Ruth First Memorial Lecture 17 August 2012 – Deputy Chief Justice Dikgang Moseneke

"While the legislature is the will of the majority the Court must always remain the conscience of the society" – Anon.

My personal tribute to her is best cast in what Comrade Harry Gwala, another martyr of our heroic struggle, taught to young cadres and political prisoners on Robben Island. That included the president of the Republic and me. I was one of those who sat at the feet of this self-proclaimed Stalinist and master of the revolution. I do not recall who he attributed the quote to but the revolutionary mantra stayed with me: I have expunged reference to "man" for "woman"

"A woman's greatest possession is life. Since it is given to her to live but once, she must so live it that in dying she must be able to say: all my life and all my strength have been dedicated to the finest cause in the world and that is the liberation of mankind."

Enough said about the revolution and its poetry. The agonising question I have chosen to ask is in what way the heroic life of Ruth First should inspire my role as a judge in a post-conflict society; thus a transforming society or one in transition. I propose to explore that question within the overarching theme of courage of principle.

The collective vision
It seems to me that people who are bent on changing their world require courage of principle. Courage of principle implies three fundamental and interconnected patterns of behaviour. The one is a vision, the other entails concrete steps to pursue and realise the vision. And the third is the preparedness to pay the price for a rigorous pursuit of the vision.

For one thing, the primal starting point of individual or collective change must be a vision. A vision must be formulated and articulated. It is that internally coherent statement of principles that imagines idealised or desirable social, political or cultural outcomes. In the context of a political or revolutionary movement a vision may consist of only minimum demands or rise to the level of ideology suitably supplemented by strategy and tactics. At different times in our long struggle we have seen the movement of the people stake the claim for freedom, equality and democracy. One of the earliest articulations of these values occurred in 1912 with the formation of the African National Congress and thereafter they were consistently followed in a variety of charters such as the Atlantic Charter, the Freedom Charter, the Ten Point Programme of the Unity Movement, the Africanist Manifesto and the socialist humanism of black consciousness.

Thus a vision is that lodestar that lights up the way to a just society. We have seen how Ruth First was consumed until her demise by the high notions of a nonracial nonsexist equal society. Her entire activism sought to banish underdevelopment, the uneven spread of means of production and distribution

and the resultant human indignity to the working people and the poor both at home and in the rest of the world.

For me as a judge the most recent and coherent articulation of our collective convictions arising from our revolution must be the high principles of our Constitution. I am not debating whether the Constitution is perfect or whether it is a sufficiently progressive bargain or whether it provides for the best social order we deserve, given our history. That debate is both helpful and perhaps necessary provided we remind ourselves that our collective vision has been settled by the democratic principle. The unanimous representatives of the people installed it as our first law joint ideal of a just society. Of course the people, through their representatives may change it. They have indeed done so at least 15 times before. Amending the Constitution is the prerogative of the people who installed it, provided the requisite majority is present and the formalities of the Constitution are followed.

In the same vein when Parliament enacts a law that is consistent with the Constitution, as a judge I am duty-bound to give effect to it. Thus our vision of a just society is a dynamic one; open to constant but necessary revision. It is subservient to the democratic ethos provided it takes the form of valid laws and executive policy. Our Constitution never was and is not cast in stone and yet it should never be changed only to pander to narrow sectarian interests.

It seems to me that as a judge I must hold dear and cherish the collective vision of the people I am required to serve. I must know and understand the high principles that animate it. Even more importantly I must commit without reservation to help migrate society from its dim past to a just social order. Fidelity, therefore, to the Constitution ¬– the supreme law – and other laws of our country, is indispensible. As a judge I owe a duty to the rest of our people to police its compliance. This I should do recalling the long and heroic struggles against past social injustice; with the full recognition of its historic mission to afford a better life to all. In other words, it behoves us to remember how we came to where we are and what animates the democratic project in the pursuit of a just society.

We cannot deepen democracy and realise social justice without certain bare minimums. Put bluntly we cannot defeat the triple burden of unemployment, poverty and disease without these minimums. We sorely need the rule of law and not mob rule. All public power must be sourced in law. The exercise of public power, and indeed of private power were it serve the same purpose as public power, must be rational, it must pursue a public good or a legitimate government purpose. In other words, public power including fiscal and budgetary competences may not be deployed to pursue ulterior or other expedient purposes.

