

The place of Christof Heyns in the history of the Centre for Human Rights

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In the beginning

The mid-1980s were dark days for human rights in South Africa. Apartheid was on its death bed. Perhaps for that reason the measures to keep it alive were at their most draconian: a state of emergency; police and soldiers in black townships; disappearances; and members of killer hit squads who barbequed meat and drank beer, disgustingly close to where they had blown up human bodies.

The University of Pretoria (UP) was known as ‘the Voortrekker University’. On 4 April 1985 it awarded an honorary doctorate to apartheid president PW Botha. When I mentioned to a colleague in the Faculty of Law, the late professor Dawie Botha, that I was not planning to attend the ceremony, at which the Commissioner of Police and previous chief of the notorious Security Branch was the guest speaker, he replied in typical fashion with a frown on his Charles Bronson-like face: ‘This f...g guy should not even be seen in public.’

This University unsuccessfully sought an interdict in the late 1970s to prevent the screening of an Afrikaans feature film, *Die Springbok*. It dealt with a talented young rugby player who studied at the University, played for the first team, was selected for the famous Northern Transvaal (now the ‘Blue Bulls’, or ‘Bulls’), dated the attractive blonde daughter of a senior rugby administrator, but ... was exposed as ... ‘coloured’! The University argued that it was defamed and would suffer financial loss because its ability to attract white students would be damaged. In the 1980s the Department of Philosophy organised a lecture series on ‘dangers threatening the Afrikaner’. One such danger was ‘liberalism’. The head of that department – a revered professor with at least two doctorates – tried, through another colleague, to recruit me to write an article in defence of the Immorality Act’s criminalisation of mixed-race marriages and romantic relationships. This opportunity to please my seniors, I declined.

On the anti-apartheid struggle side things were heating up. Suspected police informers and those perceived to help them were killed by ‘necklacing’. When an elderly frail *sangoma*, who allegedly used the

magic powers of traditional medicine to scare ‘young comrades’ away from a police officer who had to be eliminated, saw the activists coming for him, he fled. In the dusty street, he was caught. A tyre doused in petrol was put around his neck and set alight. In broad daylight onlookers saw how his eyes popped out and his body exploded before being reduced to black bones and ashes. His attackers, who regarded themselves as freedom fighters, received the death sentence.

As a young professor at ‘the largest Afrikaans university in the world’ (as UP liked to portray itself, light heartedly), I was wondering what we could do for our burning country; the struggle against apartheid; and human rights. In my Jurisprudence course I had been teaching human rights for almost ten years.

Earlyish in 1986 professor Niek Grove, a specialist in contract law, and I met in the parking space outside the Law Faculty building – and shared our depression. I asked what we could do at our conservative university that was perceived as one of apartheid’s think tanks. He proposed a conference on a bill of rights for South Africa. If this was not the birth hour of the Centre for Human Rights, it was indeed the moment of conception – in the bright sunny heat on the concrete and tar of a parking space, *nogal*.

I chaired an organising committee. Several colleagues cooperated, not necessarily because of their political or philosophical convictions, but in the interest of the image of the University and some progress on the way forward for our country. We received about R30 000 from the American Embassy. As our financial manager, Professor Piet Delpont watched over this. During the actual event, the later Dean, Professor André Boraine, not only managed but also actively took care of the hard logistics, by tirelessly transporting speakers to and from the airport, in a combi. An ‘events organiser’ was neither needed nor affordable. Professor Duard Kleyn – also a later Dean – provided valuable moral support. ‘Why are you doing this?’, he asked me while I was frantically calling speakers late one evening. Professor Henning Viljoen was a calm but determined influence.

