

A Delicate Balance

THE PLACE OF THE JUDICIARY
IN A CONSTITUTIONAL DEMOCRACY

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PROCEEDINGS OF A SYMPOSIUM TO MARK THE RETIREMENT OF
ARTHUR CHASKALSON
Former Chief Justice of the Republic of South Africa

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Preface

In May 2005, Arthur Chaskalson retired from the Constitutional Court bench. An eminent human rights lawyer during the apartheid era, he was appointed the first President of South Africa's Constitutional Court in 1994. He became Chief Justice in 2001, following constitutional amendments that combined the offices of President of the Constitutional Court and the head of the South African judiciary.

In his farewell speech delivered at the Constitutional Court on 2 June 2005, Chaskalson reflected on his first days in office in 1994. The newly established Constitutional Court had, he recalled, 'no judges, no jurisprudence, no building, and no traditions. It existed only on paper'. The paper was the interim Constitution, which recognized a principle that, in the context of South African constitutional and political history, was nothing short of revolutionary. It was the principle of constitutional supremacy. In the post-apartheid democracy, state power would be delineated and limited by a supreme constitution and these limitations would be enforced by the judiciary. The interim Constitution gave unprecedented powers to and put unprecedented faith in the South African courts in general and the Constitutional Court in particular.

There is no doubt that this bold experiment with judicial review was a success. The 1996 ('Final') Constitution affirmed the importance of judicial review in the legal and political system. The Constitution ensured permanent acceptance of judicial review, and put the Constitutional Court firmly at the apex of the judicial system. It requires all courts actively to transform the legal system to ensure the achievement of the Constitution's goals.

Justice Chaskalson's judicial career traverses a decade in which a new court had to find a place for itself in a legal system that, for most of the century, had been premised on Parliamentary supremacy. It had to oversee a project of transformation of a political system that had been premised on the use of state power to uphold minority rule and on the systematic denial of human rights. Under the 1996 Constitution it was required to take an active role in the development of a legal system that could achieve the Constitution's transformative goals. It had, above all, to find an accommodation for itself and for the unfamiliar instrument of constitutional review in the new political order, a place that was neither too much in the way of the democratic branches, nor too easily overlooked and ignored.

Chaskalson adverted to these challenges in his farewell speech. 'There is', he said, 'a delicate balance between the judiciary and the other branches of government'. Maintaining the balance, he continued, 'requires the three arms of government to pay attention to the inter-relationship between them mandated by the Constitution, and to the deference that each owes to the other. How this is done is of particular importance to the standing of the courts, their efficacy, and the respect that their judgments command. It is crucial to constitutionalism.'

Justice Chaskalson's retirement presented an appropriate occasion to reflect on the theme of the 'delicate balance' between the judiciary and the other branches of the state in a constitutional democracy. How has this balance been struck by the South African Constitutional Court? Since all courts with constitutional review powers must confront this problem, do different jurisdictions have any instruction for each other? Is the balance that a court strikes entirely situation-specific and of local interest only, or are there wider lessons to be learned from it? To answer these questions the symposium addressed the following topics: the separation of powers, the standard of judicial review, remedying breaches of the Constitution and judicial review in a time of terrorism.

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The symposium was coordinated by Prof Glenda Fick, Head of the School of Law, University of the Witwatersrand.

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General Remarks

ADV GEORGE BIZOS SC

Thank you.

Mr Ambassador, Chief Justices, and Arthur.

You don't know how moved I am by the steps taken by the organizers for me to speak on Arthur's retirement. He spoke at my birthday party when I turned 75 and he praised me for my good memory. He added, on a very serious note befitting a Chief Justice, that I even remember things that never happened!

He could say that about me because he is such a good friend and has been for a long time. It came out during the amnesty process that my office was being bugged by the security police, particularly during the Agget inquest (a doctor who had died in detention). They were actually rehearsing what cross examination the witness would be put under by me in order to improve their prospects of success and being believed. From our side, there was a lot of protest at this tremendous lack of respect of professional privilege. We asked: 'What was going on?' And Arthur's response was: 'Don't worry George never keeps to the text! So it wasn't to their advantage because what they heard going on in his office would not come out the same in court.'

I am not going to speak about former Chief Justice Chaskalson as a judge. His colleagues will judge him. History will judge him. And more particularly, you academics will no doubt do your bit in discussing his judgments. I am going to speak about the friend that I know.

