The Helen Joseph Memorial Lecture

Law, ethics, morality in public life in South Africa

by

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When I was approached by Professor Leila Patel of this University to deliver the Helen Joseph Memorial Lecture for 2008, I should have heeded the sage advice of Lewis Carroll’s young man, when he addressed his father:

‘You are old, Father William’, the young man said,
‘And your hair has become very white;
And yet you incessantly stand on your head –
Do you think, at your age, it is right?’

‘In my youth’, Father William replied to his son,
‘I feared it might injure the brain;
But now that I’m perfectly sure I have none,
Why, I do it again and again’.

The fact that I am here with you tonight reflects my tendency towards perversity, in this case overruling my medical advisors. But there are a number of good reasons for such erratic behaviour on my part.

First, it is not every day that I am invited by Professor Patel; it would have been ungracious to have said no. Second, this is the first opportunity I have had to visit the University of Johannesburg, in whose creation I played some modest part; third, I wanted to say something about the need to recognise the primacy of politics and the values associated with participation in public life.

But most important of all, at a time of enormous challenge that we face domestically and internationally in our economic and political lives, I would like to pay my personal tribute to this remarkable woman whose life we are celebrating tonight.
J B Marks, no mean slouch himself, was so impressed by the careful plans that Helen Joseph had prepared for one of the innumerable campaigns she had been involved in, that he called her the ‘General’, marshalling her forces before the battle. And the battles she fought – from the Defiance Campaign, to the setting up of the Federation of South African Women (incidentally, the Women’s Charter is one of the most comprehensive and beautifully written claim of rights, and precocious in its formulations), the Treason Trial, and the formation of the UDF. She was a most consummate organizer, but with a vision and a large heart.

Neither imprisonment, detention nor house-arrest deterred her from her single-minded opposition to apartheid. An English-woman, with a public school voice and a commanding presence, had moved from being an agitator to a freedom fighter and for her unique contribution to the freedom we now enjoy, she was given the highest award that the African National Congress can bestow, the Isitlawandle Seaparankoe medal.

I am therefore honoured to be delivering this memorial lecture as a tribute to Helen Joseph.

I thought I would start this discussion with a quotation from an unusual source, given that I may not share many of his ideological and other suppositions.

John Quincy Adams the sixth President of the United States once said: “Always vote for principle, though you may vote alone, and you may cherish the sweetest reflection that your vote is never lost.”

One could perhaps paraphrase Quincy Adams slightly in today’s contemporary South African political landscape and say: Always adhere to the highest standards of ethics and moral conduct in public life, though you may stand alone, and you may cherish the sweetest reflection that your principles are never lost.

It seems to me that we need to revisit our views on the role of ethics and morality in public life as we approach an unprecedented level of upheaval in our political landscape which offers both threats and opportunities. But we will only benefit from these events if we do not fall into the trap of personality politics but actually ask ourselves profound questions about what challenges these events pose to our values and our views and what principled positions we wish to adopt in response to ensure that our journey as a young democracy continues to evolve on the basis of sound practices. And our questions must move beyond individuals, institutions and statutes if we are to make real progress and not simply tick another box on an institutional matrix of how we may be performing.
We need to entrench a values-driven approach to these questions where we measure our personal actions and statements every single day and not just look at our country's compliance with various global or other indices that track corruption and various other vagaries that others may regard as opportunities in public life or by virtue of public life.

In South Africa we have taken numerous steps over the years to pass various statutes and build institutions that have addressed what I would call the more ‘formulaic’ aspects of the question of integrity and morality in public life.

But we have to take a very critical look at the disjuncture if not rupture between intent and action, between codification and clarification by moral, sound, ethical and principled action as a daily diet requirement of public life and ask critical questions of our performance. Where there has been compliance with the instruments it has not been as sound as it could be as a recent study has shown. Where there has not been compliance our enforcement of possible punitive measures for breaches has also not always been as stellar as it could have been.

But it is in the silent spaces between the various codifications where our actions speak much louder than our words or our noble declarations.

Who can deny that the unseemly sight of travel-voucher scams has denuded our Parliament of its reputation and the credibility of every single member who is tarred with the brush of the behaviour of the institution in its latest actions to try and settle the debt for liquidators at taxpayers’ expense?