For instance, appointments in the public space must be done in accordance with the law, rationally, lawfully and not in pursuit of mere hegemony or patronage. The people so appointed, objectively speaking ought to be sufficiently competent to pursue to public task they are entrusted with. This is a commonsensical

utilitarian requirement. If public officials are incompetent to give effect to their public duties, are incapable of effective and honest use of public resources, our vision of a good society would come to nought. Our transition would abort. We cannot compromise on the competence and certainly integrity of those who ought to help society move to a better space.

The Constitution enjoins us to observe good governance within an effective state. It insists that the business of government and indeed of all organs of state must be transparent, accountable and responsive. These values cannot now dissipate under the madness of incumbency.

These stringent requirements apply equally to judges. All law binds me too. In my personal and judicial life I may not act unlawfully or inimical to the vision of our people as encrusted in law and valid policy. Besides being impartial, I must be efficient, diligent and effective as I perform judicial function in an open court. The principle of open justice requires nothing less. It behoves me to be transparent, accountable and responsive. I must explain and lay bare my reasoning for all to assess, criticise or indeed support.

It is welcome that public debate ensues on the merits of the reasoning and outcome of my judgments. And yet it is singularly unhelpful to suggest that because one differs with a judgment or outcome the judge concerned is serving an ulterior goal or political party. Judges are accountable to all our people and to no political or ideological tendency. I am proud to say that virtually all my judicial sisters and brothers take seriously this obligation and live by it. In some instances judges get the facts or the law wrong. That tells us nothing about their judicial probity. Our democratic system, like most in the world, readily acknowledges judicial fallibility and arrests that risk by creating a hierarchy of courts with appellate responsibility.

A few jurisdictions on our African continent increasingly dishonoured this requirement of open and accountable judicial function to their utter detriment. Judges stopped explaining themselves publicly. Arbitrariness and judicial dishonesty took root. Recently we received a judicial commission delegation from our sister country Kenya which related how their judiciary faltered so much as to make it necessary to ask all judges to resign in the interest of a fresh start. The delegation sought our counsel and judicial experience thus far. Our esteemed retired colleague Albie Sachs serves on panel assisting Kenya to select fresh judges in accordance with their new constitution.

For us the lesson must be that, we must give our all to protect the integrity and effectiveness our institutions of democracy including the judiciary. A narrow and sectarian interest to make any public institution compliant or pliable ultimately redounds to the disadvantage of our people. Properly, these institutions have to survive intergenerational and party political changes as we continue to pursue our collective good.

Concrete steps to make the vision real

I have suggested earlier that beyond a vision concrete and credible steps are required to make it real. That much is true of judicial function. Courage of principle would require judges to do what's to be done. Much like other social activists who are expected to take practical steps to realise the vision, judges too must show absolute fidelity to the law. Judicial power flows from the Constitution. Ours in particular vests in judges wide and vast decision-making powers. It is no exaggeration to state that the people have installed the judiciary as the ultimate guardians of the Constitution. In this sense, the judiciary is an integral part of the transition and the achievement of a variety of social and economic goods our Constitution envisages.

At its barest, judicial function is not anything more than an instrument to prosecute and advance these cherished values. Its primary duty is to ensure that laws, hopefully just laws that flow from the Constitution devised to uphold our common convictions, are honoured. In that sense, the rule of law is more than a fetish of lawyers, it is an integral part of the democratic process. Laws are made by the people through the democratic representative. In their purest form, they are meant to represent the anxieties and hopes of the people. They are meant to nurse and address the deepest fears of a society. On that view, judges therefore play a vital agency role. Their role is utilitarian. That explains why contextual adjudication is so vital in modern jurisprudence. We have to debunk the mystery around judicial function.

By implication the judicial function is always invited to mediate conflict. It is always required to enforce standards that we have imposed upon ourselves in pursuit of a collective vision. It is apposite and proper that they do so in order to optimise the business efficiencies. Judges must be embedded in the crucial struggles of the society that they serve. They must be alive to the history, social context and contradictions of the society they live in. And when all public and private functionaries are performing at the height of their sincerity with appropriate competencies required, judges must refuse to trespass into those terrains; they must stand by, cheer and applaud as society flourishes.