I was under attack as a member of the Student's Representative Council because of my radical views in relation to the treatment of black students at the University of the Witwatersrand. And there was a meeting and there was discussion as to how black students were being treated and the debate was going on about the University's policy of academic integration and sporting and social—not segregation because that was a harsh word—but separation. And so the debate was going on and I won't tell you too much about it but there was a motion of no confidence in me and my doings because I was a law student elected by arts students and what was I doing on the SRC. The Dean called me to tell me a thing or two about the brotherhood of the law and that my behaviour was unacceptable. I was going to vote against the grant of R100 for the Law Dinner

But during this debate, here was one of the first-year law students (I was already in the intermediate year) who stood up and just said:

‘Mr Chairman, we all [not ‘you all’, ‘we’—he put himself in this as well] are asking the wrong question. Surely the question is not what the University policy is, what it has been, and what it ought to be. The question is actually a simple one. Let us just ask what is right and what is wrong.’

And throughout our years of friendship this has been the one question that Arthur Chaskalson always asked. I don’t know what happened in the adjudication process behind closed doors, I was not privy to it, he never discussed it once with me, he never discussed the views of his colleagues. But in any matter that affected anybody in the profession, anybody in a particular case, what we should do under certain circumstances at the Legal Resources Centre when I joined him in 1991, the question was always this—what is right and what is wrong? He usually answered the question himself and it turned out that he was almost invariably right.

We did a great number of cases together. We did two against one another. He beat me at the first one hands down because every time there was an adjournment he managed to find some evidence to knock me on the head or my client on the head. And we had another case which was settled which was sort of a draw. But let me tell you, that Arthur was not one of those at University that, like me and a few others, were known members of an amorphous organization called the Left. There were members of the illegal Communist Party, members of the ANC including Mandela, Motlana, and Duma Nokwe and others. Because he never had any doctrine to which he appeared to ascribe, just what was right and what was wrong.

He really did work for Defence and Aid right from the beginning. There was a Legal Aid Bureau which was run a woman called Pauleen Liebson. If you went to your office and she got you at about nine forty-five, she would say: ‘There is a case in court 8. No legal representation. Can you get down there?’ Yes, of course we could get down there, and Arthur was part of that.

And then there was a Defence and Aid formed with very little money and Arthur undertook one of the most difficult cases at that time. Detention without trial for 90 days had come into operation. Young people were detained, they were beaten up, confessions were extracted from them, and they were then put on trial. Arthur and Joel Joffe, now Lord Joel Joffe, defended a group of youngsters on a charge of sabotage. They had made confessions and the most notorious torturer Swanepoel was the man who gave evidence. There was a number of them. Arthur and Joel told Judge De Vos that there was systematic torture of the sabotage accused. And they wanted not the confessions to be considered on an individual basis, but because it was a system they wanted everything to be heard

together so that one witness would corroborate the other and also there had been other people who had been detained and interrogated but not charged, and they became witnesses. The judge would have none of it. He dismissed objections to the confessions in each case. And Arthur took the matter on appeal. If you ever look at the heads of argument, the summarized heads of argument in the law reports (I did it this afternoon), you will realize how much work went into that case on appeal. He succeeded in part by establishing the principle that if you have a group of policemen and that group interrogates people, you must hear the evidence of all of them and it was irregular not to do so.

That case was used by us over and over again. Not only in criminal cases. When the Legal Resources Centre sued on behalf of ten or twelve tomato pickers who were assaulted on the farm for all sorts of misdemeanours, Arthur would take the first case because he issued individual summonses. He would call the plaintiff and then he would call the next person. There would be an objection saying he had nothing to do with it. Arthur would cite the Letsoko case: 'My Lord, this farmer mistreats all his workers.' So this was the sort of innovative work that Arthur did at the Legal Resources Centre which really benefited a lot of people.

I also want to say something about his managerial style. He attracted some of the best graduates from some of the best Universities as young lawyers. And you know, the young people with long hair, jeans and open shirts. An authoritarian director would have said you have to dress properly. I didn't hear this from Arthur, I heard it from them.

He would call them in one by one and he'd say: 'you know we don't take money from our clients, and if they come in and see us dressed not the way proper lawyers are dressed, in their mind (I mean I know you are a proper lawyer) they will think that you can't possibly be a proper lawyer if you are dressed in the manner in which you are dressing.'

So immediately everybody fell into line. There was even a demonstration of one with a placard—a messenger who wanted to be taken seriously, so he held a demonstration. Arthur made him into a paralegal. So this was the way in which he built up the Legal Resources Centre.

For those of you who may not know, the LRC was founded by Arthur in 1977 together with Felicia Kentridge and our friend Geoff Budlender sitting here so quietly. The three of them with a couple of auxiliary workers built it up to what it is now about 40 lawyers and about 60 auxiliaries and this dress-code has been the tradition for many years up to now.

