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The role of law in constituting a contemporary South African Identity.

Thank Zohra Dawood and Centre for Unity in Diversity for invitation.
Audience.

In my comments I will cover 3 things:

First, I will briefly look at apartheid's construction of identities – and its legacy in South Africa today.

Second, I will examine the South African Constitution to highlight the sections that refer directly or indirectly to the issue of identity.

Third, I will make some comments as to what kind of identity we as South Africans may wish to pursue – and look at the possibilities and challenges that we confront in pursuit of such identity.

Please allow me to make some comments as a curtain raiser to the topic. For obvious reasons I am peddling in the **generalized** and **simplistic**. Many of you have thought about these issues at great length – I would venture to state that it is currently our national obsession - and I suspect that some of you have also written on the topic.

The issue of identity is a huge topic with many moving parts as well as quite a bit of fluidity.

In fact, we've seen a flurry of flashpoints around identity, whether it's **Julius Malema's** attacks on Indians, or Afrikaners seeking special **immigration status** from the Australian government, or the Zulu king linking identity to property rights in KwaZulu-Natal.

But here's an obvious fact: Human beings do not have a single identity. At any given time we embody many identities. For example, I am a black (Coloured) woman, a law professor, dean of a law school, a property owner, a knitter, single, an aunt, sister, New York Yankees baseball fan, devoted fan of Serena Williams.

Research seems to suggest that when we feel secure and well off, we appear to be more relaxed about our sense of identity. We also know that when we are threatened or insecure, we retreat into an "armour plated version of identity" (usually racial or ethnic).

We all have a **multiplicity of identities** that interact in different ways and that determine our responses in discrete contexts.

Your world view will be clouded by your sense of your identity.

Identity not autonomous but operates in relation to others. It also operates in relation to land/space/place. At its most distressing identity operates in the context of trauma: rape victim, cancer survivor, abused child, etc. So identity is **contextual** and **relational**.

We also have a range of professional/vocational identities that may be distinct from our personal identities, or they may overlap.

For the purposes of this presentation, I will focus on racial identity, as Du Bois stated, the problem of the color line in the 20th century in the USA. The concept of racial identity is fraught and contested in South Africa.

For those of you who wish to pursue this subject, may I suggest that you obtain the 2016 BBC Reith Lectures given by Professor Anthony Appiah, which focused on the issue of identity.

1. *APARTHEID AND IDENTITY*

We have inherited the apartheid identities of White, Indian, Coloured and Black – although black is often the term used generically for those who are not white. Sadly, many of us have also internalised those identities and ways of being. There is a crudely inverse relationship, some would argue a dependency, between white superiority and black inferiority.

In a 2004 paper that I wrote in an American law journal on reconciliation and reparations, I raised some questions to guide my analysis. They included:

In situations of systemic and widespread racial subordination, dispossession, and discrimination, how does a society "make reparations" to its seemingly countless victims? How is the victim made identified? Who are the beneficiaries of apartheid and should they be implicated in the reparations process? What counts as reparations? An apology? Monetary compensation? How does a society shift from one premised on apartheid and authoritarianism to one characterized by democratic notions?

In sum, what was apartheid and what were reparations for?

Much has been documented about the total repression, subordination, and racial discrimination that so typified apartheid. The brutal imprint of apartheid, with its legacy of racially segregated communities, distressing levels of poverty, and disproportionate levels of economic inequalities, is everywhere. Apartheid was no doubt one of the twentieth century's most brutal forms of social engineering, which is captured in the following description:

Every aspect of people's lives [is] regulated according to the population group to which they are officially assigned. For black groups there are separate and subordinate political structures, under white control and domination. Where people may live, or work, or own land, or trade, who they can go to school with, or have as a neighbour or friend, or marry - all these things, and many more, are determined by how they are classified in terms of the racial laws of apartheid.

[Chief Justice Arthur Chaskalson]

These absurdly rigid laws of segregation were bolstered by a police and security apparatus, which was brutal in its determination to maintain a racially divided and racially hierarchical status quo and tolerated no dissent. In addition, a vast Kafkaesque body of censorship laws ensured that

dissemination of unfavorable ideas was sharply curtailed.

The ideology and system of apartheid embodied the most vicious combination of race, class, and gender subordination and discrimination. This was most pronounced in the system of migrant labour, or influx control, which had the most devastating impact on the lives of black South Africans, rendering a stable family life, freedom of movement, and economic security an impossibility.

This legacy of destruction and deprivation will haunt South Africa for generations. So too will the violence of apartheid and our identity/status as a violent society.

What role did law play in constituting identities of superiority/inferiority?

Chief Justice Arthur Chaskalson: *Apartheid was defined by law and enforced by law. It is necessary therefore to acknowledge the role of the legal system in upholding and maintaining apartheid, and the injustices associated with it. Apartheid caused poverty, degradation and suffering on a massive scale*

We've held on to those identities – White, Indian, Coloured, African – for the purposes of redress and reparations. But more of that later.

I refer her to my years as a law student at the University of Natal and the “normalcy” of studying the various law subjects underpinned by racism, sexism and authoritarianism. (reference

to the Group Areas Act, the 1913 Land Act, the Immorality Act, the Separate Amenities Act, etc.)