What are we spending our precious taxpayers’ revenue on when we settle these debts, and pay considerable legal bills of all and sundry in either public life of the numbers of civil servants that have been suspended pending future actions or who are facing legal difficulty for unethical, unprincipled and immoral actions pending before our courts when we should be channeling these funds into improving the lives of our people?

How do we address the gap between the legal regulations and the human conscience when we cannot codify all ethics exhaustively and must rely on individual ‘self-regulation’ and questions arise about whether individuals will indeed act ethically or not?

We simply have to answer that only ethics and a moral conscience can serve, aided where possible by the moral voices that step in.

A few months ago we had the burning question as to whether Members of Parliament implicated in ‘Travelgate’ should be allowed to vote on the legislation effectively disbanding the Scorpions. Given that their ‘interest’ in the matter was
not strictly speaking financial, though one could convincingly argue that it was, it became a very real possibility that they would be voting on the amendments without having to either declare their interests or in fact recuse themselves from voting. Given that the future of the DSO seems all but set, this question will continue to arise.

The issue here is not whether the member of parliament is legally entitled to vote; the issue is how it is perceived as a matter of ethics: is it right to take action against the very body that could have completed the investigations against you?

What values are we inculcating in public life when we allow the arms deal to be an albatross around the neck of one of our continent’s most hopeful stories of transition and possibly, at a global level, of harmony and unity of purpose amidst diversity and challenge? The ominous cloud of the arms deal continues to hang over individuals and institutions alike permanently reminding us of the risks to our societal fabric posed by an absence of ethics, morals and principles in public life.

Where was the collective revulsion when thousands of our fellow Africans were thrown out of their dwellings, scores were murdered and driven into inhospitable camps where the only redeeming feature of this sickening bout of xenophobia was provided by young volunteers, who gave a hand of friendship so lacking among so many of us. Stephen Friedman is right – we don’t know why this dreadful outburst took place. Surely it is time that a Commission of Enquiry was set up, whose very existence would play an educational role.

As Justice Sachs, in the *Fourie* case said, in a slightly different context but one that seems very appropriate here, “At issue is a need to affirm the very character of our society as one based on tolerance and mutual respect. The test of tolerance is not how one finds space for people with whom, and practices with which, one feels comfortable, but how one accommodates the expression of what is discomfiting.’

What values of ethical and principled conduct do we inculcate when under the guise of free speech we allow incitement to violence to remain largely unpunished and unbridled? If not checked, this can develop into a culture that will assail our constitution, its founding provisions and its institutions.

We always have to remind ourselves that there are no separate silos in which our ethical conduct and judgment and our political involvement reside – they live together like Siamese twins in the heart of accountable governance. This is true irrespective of where we find ourselves in public life or service.
I recently had occasion to reflect on this when reading about the 28% salary increase of our Governor of the Reserve Bank, Mr. Tito Mboweni.

This example is only one of many, but I choose it because Mr Mboweni is a man I have admired in the past. Given that our country has a spiralling inflation problem, as well as a clear policy target of 3-6%, this salary hike - four times the upper end of the inflation-targeting band - was an outrageous and egregious example of how we need ethics to guide our actions if we are to have any credibility.

There are no codified codes of conduct for Central Bankers that deal with salary hikes – though Wall Street’s dramas may shift everything about banking including its supervision. But that is hardly the point. One can argue the toss as to whether such codes should or should not be introduced. But the unethical conduct present in choosing to allow such an increase jeopardizes the institution’s credibility, the policy’s authenticity and the stature of the man.

While the ordinary worker is urged to exercise every restraint, we pay non-executive directors in ESKOM over a million rand to stay silent during the blackouts; our civil servants enjoy perquisites unknown to nearly every developed country, and we encourage get rich schemes under the guise of changing the skewed racial nature of our economy.

The democratic South African government has adopted various stringent regimes which aim to codify aspects of ethics and morality in public life. But our performance has often been lacking not only in terms of breaches of these provisions but, worse still, in not always acting with a clear sound moral judgment on the most basic of challenges whether at the personal, institutional or governance level.

**Ethics and law**

I have included law as part of the topic for this evening. So, it is necessary to discuss the relationship between law and morality. Here I take my cue from an important statement made by Earl Warren, a former Chief Justice of the Supreme Court of the USA, and a surprising champion of civil rights and opponent of racial segregation.