He really was in a class at the University that was *the* class of the generation—two Sirs and one Lord Joffe. They didn't know to whom amongst the six or seven of them to give the Advocates' prize in the year in question—it

was such an outstanding class. By way of contrast we, the year ahead of them, were so bad all 17 of us, that for the first time—I don't know if it has happened since—that the Dean and the Professors decided that there was no one worthy of the Advocates' prize.

He was briefed with leaders of the most prestigious of groups: Norman Rosenberg, Isie Maisels, Harold Hanson, Bram Fischer, Cecil Margo, and Sydney Kentridge. The very top people in the profession. He did a certain amount of work with Bram Fischer in commercial and insurance work. But then this detention without trial came in and the arrests of the 11 July 1963 were made at Rivonia. Hilda Bernstein was the wife of Rusty Bernstein, an architect and an acknowledged member of the Communist Party. She herself was during the war elected by white voters in Hillbrow as a member of the Communist Party. She was a leader whose husband was detained. And the women whose husbands were detained, naturally went to Bram Fischer. Bram Fischer asked what attorney would be available. A man called James Kantor had been arrested because his brother-in-law was Harold Wolpe. He was detained and eventually acquitted. It was really a revenge arrest because Harold Wolpe and others had escaped from prison so they took Jimmy Kantor in.

Joel Joffe had had enough of South Africa and its laws under apartheid. Australia would not have him. He made an application, but Australia would not have him because they asked the security police what sort of a person he was and it could not have been a very complimentary report. He is now a Lord in the House of Lords. Bram Fischer then asked Arthur, myself and Vernon Berrangé who was overseas at the time, to do the trial. Arthur, Joel and I were alone until Vernon came back and Bram Fischer finished the case he was in.

Arthur is responsible for persuading Bram Fischer to lead the team in the Rivonia trial in which Nelson Mandela, Walter Sisulu, Govan Mbeki and others were the accused persons. Neither Arthur nor I nor Joel Joffe knew that Bram was heavily involved in the underground. It was not something that he would tell us. Bram said, 'There are reasons why I cannot do it.' And I remember the words that Arthur communicated to Bram: 'You are the only counsel in the country who is an Afrikaner who can tell this judge that my clients have done nothing more than our own people did in the 1914 revolt and in the other protests they have had to protect their rights in the country of their birth. My clients are no different. You Bram are the only person who can credibly say that.' That was a very persuasive argument. Bram took the case.

We took exception to the indictment. I was busy taking statements. Arthur and Bram presented an almost perfect argument for the quashing of the indictment. It may be considered a technical victory, but it played a very important role, I believe, in the final outcome of that trial in avoiding the death sentence

which if it had taken place would not have had the South Africa we have today if the Mandelas and the Sisulus and the Govan Mbekis and Ahmad Kathradas were sentenced to death and were executed. In fact, Verwoerd had said that if the judge had found them guilty and sentenced them to death, the sentence would have been carried out.

Well, having come into that trial, his prospects of becoming a judge in apartheid South Africa were reduced to zero. He became known by the label of 'the political lawyer', for which he did not apologize.

Having done that case, we became a sort of team in other cases. The Ndou case finished up in the Appellate division on the double jeopardy acquittal. During the NUSAS trial (Geoff Budlender should actually speak on this because he was a co-conspirator—a non-indicted co-conspirator) Geoff Budlender came to Arthur and he said, 'Well I'm working for Raymond Tucker, the attorney, I am his clerk. I know the facts because I was a student leader in Cape Town.' Raymond and Geoff were really worried whether it was proper for a person who was a co-conspirator to be involved in the case. And again, Arthur said let what is right and what is wrong prevail. He called Geoff and said, 'Were you a party to any such conspiracies?' He had an assurance from Geoff that he was not. He said you stay on. Geoff was absolutely invaluable to his friends Charles Nupen, Karl Tip, three others and one of the professors at Wits, Professor Webster. The trial lasted 10 months before a regional magistrate, and if it were not for the reputation of Arthur Chaskalson, if it were not for his intelligence, if it were not for the manner in which he cross-examined witnesses who needed to be cross-examined with sensitivity, they would not have been acquitted. I was later described as a street fighter when Arthur applied for the recusal of a judge—he threatened Arthur with contempt of court which was actually directed against me. No one could ever believe that Arthur could be contemptuous.