I had to fill in forms to get permission for the presence of black speakers on campus. One of the questions on the form was whether they would use toilet facilities ... The invited speakers included then advocates Dikgang Moseneke and Zak Yacoob, later Deputy Chief Justice and Constitutional Court Justice, respectively; Judge Laurie Ackermann, later a Constitutional Court Justice; Mathole Motshekga, later premier of Gauteng and prominent ANC Member of Parliament; Godfrey Pitje, an attorney in the law firm of Mandela and Tambo, who was once convicted for refusing to move away from the seats reserved for white attorneys in a court; and academics John Dugard, Marinus Wiechers, Dennis Davis and Hugh Corder. While a bill of rights was regarded as

liberal and even leftist in conservative circles, there was suspicion on the left. The apartheid regime had become interested in the concept of 'group rights', as a possible way to preserve white privilege in an inevitable new dispensation. Justice Minister Kobie Coetzee appointed Judge Pierre Olivier to head a commission to investigate human rights and group rights in particular, whom I also invited as speaker.

Naively, we arranged the conference to commence on 1 May 1985 – international Workers' Day! Young activists created an 'anti-bill of rights committee' and were very vocal at the event. In my own short talk, I stressed that what I at least was having in mind, was a fully-fledged bill of rights in a new constitution that could not go hand in hand with apartheid. Judge Johann Kriegler, later to head the Independent Electoral Commission for our first democratic elections and to serve on the Constitutional Court, spoke forcefully and movingly at the end of the conference. It turned out to be a huge success, as well as a milestone in the history of UP. The events caught the attention of the banned African National Congress (ANC) in exile and communication started.

At a lunch for the organising committee a few days later, we asked: 'What now?' Someone suggested that we start a centre. After much work and many meetings, the constitution of the new Centre for Human Rights Studies was passed in 1986 by the Board of the Faculty of Law and approved by higher structures. One of these formal developments is probably the actual birth date of the Centre. Professor Riel Franzsen designed a logo, with the peaceful colours, turquoise and blue. I was the first director.

The coming of Christof

Christof Heyns was my student. At the time when he was the chair of the new Law House for students, I was the coach of the rugby team. In 1986 he was studying for his master's degree at Yale University in the United States. Following what was happening, he sent me a letter with the phrase 'the warning voice from Pretoria' in it. This was a reference to an article titled 'The warning voice from Heidelberg: the life and thought of Gustav Radbruch' by the late professor Barend van Niekerk.¹ Van Niekerk applauded Radbruch for speaking out against Nazism. I regarded the much appreciated compliment as undeserved. Quite a number of South Africans of all races had by then voiced opposition to apartheid. Christof would later research international human rights law in Heidelberg.

Upon his return he was appointed in the Department of Legal History, Comparative Law and Legal Philosophy, which I headed. He joined the Centre, then virtually a club of non-paid volunteers in the Law Faculty. Eventually we obtained funding for administrative

support. Isabeau de Meyer and later Carole Viljoen joined and have rendered invaluable service over the years.

Christof's enthusiasm and energy soon kicked in. He persuaded me to drop the 'Studies' from the name of the Centre for Human Rights. Initially I decided on it in order to give our activities, which reactionaries regarded as political activism, a more or less academic look. Later, after my departure, Fearika Heyns used her considerable artistic talent to design a new colourful logo, with a butterfly resembling Africa, symbolising something like the awakening of the continent.

After being somewhat skeptical about my participation in the 1987 'Dakar Safari', organised by doctors Van Zyl Slabbert and Alex Boraine, Christof was invited – like I was – to meet with future President Thabo Mbeki and other ANC leaders in Harare. He was warned by someone close to him and high up in the Afrikaner hierarchy that his career could be jeopardised by going there. I was not happy, because his immediate senior at the university was me, as his head of department! He went, participated in rich discussions not only with future government ministers, but also influential thinkers from inside South Africa.

Christof enjoyed the experience tremendously – especially when several of us followed Thabo Mbeki and the late Steve Tswete toyi-toyiing into a large tent where the wedding celebration of the daughter of Stanley Mabusela, ANC representative in Harare, was taking place. We joined the event late. It was in full swing. Tswete was supposed to be the programme director and Mbeki a major speaker! African time? Christof remembered his school days when young white Afrikaners in the Voortrekker youth movement were taught at field camps to leopard crawl through bushes and tall grass at night, with teachers throwing clods at you when your buttocks was visible ... all to prepare for battle against ANC terrorists and other communists.

