a large number of complaints to the Minister of Justice. To act on them, however, would constitute political interference. One task of the Magistrates Commission will be to create a mechanism for handling such complaints. We hope that this mechanism will permit members of the public to participate directly.

In the interim, we have opened our courts to the public.

March 7, 1997, in celebration of International Women's Day had an open day at all our Magistrates CCurts.⁹ We invited women's groups in all local areas to go to court in large numbers, where they addressed magistrates and prosecutors with regard to issues such as violence against women. Again, on March 22 - previously known as Sharpsville Day, but now celebrated as South African Human Rights Day - we opened the courts, this time, to address concerns relating to the Magistrates, prosecutors and court personnel listened to concerns of local organizations about how these sensitive matters were treated before the courts, and how courts could create conditions in which victims of violence - women and children - testify without fear or disgrace. Through such interaction among NGOs, women's organizations and others, we hope to sensitize our courts.

Another institution that we inherited from the apartheid years is the prosecution authority. Each province has such authority headed by an Attorney General, all of whom were appointed during the apartheid regime. All are white male, most are Afrikaner. Shortly before the democratic election the apartheid government rushed legislation through parliament to make these Attorneys General independent, beyond the reach of the newly elected government. The law says they are accountable to parliament, but no mechanisms are created to ensure that accountability. As a result, the Attorneys General are presently accountable to no one.

We are now promoting legislation to change this situation but without derogating from the principle of prosecutorial independence. The choice of whom to prosecute and when will remain in the hands of the prosecuting authority. We have

interest in interfering. But we do intend to create a single national prosecutorial system, at the head of which will be a national director of public prosecutions. The current Attorneys General will be known as directors of public prosecution and will be accountable to the national director in many ways. Policy matters will have to be determined by the national director in consultation with the Minister of Justice. This is regarded as political interference in some countries (though perhaps not the United States). Our belief, however, is that the elected representatives of the people should decide on or not an unelected prosecutor.

A recent case demonstrates the awkwardness of the current situation. Soon after the election, the question of the death penalty came before the Constitutional Court. The ANC had consistently opposed capital punishment. When the case arose the Government took the position that, indeed, capital punishment violated the right to life as well as other provisions of the Constitution. But the Attorneys General took an opposing position. We found ourselves in the strange situation in which the Attorneys General, representing the State, argued for the constitutionality and the duly elected government briefed counsel which argued the opposite. Nevertheless, our proposed legislation remains controversial and is opposed, not surprising to the Attorneys General themselves.

In our effort to bring representativeness to the courts we have also introduced a system of lay assessors in the Magistrates Courts. It is one effort to introduce community participation. It has already helped to create legitimacy and to develop an understanding in communities of the role of courts. We regard this as an essential step towards reversing the culture of

lence and making legitimate the non-violent means of resolving disputes.

We are also seeking new approaches to family disputes. Until now, matrimonial and related matters were heard in high courts making use of the same adversarial approach that is a hallmark of our legal system. We believe that family matters should be handled differently, that methods of conciliation and mediation should be used, as well as efforts at counselling. We have established a pilot project of family courts in Johannesburg, Cape Town and Durban. Ultimately, we hope that this project will result in the introduction of a family court system throughout the country.

The South African Law Commission

We have dramatically reformed the South African Law Commission, the body of technical experts whose role was to research and draft the laws of the apartheid state. For the first time, the Law Commission is attending to matters of concern to the average citizens of the country. One of the most important examples is the question of harmonizing South African law with indigenous law. It is a huge enterprise. We have asked Professor N. Nhlapo, from the University of Cape Town and a recognized expert on customary law, to serve as resident commissioner.

We have asked the Commission to look at the question of violence against women and children. It has published a report on domestic violence and suggested certain amendments to the law to deal with such matters. In terms of government pol-

we have acceded to a number of international conventions, including the Convention on the Rights of the Child and the Convention on the Elimination of All Forms of Discrimination Against Women. We are a party to the Beijing decisions and have set up national programs of action both in respect of women and children. A number of steps have already been taken to implement the provisions of the conventions to which I have referred.

The Truth and Reconciliation Commission

At the moment the nation is involved in the process of exposing the crimes of the apartheid era and seeking a path to reconciliation. In 1995, we promoted the legislation and engaged in a process that led to the establishment of the Truth and Reconciliation Commission. Our Commission is different from any other truth commission in that it combines the amnesty process with the search for truth. In addition, it is a victim-centered process with special provisions for victims in the process. Finally, our commission was established through legislation by a democratically elected government and not imposed by the President or any international body. It has been a very participatory process.

One of the reasons for the success of the Commission to date and for the support that it enjoys lies in the broad discussion that preceded the legislation. We had a number of seminars in South Africa to discuss the establishment of the Commission; we faced the question of why we could not have Nuremberg type trials in South Africa. We then went to Pa

ment where we faced a vigorous debate. Parliamentary committees held public hearings in which human rights organizations participated actively. The participation did not enter the formulation of the law. Under the law, the President was authorized to appoint the commissioners in consultation with the cabinet. Instead, the President decided upon a process of public participation in the nomination process. He set up a selection committee that took nominations from public organizations. The committee presented the President with a shortlist from which he made the appointments.

The Commission itself has pursued its work in a spirit of openness and transparency. Essentially all of the hearings have been public. Even the Amnesty Committee, which evaluates claims for amnesty by those who committed abuses, has held public hearings.