The very establishment of the Legal Resources Centre was due to Arthur's integrity. The idea, in our conservative profession, that you could have attorneys and advocates working in the same office was an absolute anathema—how can that be?! The rules of the bar had to be changed, the rules of the law society had to be changed, and all on the assurances of Arthur that advocates would do advocates' work and attorneys attorneys' work in the Legal Resources Centre. And although this distinction has fallen somewhat into disuse in our days, at the time that Arthur was there every attorney had to write out a form to the advocate to give instructions to act for the accused or for the client.

And, of course, there were other very difficult cases. The first Goniwe inquest, the four bodies found two kilometres apart from one another in the bush with a collection of no less than 52 stab wounds and the bodies burnt. Everybody knew that the police had done it. But Arthur Chaskalson, not being prepared to

accuse people without the proper evidence, used the technique of the rhetorical question. In three pages of the final summation, the most significant I have ever seen in my life because they were proved true in every word when the people applied for amnesty, he asked:

‘Who would have had the authority to stop the car in the middle of the night?’

‘Who would have the confidence that the people that they have stopped would not put up resistance—after all there were four?’

‘Who would have done this? Who would have done that?’

And the answer was always a simple one. It must be either the army or the police or both. So convincing was the argument—it was a long time ago so that I feel free to breach any confidentiality that was intended by the presiding magistrate—when he went to say good bye to the magistrate the magistrate said, ‘Yes, I found no one to blame. But it seems to me that there are people in this here town of Port Elizabeth who do one job during the day and another during the night.’ And that was advocacy par excellence.

One other case that I want to deal with, that we did together, was the Delmas Trial.

An indictment was served three days before I was going to go to Greece with my family. Having quashed the indictment in the Rivonia Trial, I went to Arthur and said I am going away, Zac Yacoob is on the case, Karl Tip is on the case. They are going to do a request for particulars on the indictment, do you mind settling the request for particulars? He said, ‘Yes, of course.’

He did that, I came back. The further particulars were given, I went to Arthur and asked have you seen the further particulars, what does it look like? He said, ‘Well, they make the indictment worse than it was.’ I said, ‘Well you know once you have done the further particulars and it’s so bad then I think that you had better come and argue the exception.’

It was to be on the Monday, I went to him on the Friday, our clients were in custody in Pretoria and I said, ‘You know Arthur, I will be odd if you don’t meet the clients before. You come there on Monday and I say this is Mr. Chaskalson he is going to argue your case etc. Can’t we go over on Saturday?’

Arthur said yes he would be very glad to meet them; Terror Lekota, Popo Molefe, Moss Chikane (cousin of the famous Frank Chikane) and 19 others. They were all in a room seated on the floor. They had no chairs. We walked in and I not having forewarned Arthur said, ‘Gentlemen, I want you to meet the leader of our team, Arthur Chaskalson.’ He didn’t contradict me. He came and argued the request for particulars but there is a continuation of this story.

He came to me after Zimmerman, he was the senior attorney and the father figure at the Legal Resources Centre, and said Zim had left and the young people

really need some guidance. 'Do you mind if the young people come up to your chambers once a week, one afternoon a week and you can give them some guidance?' I said sure.

He then came back a little later and said this is working very nicely perhaps we can make it two days a week. I said sure. He then eventually said wouldn't it be easier if you just came to the Legal Resources Centre. I said alright. And then I started going and started liking the people and I liked the work and I was getting tired of being people's gladiator whether their cause was just or not and I rather liked the idea and then he made me an offer to go to the Legal Resources Centre. And he acknowledged publicly that it was really the payback for what I had done to him in relation to the Delmas Trial.

Enough of these reminiscences; the time has gone by. What I wanted to say, was that Arthur as a colleague, as a friend, as a husband, as a father, as a grandfather, is a man that I am privileged to have crossed his path. There are so many other people that have crossed his path. He played a very important role when he was appointed President of the Constitutional Court. The relationship between the Court of Appeal and the Constitutional Court was not a happy one. Not all the judges of the Court of Appeal were happy and they actually refused to have constitutional jurisdiction. God forbid anyone should set aside their judgments under the interim Constitution. Had it not been for Arthur Chaskalson and Chief Justice Corbett there would have been an almost irreconcilable clash between those two courts. But for these two most eminently reasonable men, well mannered reasonable men, we would have been in great trouble.

As leader of the Judicial Services Commission, although there are criticisms of what the Judicial Services Commission may have done, nobody has had a greater champion of transformation by the appointments of members of the previously disadvantaged groups and women than anyone else might have managed. He always managed to keep some of us under control. Never once did he himself say anything that could possibly give offence to any candidate however poor he or she may have been. For that contribution I think the country owes you a debt of gratitude.