Together we thought up projects and organised large conferences. One was on a new jurisprudence for South Africa. Christof proposed that we commission an artist to design an advertising poster. This resulted in a dramatic, controversial oil painting by the famous artist and chef, the late Braam Kruger. The painting was way beyond our poster expectations. Cecille van Riet, who was not only the Centre's Street Law coordinator at the time, but also a keen, energetic and very active public relations officer, purchased the painting. It is currently displayed in the Centre. Signed posters are still visible in offices across the country. Cecille contributed immensely to the success of the Centre in its early years. When she received a job offer from Lawyers for Human Rights, she left but remained a life-long friend of the Centre.

A large conference on *de facto* discrimination was the launch of an ongoing project on the topic. We realised that after centuries of colonisation and not only discrimination, but indeed the violation if

not denial of the human dignity of millions, a simple statement about equality and the prohibition of discrimination in a new constitution would not guarantee substantial equality. Many ways to continue with apartheid spatially, as well as in the workplace and business world, could easily be designed. While attending a short course on constitutional philosophy by professor Frank Michelman in the Harvard Law School, Christof and I researched and discussed indirect discrimination, disparate impact and related issues. Thereafter we biked in Vermont and around the whole of Martha's Vinyard Island. Before he left, we watched the stage production of Ariel Dorfman's play 'Death and the Maiden', on the truth and reconciliation process in Chile after the abuses of the Pinochet regime, in New York, with Hollywood actors Glen Close, Gene Hackman and Richard Dreyfuss. On questions around cruelty, suffering, retribution, forgiveness and justice it left a deep lasting impression on both of us.

The Centre hosted many foreign and South African speakers and attracted large audiences from several faculties at UP, as well as the wider community. After the unbanning of the liberation movements in 1990, then professor Albie Sachs and Penuel Maduna, the future Minister of Justice, visited. Security Branch agents came to see me in my office and invited me to secretly supply them with information about Albie Sachs and other ANC members. According to them, the information could help the government to speed up their reform initiatives, which were too slow. When I did not agree, they told me that it might already be known that I was in their company and that my reputation in progressive circles would be harmed.

I informed Christof, who received a similar offer during his time at Yale. A persuasive voice close to him advised him to accept. As a poor student he could earn some money and help to fight communism. A friend of his was indeed doing it. Christof declined, because it would undermine the entire purpose of academic discussion. So did I; and informed the agents that as members of the public they were welcome to attend any of our events and make contact with the speakers.

Right wing resistance was mounting. I held back on inviting Nelson Mandela, but a progressive student organisation did it. He accepted. Christof and I were sitting in the front row of the amphi-theatre. When Mandela appeared on stage, I mentioned his surprising and imposing length to Christof.

Mandela smiled and waved. Then the chair, art student Hedwig Barry, said: 'Let us sing the national anthem, 'Nkosi sikelel iAfrica'. Someone jumped onto the stage and proceeded towards Mandela. One of his two bodyguards stepped in front of this person. Their shoulders touched. Hell broke loose. "*n Blanke is in gevaar!*" (A white person is in danger!) Christof later mocked the response of the right wingers.

Ever so slightly Neanderthal-looking hordes in khaki outfits stormed the stage and damaged the speaker system. Mandela's security staff grabbed both his arms and whisked him away. I ran around the building and caught up with them on the way to their vehicle. A bodyguard tried to stop me when I came close. I brushed him off and shook hands with Mandela. Christof was close behind me. Then we lamented in my office, with a few colleagues. Days later, at a conference in Durban, I spoke to Mandela. He understood better than I did.