2. THE SOUTH AFRICAN CONSTITUTION AND IDENTITY

The Preamble to the South African Constitution, much admired globally but now under some severe criticism here at home, especially the property clause, states among others.

Regarding identity, the Preamble states:

We, the people of South Africa,

Believe that South Africa belongs to all who live in it, united in our diversity.

We therefore, adopt this Constitution as the supreme law of the Republic so as to

Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights.

Improve the quality of life of all citizens and free the potential of each person.

The Bill of Rights ***enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.***

- ***Everyone is equal before the law and has the right to equal protection and benefit of the law. Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or***

advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

- ***The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.***
- ***No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3)***
- ***Everyone has inherent dignity and the right to have their dignity respected and protected.***

Range of other rights, including security of the person, freedom from violence, privacy, social and economic rights.

Chapter 9 institutions to protect those rights.

C. CREATING A HUMAN RIGHTS SOCIETY AND INDIVIDUAL IDENTITY

Our identities were created by colonialism and apartheid. How do we transcend our identities and create a “human rights person”?

This project requires more than just a Constitution or set of laws.

If not as a true human, let me tell you as a Biologist, color of the skin does not define an individual’s intelligence – it does not define an individual’s ambitions - it does not define an individual’s dreams – and above all, it does not define an individual’s character.

– Abhijit Naskar, *We Are All Black: A Treatise on Racism*

What do we wish for our identity as South Africans? Who is the imagined 21st century South African?

Some tensions: Citizen – Global versus national

Appiah's Reith lecture on nationality draws heavily on the "nonsense misconceptions" he saw emerge prominently in the Brexit and Donald Trump campaigns – that to preserve our national identity we have to oppose globalisation.

Race, nationality, religion (and gender?) - central to who we are.

As Appiah notes: *Nationality, religion, both have always been fluid and evolving, that's how they have survived.*

And when it comes to self identity, Appiah argues, race is just as misunderstood as nationality – with disastrous consequences.

The way that we talk about race today is just incoherent, he says. The thing about race is that it is a form of identity that is meant to apply across the world, everybody is supposed to have one – you're black or you're white or you're Asian – and it's supposed to be significant for you, whoever and wherever you are. But biologically that's nonsense.

If you try to say what the whiteness of a white person or the blackness of a black person actually means in scientific terms, there's almost nothing you can say that is true or even remotely plausible. Yet socially, we use these things all the time as if there's a solidity to them.

Appiah is at pains to point out that, while society has made race and colour a significant part of how we identify ourselves, particularly in places such as the UK and US, it is an invented idea to which we cling irrationally.

Appiah's lecture explores the notion that two black-skinned people may share similar genes for skin colour, but a white-skinned person and a black-skinned person may share a similar gene that makes them brilliant at playing the piano. So why, he asks, have we decided that one is the core of our identity and the other is a lesser trait?

How race works is actually pretty local and specific; what it means to be black in New York is completely different from what it means to be black in Accra, or even in London, he explains. And yet people believe it means roughly the same thing everywhere. A narrow race analysis without context does nothing for us.

I do think that in the long run if everybody grasped the facts about the relevant biology and the social facts, they'd have to treat race in a different way and stop using it to define each, he says.

Divisions of colour prove to be so resistant to change

But we also have to deal with the persistence of racism as seen with the #Fallist and other movements in South Africa and Black Lives Matter in the USA.

We know that the ideology of racism - the underbelly of slavery and colonialism/apartheid - enlisted a range of and scientists, evolutionary theorists and anthropologists (measuring African skulls, for example). We know that the 19th century race concept took hold in scientific circles with odious consequences. We also know that the catalogues of inferiority went beyond physical to the emotional state and intelligence of black people.

Racial assumptions of the 19th century had a moral aspect too.

In opposing some of the entrenched notions of the racial fixation, critical scholars, including anti-colonial and critical race theorist have engaged notions like “whiteness as property”. Liberatory discourses attempt to disrupt the persistence of inequality.

These racial struggles are global. Look, for example, at the Alt right/conservatives in the United States who see the identity of the nation as white and Christian

So the question is: Can we create a world where colour is just a fact and not fate?

And what about those on the peripheries of accepted identities (Anthony Appiah)?

Where do the resentments of racial humiliation go?

- Colorism
- Identities mobilised when resources are in threat
- Racial othering – defining oneself in relation to the other
- The myth of black solidarity
- Identity as source of strength solidarity. But it may just as likely exclude.

Then there is also the issue of patriarchy, which Justice Albie Sachs has termed *the only truly non-racial institution in South Africa*. We have to vigorously and purposely address the issue of sexism and patriarchy, especially in relation to:

- Equality of opportunity for all citizens;
- Freedom for violence and security of the person;
- Access to economic resources.

We must have a candid conversation about white privilege, without denials and obfuscation. White privilege in all its manifestations has to be eradicated if we are to move forward. But, as President Mandela warned, it is not to be replaced by black privilege.

Finally, we have to remove the scourge of corruption from our institutions, our ways of doing and being, and our culture.

I thank you for your attention.