He once said, “In civilized life, law floats on a sea of ethics.”

We who experienced the way in which the apartheid state used law, including the constitutions it enacted, to enforce the gross injustices and inhumanities of that evil era, know exactly what Earl Warren had in mind. We know that law as
such is no guarantee of moral goodness; indeed, that it can be the instrument of the grossest violations of moral decency.

We have seen the repudiation of ethical behaviour by Warren’s country in the treatment of prisoners in Abu Ghraib and Guantanamo.

This is also why our democratic constitution enjoys such widespread admiration. The Bill of Rights which is its centrepiece stands on the firm ethical foundation of three vital moral values: freedom, equality and human dignity. As the supreme law of the land, the Constitution provides South Africa with an instrument of immense importance in our quest for a society in which all can thrive.

We must recognise though that our Constitution denies a continuity with the past. The value system underlying it is best described in the judgment of the Constitutional Court in the *Fourie* case, through Justice Sachs, writing for the Court:

> Our Constitution represents a radical rupture with the past based on intolerance and exclusion, and the movement forward to the acceptance of the need to develop a society based on equality and respect by all for all. Small gestures in favour of equality, however meaningful, are not enough. In the memorable words of Mahomed J:

> “In some countries the Constitution only formalizes, in a legal instrument, a historical consensus of values and aspirations evolved incrementally from a stable and unbroken past to accommodate the needs of the future. The South African Constitution is different. It retains from the past only what is defensible and represents a decisive break from, and ringing rejection of, that part of the past that is disgracefully racist, authoritarian, insular and repressive and a vigorous identification with and commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos expressly articulated in the Constitution. The contrast between the past which it repudiates and the future to which it seeks to commit the nation is stark and dramatic.”

The past should be referenced not only in order to applaud traditions we wish to preserve but to stare down the spectre that we as a society are determined to avoid.

As Justice Mahomed made clear, in South Africa, our constitutional justification should be unequivocally aspirational, future-bound, preserving from the past only that which is justifiable. And while this style of reasoning, of justification, may seem especially suited to South Africa. I would suggest that it is fitting for much of the world as well.
The Constitution makes a break with the past. But have our values in business, trade unions, universities and other areas of public life made such a severance, from the greed, self-aggrandisement, conspicuous consumption, unbridled ambition and selfishness of the apartheid era? Or, is it now too late to ask such a question? If not, is it impertinent to do so?

That said, it must at once be added that there is also a crucial limit to the power of even the finest constitution and even the wisest laws based on it.

To see why, consider the following definition of the relationship between law and morality: law seeks obedience to the enforceable; ethics seeks obedience – or better still, commitment – to the unenforceable.

Respect, for example, is a moral value of great importance, but it cannot be commanded. Threats of retribution can evoke a pretence at it, but not the real thing. Only the moral quality of the person in question can evoke it. As such, it is clearly unenforceable. That in itself reveals the limited civilizing power of even the finest laws.

Just why moral quality is unenforceable can be seen when we understand that an act has moral status if, and only if, it meets two requirements: the agent performing the act must understand both what is being done and the concepts of right and wrong, and secondly, the agent must act freely. It is that vital element of free choice that confers moral status and moral responsibility on the agent. Enforcement and coercion run counter to such freedom.

These clarifications enable us to understand just why democracy is such an enormously important moral advance over other forms of social governance. Its foundation is the freedom of the citizens, and hence their ability to exercise ethically responsible choices about whom to put in power. Can we in South Africa at this time be entirely confident about the moral quality of our political decisions?

What these remarks show about law, and above all about a constitution, is that without moral depth at least equivalent to the legal wisdom that gave us our constitution, that great document will not have the effect we all want.

All the great ethical traditions of the world warn against selfishness and advocate active concern for the good of others or, in a more secular tradition, the need to express solidarity, not only with our fellow citizens but also with the stranger among our midst. Might this not mean that our Bill of Rights, for all its undoubted quality, is not as ethically rich as it could and should be, since it lacks explicit reference to these universal, core moral values?
If so, and if my earlier argument about moral values being the foundation for all true and lasting well-being is sound, then we will err if we think that our young democracy, and within it public life, need no more than the power of the constitution, of good laws and the courts in order to promote the fullest possible flourishing for ourselves and our descendants.