When we then invited Thabo Mbeki to speak, we had reason to worry about security. Christof and I met with right wing students and promised them an opportunity to speak, if they do not disrupt the event. Christof fetched Mbeki and Stanley Mabusela in Johannesburg. On their arrival, ANC flags were being burnt, amidst much noise, outside the venue. At the end of the speech, we invited the protesting students to join. They marched in with their flags. Mbeki went down the line and greeted each one of them with a handshake. Only the last one had time enough to think and held his hand behind his back.

Then I invited conservative white South Africa's number one enemy, Communist Party leader Joe Slovo, together with Tony Leon and deputy minister Theo Alant from the National Party. We were nervous. This time the special riot control unit of the South African Police agreed to wait a block or two away. They had to protect the deputy minister, they said. Slovo fell ill and Essop Pahad stood in for him. Those who attended did not know in advance. When I arrived at the venue, Christof – with considerable concern – told me that the colours of the metal detector at the door were the orange, white and blue of the flag of apartheid South Africa. And, our totally innocent caterer and spouse of a professor thought it a good idea to decorate the tables for the function afterwards with napkins in the ANC colours of black, green and gold!

At Christof's instance, the Centre found financial support for a bursary for deserving students. We appointed as research assistants three African men and one white Afrikaans speaking woman. One of the men was an ANC activist, who later – with his family - was driven out of his job and indeed the Eastern Cape, for fighting corruption. One was a supporter of the Pan Africanist Congress (PAC). The third was apolitical.

A somewhat mad meeting was perhaps a definitive moment in the history of the Centre. I was at Yale University, Duard Kleyn in Germany, Christof somewhere in Europe and Riel Franzsen on his way to do research. We decided to meet to discuss the Centre's future. Amsterdam was the location. I very nearly missed my flight from New York after grossly underestimating the traffic. At the last minute, the hard pushed cab driver dropped me off in front of the desk of PANAM. Christof

indeed missed his train from Germany, after a good time with old friend Marc Leistner. We met Duard and Riel who were quite unwell after indulging in a very spicy Indonesian rice table the previous evening.

At our meeting in the Grand Hotel Krasnapolsky on *Die Dam* we discussed several issues. While crossing a street on the way back to our humble accommodation, Christof mentioned his ideal of an annual Southern African Moot Court Competition. I responded that – based on my experience in Senegal, Ghana, Burkina Faso and The Gambia – *it could never work*. The infrastructure did not exist. He did not accept my pessimistic response and we went ahead to arrange it to happen in Harare in 1992. The theme was ‘From human wrongs to human rights’. To facilitate communication, Christof supplied the Law Faculty in Harare with a fax machine at our cost. A day or two before the event, the machine ran out of paper. And so on.

It was hugely successful. After a few such competitions, Christof wanted to make it an all-African event. When I told this to Albie Sachs, who enthusiastically supported the first moots, on an airplane, he said ... *it would not work*. But it happened ... and succeeded. Several other moot court competitions for students and school children followed, in the Constitutional Court, Geneva and elsewhere. To a considerable extent the moot courts are the most tangible manifestation of Christof’s innovative thinking and perseverance against many odds, as well as of the Centre’s change of focus from resistance to apartheid and the promotion of human rights in South Africa, to its role in the rest of our continent.

Christof Heyns contributed significantly to the constitution making process. During the drafting of the interim Constitution at Kempton Park in 1993 I co-chaired a committee that had to identify legislation that could impede fair and free elections the next year, to be abolished. It was an awful lot, from draconian ‘security’ laws in South Africa and the so-called ‘independent’ homelands of Transkei, Bophuthatswana, Venda and Ciskei, to the laws by which traditional leaders ruled rural communities, especially in KwaZulu-Natal. I appointed a number of experts onto the committee. Christof was one. Others included attorney Dumisani Thabata, Professor Johan van der Vyver and human rights lawyer Howard Varney. The start was chaotic and frustrating, but we concluded the task successfully.