The overall acceptance of the Truth and Reconciliation Commission is also due to two other factors, besides its participatory and transparent qualities: its investigative capacity and its link to prosecutions. The Commission has broad investigative powers enabling it, for example, to subpoena witnesses and require production of information. With regard to prosecutions, many people mistakenly believe that they are excluded. That is not so. The two complement each other. The threat of prosecution gives teeth to the requirement to come forward and disclose the truth. There have been prosecutions. And there have also been applications for amnesty. Amnesty is not automatic but rather depends on the political nature of the crime for which

is sought and the willingness of the applicant to disclose relevant details. Some applications for amnesty have been refused. In any event, those who did not apply by May 10, have forfeited their right to apply for amnesty.

Crime Prevention

Lastly, we have been devoting considerable time to the development of a national crime prevention strategy. As I said at the outset, violent crime, though an intimate element of an apartheid regime, did not disappear with its conclusion. The reasons are fair or unfair; it now threatens the image of South Africa and its capacity to achieve the ambitious goals we have set for ourselves. In response, we have developed a national crime prevention strategy, which is the first of its kind in the history of our country. It is not a purely theoretical document, but a practical program with strategies to control crime in the near term and, hopefully, to prevent it in the long term. There are just under 20 "national programs," and in respect of each there is a lead department - police in respect of some, justice or correctional services in respect of others. These programs are already being implemented so as to ensure for the first time that South Africa fights crime on a systematic

Conclusion

As I have tried to indicate, in a period of two and one-half to three years, we have taken a large number of steps to democratize our society from top to bottom and to lay

basis for its transformativ. In the media, you continue to see stories of pain, bleed and suffering. You may be presented with the bath water, though very seldom is your attention drawn to the baby that was born and is now growing.

There is no fairy tale ending. Even miracles create problems. But how the problem is perceived depends to a large degree on how you view the miracle itself. I conclude with a pair of anecdotes that illustrate the dilemmas we face because of the success we have thus far achieved.

There have been reports of chaos in the hospitals in our country. Hundreds of women and children are waiting hours and hours to be treated. That is true; it is a problem we must address. But these women and children have come to the hospitals because, for the first time in our history, free care exists for children under six, for all pregnant women and for all lactating mothers. Thus there has been a surge of people going to our hospitals.

Some suggest that the solution is to charge fees. But the Minister of Health, who has been highly criticized in the past, did not succumb. She said our hospitals shall be open and shall be free medical care as promised. She recognized that the problem was in part one of education and in part one of access to primary care. In response, she has invested in nearly a thousand primary care clinics throughout the country, many in places where no facilities previously existed. Now the minister is encouraging people to take advantage of primary health facilities before seeking help in hospitals.

At the level of education, as well, the situation is "All six-year-olds must be admitted to school. The result is overcrowding and angry teachers, frustrated by the increased work load. But there is another, overlooked reality—for t

time in history, black six-year-olds are benefiting from compulsory education.

These accomplishments are not inconsiderable. But we need much bigger things. I think on balance that the baby was born in April 1994 is walking. Thank you.

Endnotes

- 1 In keeping with the South African usage, "Black" refers to members of all "classified races" under apartheid, including South Africans of Indian or mixed race origins.
- 2 The Interim Constitution, Act 2000 of 1993, came into effect on April 27, 1994, the first day of the 1994 elections. The new Constitution, which was adopted by the Constitutional Assembly on May 8, 1996, and subsequently modified to meet the concerns of the Constitutional Court, took effect beginning on February 4, 1997. Some provisions of the Interim Constitution, however, including the controversial Government of National Unity remain in effect until April 30, 1999.
- 3 Certification of the Constitution of the Republic of South Africa 1996, CCT 23/96 (6 September 1996) (rejecting certain articles of the draft Constitution under the terms of Article 71 of the Interim Constitution) ; Certification of the Amended Constitution 1996, CCT 37/96 (4 December 1996) (certifying the amended constitution).
- 4 Etisircit because the ANC never takes decisions merely by a majority vote. I have been a member of ANC Executive Committee since its inception in 1990 and there has never been a single occasion when decisions have been taken by a simple majority vote. There are huge debates and differences among us. Ultimately, we always manage to arrive at a decision by consensus. Perhaps that is in part due to the culture of the ANC - its all-inclusive approach - and of course, the

leadership of our president. But even in cabinet we have always tried to arrive at decisions in the same way.

- 5 For example, the court declared capital and corporal punishment to be unconstitutional. *State v. Makwanyane* and another, CCT 3/94 (6 June 1995); 1995 (3) SA 391 CC. It held that various presumptions of our criminal procedure are unconstitutional. *Se, e.g., Suzuma* and others, OCT 5/94 (April 1995); 1995 (2) SA 642 (OC). It held that every person has the right to information, the right to access dockets of the prosecution, and many related rights. For South Africa, at least, that has been a dramatic development.
- 6 Constitution of the Republic of South Africa, Article 177 (Appointment of Judicial Officials), Article 178 (Judicial Services Commission).
- 7 *Id.*, Art. 184 (Functions of the Human Rights Commission) and the Human Rights Commission Act (No. 54 of 1994).
- 8 There were separate departments for each of the ten "homelands" or putatively independent states, in addition to RSA.
- 9 The Holiday itself is celebrated on March 8.
- 10 . See Promotion of National Unity and Reconciliation Act No. 34 of 1995, *in particular*, Chapter 5 ("Reparation and Rehabilitation of Victims").