It is well known that that role must be performed with strict observance of division of powers. It must be said that Parliament must be in the forefront of making laws and making a budgetary allocations that help change our divided and unequal past. The executive is entrusted with vital roles of policy formulation, management of the budget and a key executive functions. It is self evident that courts are relevant only in the event of a system failure. Our role is not proactive, but reactive. It arises only when a breach of a vital right or interest is alleged and only when other forms of mediation have failed. We don't choose cases; they choose us. We have neither the purse nor the sword and yet we are entrusted with vast policing duties. This scheme that apportions public power is foundational to democratic project. Courts must bolster rather that diminish democratic control. They must be wary not to intrude into the terrain of the legislature, the executive and other state institutions. This they must do only in the clearest of cases and only when the constitution permits the intrusion.

That however does not import wholesale deference to other state actors. Our Constitution is pro-poor. It is cognisant of vulnerability in society. It is premised on a past that has entrenched vacuous but real divisions along race, gender, class, religion, conscience and belief, culture, language, origin and sexual orientation. Like Ruth First, our Constitution seeks to achieve a caring, sharing and empathetic society. It rejects the notion of mere political might being right and seeks to restrain and control all public power and private power within the constraints of an over-arching basic law.

In many senses our courts have been remarkable. Shortly after our transition equality and discrimination cases proliferated. In a series of notable cases, courts have refused to tolerate inequality and discrimination. They have struck down scores laws that undermined appropriate respect for diversity or that harbour antiquated prejudices. Amid many rumblings, courts would not tolerate for example homophobia or gender inequality inspired by religious or cultural patriarchy. They have fashioned the notion of substantive equality that travels well beyond liberal notion of formal equality. We have insisted that laws and policy must provide for adequate protection of children, root out domestic violence and help people with disabilities, refugees as well as migrants.

Courts have, time without count, required the executive to give effect to socioeconomic claims of the poor and vulnerable. We have required government to provide appropriate access to health care. Happily so today, our jurisdiction has arguably one of the best public treatment regimes for HIV/Aids patients. We have reminded the executive of its duty to provide access to housing. Courts have been slow to evict homeless people and we have insisted that government must find alternative accommodation should eviction ensue. Courts have insisted that drinkable water be made available to vulnerable members of society. We have protected learners from being subjected to medium of instruction they don't want. We have required that learners be furnished with study material. We have mediated differences around rampant eviction of homeless, urban and rural occupiers who are said to be unlawful. Courts have required the social grants to reach all including migrants and that they are paid promptly, particularly in the rural neighbourhoods.

Our courts have developed a proud jurisprudence on justice at the workplace. That is a consequence of the vital choices our founding mothers and fathers have made on worker rights, the recognition and formation of trade unions and employers organisations, the resultant collective bargaining and fair labour practices. Properly so, courts have refused to sacrifice work place justice on the back of claims or promises of economic growth that a so-called open labour market will bring to us. That is a matter on which judges are not at large to freewheel. Just labour laws are integral to a more equal and just society where the dignity of all, including of working people is well shielded.

We have been properly pre-occupied with the right to free expression, including a free press and the right to impart and receive information and art. Our judgments point to the intrinsic worth of free expression and the many public and private blessings of a free and open and debating society. And yet our

judgments have also warned that free expression has limits particularly when it encroaches on dignity and privacy. However, when public interest is in issue other and perhaps more pressing considerations come to the fore. That balance is not generic; it can be properly struck only on a case-by-case basis.

In all of this sadly, very few cases on land restitution or expropriation or acquisition for public use have reached our Court. One would have expected that a matter so pressing as land use, occupation or ownership would pre dominate the list of disputes. It may be that the property and restitutionary provisions in section 25 of the Constitution on land have been under worked.

Courts have intervened where valid allegations have been made about wrongful procurement of goods and services by government. This is a sequel to the solitary requirement to our Constitution that when all spheres of the state contract for goods and services they must do so within a system that is fair, equitable, transparent, competitive and cost effective. To that end, Parliament is enjoined to legislate in order to prescribe an appropriate framework of a procurement policy. Of course, the Constitution was alive to the fact that our government would serve as a vital cog in the achievement of a more equal society and it is thus anxious to ensure that public procurement helps erode under development and social inequality. In the same breath, our constitutional arrangements are properly inimical and intolerant of public or private corruption. Courts can only deal with prosecutions that come before them and these may be fewer than what they should be. Where the prosecuting authorities have ventured into courts, the record shows that my judicial sisters and brothers have not wavered.