In support of these remarks, let me mention a clear lesson of history. All known societies devote time, energy and resources on a very large scale to two great requirements for social and person well-being: law and morality. We have achieved much in our new South Africa to transform law from the travesties of the apartheid era. But we have not done nearly enough to rebuild the damaged structures of morality - perhaps the most serious of the many wounds inflicted on our country by apartheid.

Corruption enfeebles democracy as it changes the rules of the game by enabling people to obtain benefits to which they are not entitled. We have a panoply of laws to deal with such unethical behaviour but our court processes are very slow and with the imminent abolition of the Scorpions we will have to wait to see whether the new structures in the SAPS will be able to meet community expectations.

As far as conflict of interests is concerned - the ethical issue here is to identify the extent to which a financial or other pecuniary interest may interfere with the exercise of a duty or function. Since 1995, beginning with the National Assembly, we have established a self-regulatory mechanism for the public disclosure of certain interests, with modest penalties attached. Legislation deals with the national and provincial executives, although the information provided is not publicly available. I see that the judiciary is about to move in this direction and that they will be required to disclose their financial interests.

Is there any reason why academics who operate at the level of public life should not disclose such interests in a central register, especially if they also act for private commercial interests or if they purport to provide independent commentary or analysis yet are in receipt of private funds?

We have to rediscover what the words ‘self-regulation’ means with respect to policing our own conduct as servant leaders in the dutiful employ of the public and their interests we are meant to respect and protect through principled behaviour.

But when we reach the stage where vigilant ‘self-regulation’ of ethical and moral conduct falls short - and we have leaders in public life not only potentially breaking statutes but also compromising themselves with a positive chasm of
credibility between their words and their deeds - we need to launch a broad societal call for an ethical rejuvenation.

When our very fabric of society and democratic institutions are subjected to severe stresses and unprecedentedly painful strains, arguably because of lapses in such ‘self-regulation’ of the core bedrock of ethics and morality in public life, we need to speak out, act and ensure that our own words and deeds contribute to the rejuvenation of the values of ethics and morality that propelled many of us to wage the struggle for our country’s liberation.

We need to launch a clarion call that will compel us to reclaim the struggle’s moral just cause that the people come before the personal, that actions must speak louder than our words and that we will always treasure the noble honour to be servant leaders and not leaders who serve ourselves.

Our struggle against apartheid had a moral basis, with a strong legal and ethical foundation. It was founded on solidarity and a sense of the need for joint action.

When I was the Minister of Education, a Mamelodi teacher told a focus group the following: ‘Apartheid had one good thing. It kept us together. We had a common enemy to fight. We helped each other. When the common enemy went, we were suddenly left alone and can’t find the same powerful thing to hold us together. Each one for himself. And this has ruined a sense of community!’

My deepest hope, in the midst of sterile posturing as to which political formation deserves support or which sporting emblem should be abolished, while the world’s financial system faces annihilation, my hope is that we will find something even more powerful, together with that Mamelodi teacher, to hold her community together. I hope this will be something so powerful that it will not only rebuild our sense of community, but will bind our small local communities to the larger community of South Africa. I suspect that what we will find will not be the result of a battle against a common enemy, but the result of the desire for a common destiny, with ethics and morality as the driving force.

We must ensure that our politics moves away from the old and now outdated ideological clichés of right and left and instead moves back to the ethical and moral space of what is right and what is wrong. This is a magnificently poignant responsibility in a country where our people have waited and continue to wait patiently for material change.

As Dante Alighieri reminds us: “The darkest places in hell are reserved for those who maintain their neutrality in times of moral crisis”.
When it comes to the questions of restoring ethics to the centre-ground of our democratic spaces we must ensure that we will not find ourselves in Dante’s hell. We must do what we can where we are with what we have achieve this. We need a vibrant values debate for a country with a moral duty to bring substantive change locally. We are not living in easy times, but hopefully we can rediscover the values of our freedom struggle and re-ignite the spark of hope for the future by joining together to overcome our difficulties.

Bertolt Brecht was right when, after the defeat of the Nazis in 1945, he wrote that the real problems of reconstruction, of a new morality and democracy were about to arise. How apt for us in South Africa too. Our mountain was the achievement of freedom, but then, as Brecht wrote:

When the difficulty
Of the mountains is once behind
That’s when you’ll see
The difficulty of the plains will start.

We are now in the plains!

Thank you.