From 1994 to 1996 I served on the ‘Independent Panel of Recognised Constitutional Experts’, assisting the Constitutional Assembly, chaired by Cyril Ramaphosa, in Cape Town. One of my particular interests was the committee that dealt with Chapter 2 of the Constitution, the ‘Bill of Rights’. Without the inclusion of socio-economic rights, in addition to civil and political rights, the new bill of rights might have had little legitimacy amongst the vast majority of black and poor South Africans.

The right to freedom of expression in the fine arts would mean little to the grandmother who had to carry water and wood for a long distance to a modest rural hut or a plastic and corrugated iron shack in an informal settlement; and once a month collected pain tablets from a mobile clinic.

The fear was that rights that cannot be enforced would amount to empty promises. This could undermine all constitutional rights. Just like there might not be money for houses, hospitals and schools, an aspirant dictator could postpone elections on the basis of a lack of funding. Resulting from the hard work of the members of the academic panel advising the bill of rights committee, especially Professors Sandy Liebenberg and Halton Cheadle, the rights concerning housing, health care, food water, social security, education and the environment were included. Cautious wording from international human rights instruments were used. Thus, the Constitution realistically requires 'reasonable legislative and other measures, within its available resources, to achieve the progressive realisation' of these rights. The fact that everything cannot happen overnight, cannot be an excuse for doing nothing at all. When President Mandela's Minister of Housing, Joe Slovo, stated in an interview with Pieter Dirk Uys' *Evita Bezuidenhout* that a million houses would be built in five years, *Evita* asked if he did not in fact mean that five houses would be built in a million years.

Christof proposed that the South African Human Rights Commission annually require organs of state to report on measures taken towards the achievement of these rights. I passed it on to the politicians and experts. But, the attitude of especially the ANC had changed since the drafting of the interim constitution. They were now the government and could be held responsible. When my colleague Zak Yacoob and I pushed for the inclusion of this requirement, ANC politicians resisted. They feared that opposition parties and civil society would use the Commission to embarrass the government. Prophetic, indeed. It is of course to be expected in a democracy where the ruling party has a large majority and is unlikely to be voted out of power soon that institutions like the Commission, Public Protector and even the courts will be used to expose failures and abuse. Yacoob mentioned to ANC Member of Parliament Willie Hofmeyr that the party must do something for poor people. Section 184(3) was included. What has happened since then, is dealt with in the contribution by professor Danie Brand to this publication.² Suffice it to say that millions of people are still without houses, health care and education. Has the 'empty promises'-ghost become real?

Christof also mooted the possible inclusion in the Bill of Rights of *duties* next to *rights*, in accordance with the African Charter on Human and Peoples' Rights. This one did not get far though. In a

speech, General Constant Viljoen, leader of the Freedom Front Plus, enthusiastically referred to the booklet distributed in this regard. A member of the panel assisting the bill of rights committee, Professor Ignus Rautenbach, stated that he would emigrate if duties were expressly included. The atmosphere at the time was not right for this idea. On the one side it played into years of conservative opposition to human rights, emphasising that one has the duty to work to own a house, as well as for other rights. On another side it evoked fears for much publicised African failures.

Many other Centre projects followed. After initial short courses and an postgraduate course on South Africa's new Bill of Rights, the LLM (Human Rights and Constitutional Practice), which I organised, the now famous LLM on Human Rights and Democratisation in Africa (HRDA) – as far as I remember also a Heyns brainchild – made the Centre hugely influential on the continent. Several other courses were offered over time. The Integrated Bar Project (IBP) and South African Student Volunteers Organisation (SASVO), led by Christof, are dealt with elsewhere in this book.³

Before my departure from UP to take up a judicial appointment in the High Court, I sought to persuade the then Vice-Chancellor, Professor Johan van Zyl, that the Centre could not continue as a time consuming unpaid hobby, that it had to become a fully-fledged academic department and that its director must be a full time professor carried by the University. Others, including Christof, worked on the same idea. So, it happened in 2007.

Both as a member of the Centre and as its Director from 1999 to 2006, Christof Heyns contributed enormously to its growth and success. He took it to heights way beyond the modest hopes and expectations of those of us who started it.