Competition law has found a niche in our courts. This is admirable. In the past, our economy has permitted very little or real competition in the market because of structural and behavioural anticompetitiveness. Some of our manufacturing and retail business have been found by our courts to have engaged in collusive practices including price fixing. The Competition Commission and its tribunals have done much enviable to remedy or reduce commercial injustices to consumers that flow from collusive pricing.

Do I have regrets about judicial function in the last 18 years? The answer is yes. Judicial function can only be reactive and is often limited to a specific case and its peculiar set of facts. It is true that precedence such as those I have earlier cited do add towards the achievement of a better life for all. And yet judicial precedent often has a minute impact in comparison to the tools of social transformation placed in the hands of the legislature and the executive and civil society. Judges are not much more than referees. They hope to keep the players on the straight and narrow for there to be a fair and worthwhile match. Thus my regret stems from the continued chasm between our collective promise to our and the reality of the majority of our people. About that judges can't do much more. We must keep the faith and try to keep other state actors to practice the faith. We must ensure compliance with the promise in the hope that it will accrue to the benefit of all our people.

Perhaps the second and biggest sadness I bear is the low level of access to courts by the vast numbers of citizens who might be aggrieved. Access to courts and therefore to justice has an obvious gender, class and race. That is singularly true when one has to litigate up to apex courts like the Supreme Court of Appeal and the Constitutional Court. This is not only true of poor people but also of middle income people. Access to justice has become unaffordable. In this context, much of our jurisprudence flow from innovative and caring intervention of public interest entities and organs of civil society. We owe them a debt of gratitude. They have taken on many trend setting cases that have brought respite to the poor and vulnerable. Otherwise our jurisprudence would have been skewed in favour of powerful commercial interests in a society already deeply divided and unequal. The Legal Aid does a splendid job of increasing access to courts. Much innovation and resources has to be devised urgently to make justice accessible. On this score alone Ruth First would have wondered what this struggle business was all about.

That then brings me to my third judicial sadness. One of my conventional obligations as a Judge is to make prison visits. I would want to do that being one who grew up in a prison. Ruth First would have wanted to do that having been arrested and detained so long and so often. Like me, she would not have been amused. Our prisons are full, very full of young men and young women well beyond their initial occupancy levels. Recently, my walk about in one of our largest prisons in Gauteng revealed frightening overcrowding of awaiting trial prisoners. Three to four people seemed to share a bed meant for one. The authorities suggested to me that the average time to await a final trial is approximately two years and yet the intake of additional people awaiting trial occurs daily. While the Department responsible for correctional centres may be doing its best in the trying circumstances, courts must devise in collaboration with other institutions concerned with criminal justice, effective case load management that will not honour in the breach the constitutional guarantee to a fair and speedy trial.

It is not inapposite for judges to remind themselves that: “while the legislature is the will of the majority the Court must always remain the conscience of the society” – Anon.

Willingness to bear the consequences
I suggested at the beginning that the inevitable outcome of the principle of courage must be a willingness to bear the consequences. Ruth First paid that ultimate price. In extreme repression those entrusted with power soon forget and resort to death, torture and exclusion to prop up their hegemony. We are a proud democracy. In many respects we have established an admirable state and proud nation. We have picked much of the low lying fruit. In some respects our courts are one such example.

However judges, and certainly all of us, cannot now back-off from our bounden duty to educate and train the young, to transmit to them the very best values of our long and heroic struggle. We must keep our collective vision well in sight. We must garner the courage and comfort to speak out and act on it. We must require

our public functionaries to pursue in truth a better life for all. The price we are to pay for social activism is small indeed – nothing comparable to Ruth First's supreme price. We must be truthful and rigorous in the pursuit of a more equal and just society. We must have the courage to call it right in the most difficult circumstances. That is so because our collective vision is not open to debate. Its primacy is well settled by a long line of virtuous struggle.