Life after Christof

Although this piece is about Christof and the Centre, the history of the Centre cannot be fairly narrated without paying tribute to his successor as Director, Professor Frans Viljoen. Frans was a student of Christof and me. In 1991 he joined the above-mentioned department which I headed, as well as the Centre. His impact was immediate, for example by coaching students for little plays to educate on human rights. In the LLM course on the Bill of Rights he taught on criminal procedure, a highly important area for the implementation of the Bill of Rights, then full of unanswered questions.

Frans toured through almost the entire rest of Africa, in a small Russian-made four by four. Because of the moot courts, in which he got deeply immersed, as well as other commitments, he has visited the vast

majority – if not all – countries in Africa. Recently, in Europe, I once again heard admiration and praise for his work, as I had often heard elsewhere.

His well-known qualities include his friendliness; fluency in several languages including French and German; immense work ethic and modesty. One of the reasons why it has been difficult to find a replacement for Frans, who has been director since 2007, is the fact that a job description based on his daily activities and responsibilities seems humanly simply undoable.

Without Frans Viljoen, the Centre which I started with a few colleagues and Christof built into a monumental institution, might no longer have existed.

Fame and future

The Centre for Human Rights is famous in many circles not only in Africa, but all over the world. In 2006 it was awarded the UNESCO Prize for Human Rights Education, based on the African Moot Court Competition and the HRDA programme. That was followed by the African Union Human Rights Prize in 2012.

Now it is facing a new future, unlike any previous future. What are its challenges and tasks, besides fundraising and sound financial administration and management? Some practical issues are obvious: inequality, poverty and greed in South Africa; the quality of and respect for the South African judiciary, the integrity of which is attacked from the far right, as from the self-styled left, when decisions do not suit them; discrimination and persecution based on an unwillingness to recognize equality based on sexual orientation in Africa; refugees in different parts of the world; suffering hungry children; and so on.

I do have another concern, on a perhaps more philosophical level. What is the global current health status of the very concepts of democracy and human rights? In the world's best known or at least most glamourised example of democracy and freedom, the United States of America (USA), democracy itself is struggling for survival. More than half of the Republican Party allegedly believe that the election decisively won by Joe Biden was stolen from Donald Trump. They believe it, because the narcissistic sociopathic Trump says so. Apparently, a significant number believe that the 6 January 2021 attack on the Capitol was staged or never happened. Under the banner of the right to freedom of expression bizarre lies and conspiracy theories are spread shamelessly and blamelessly. Under most modern constitutions all rights can be limited. But in the USA there is an inability or unwillingness to accept this with regard to the constitutional right to bear arms. Thus, teenagers buy machine guns in corner shops and go

on killing sprees in schools. These fatal attacks are merely fake news, argue some politicians and talk show hosts, protected by their right to free speech.

On the other side of the world we hear about ‘the Chinese narrative of democracy and human rights’. Millions of people have allegedly been lifted out of abject poverty – a socio-economic rights success story. However, one party governs; national elections do not take place; protest is suppressed; courts are not independent; constitutional supremacy is unheard of; and whether the abuses of America occur in China we would not know because there is little or no freedom of expression. A tennis player who accused a prominent Communist Party member of sexual abuse is silenced and all but disappears.

We need to constantly rethink, revitalise and perhaps even re-invent theories of human rights. The Centre for Human Rights has a duty in this regard. Humankind likes to argue in terms of what great deceased leaders and thinkers like Jesus and Karl Marx would have done. It is unlikely to help the Centre to ask how Christof Heyns would have dealt with specific new problems. What he did do, is to show how far innovative thinking, hard work and perseverance can go.

* Founding Director of the Centre for Human Rights; former Justice of the Constitutional Court of South Africa.

1 (1973) 90 *South African Law Journal* 234.

2 See ch 36 D Brand ‘Socio-economic rights in South Africa: the “Christof Heyns clause”’.

3 See chapters 8 and 9.