I have already said that I am not going to speak to him as a judge of the constitutional court—I will leave that to others. But I do believe that this was a great man, is a great man, a great friend, a great patriot. I am just wondering about how long we will have to wait for another like him. With all those qualities that was prepared to give up a very lucrative practice in order to form the Legal Resources Centre. To be so loyal to so many people.

Thank you, Arthur.

Opening Remarks on the Conference Theme

JUSTICE EMERITUS L W H ACKERMANN

The concept of democracy has followed a radical course of evolution. It has expanded from the limited idea of representative government for the majority in a state, to one which also includes human values and human rights; one in which human dignity and the rights which have evolved therefrom are effectively protected from majority tyranny by various techniques, including Bills of Rights in protean forms. Democracy's initial concern was to introduce representivity, leaving accountability entirely to the political process dependant on regular elections. In the process of change Plato's question 'who shall rule the state?' has happily lost out (I hope) to the question 'how can we so organize our political institutions that bad or incompetent rulers can be prevented from doing too much damage?'¹ The rule of law has also outgrown its Diceyan origins and has, in many countries outside the United Kingdom—ironically enough—become fully constitutionalized. When translating the continental concept of the 'materiele Rechtsstaat Prinzip' with 'rule of law,' one must be careful to specify which species of the latter one is employing. Perhaps the expression 'substantive constitutional state' would be more apt. Although the Constitutional Court has been at pains to point out the deep, foundational centrality of the Constitution for our new democracy, for all its institutions and indeed for all law, the true nature and implications of the Constitution, are not, even now, fully or universally appreciated. Some still think of our Constitution as just another statute, albeit a very encompassing, super statute, rather than as a quintessential *grundnorm* or a foundational, generative value system, in the full Kelsenian sense of the expression. A value system arising from a solemn pact between the people of South Africa. From this it seems to me to follow, inescapably, that unless one wishes to eviscerate the constitutional state at the outset, the interpretation, enforcement and protection of its constitution cannot be entrusted to either the executive or the legislature. This leaves only the judiciary to perform this duty. Sound political science, intelligent perception of the necessity for checks and balances and deeply ethical constitutional principle, all lead to this inescapable conclusion. I understand

¹ Karl Popper *The Open Society and its Enemies* Volume I, 120–121.

the anti-democratic argument, but it has become a fossil in the era of steadily expanding fully constitutionalized democracy that has been a feature of the past 60 years. The widespread assaults on human dignity by organized power groups of various kinds, including bodies elected—in some way or other—into power, has been a lamentable and tragic feature of humanity's lack of progress. A fully constitutionalized, human rights centered democracy, may not be sufficient to halt this chronic onslaught, but it is our only hope. Likewise an independent judiciary, as ultimate guardian of the Constitution, may not always be sufficient but, once again, it is our only hope. Of course the judiciary is accountable for its actions, but—and I cannot sufficiently stress this qualification—it is an accountability different in nature, form and execution from the accountability of the other branches of the state, and one which dare not undermine the judiciary's independence. The judiciary is a noble institution, not because its members are noble, but because the Constitution is. The judiciary's orders are to be obeyed, not because its members have any power, but because the Constitution demands this, and the Constitution is all-powerful. I stress these features, because whatever 'balance' means, and whatever difficulties this activity might entail, it must not be forgotten that, ultimately, it is the Constitution that must solve and speak.

The principle and problems of the separation of powers is not just the subject of the first session; it in fact pervades and directs the entire conference theme. Is it a question of 'balance' or is it, as I would argue, a matter of delineation. Whether it is 'balance' or 'delineation,' is it correctly described as 'delicate' rather than 'difficult'?

It might be useful, at the outset, to repeat a cautionary observation by the Constitutional Court, in affirming that a 'distinctly South African model of separation of powers [would] be developed over time.'² The Court endorsed,³ for South Africa, the following remarks of Professor Lawrence Tribe:

'We must therefore seek an understanding of the Constitution's separation of powers not primarily in what the Framers thought, nor in what Enlightenment political philosophers wrote, but what the Constitution itself says and does. What counts is not an abstract theory of separation of powers, but the actual separation of powers '*operationally defined* by the Constitution.' Therefore, where constitutional text is informative with respect to a separation of powers issue, it is important not to leap over that text in favor of abstract principles that one might like to see embodied in our regime of separated powers, but that might not in fact have found their way into our Constitution's structure.'⁴

² *S v Dodo* 2001 (5) BCLR 423 (CC) 423 (CC) para 15.

³ Para 17.

⁴ *American Constitutional Law*, Vol I 3 ed (Foundation Press, New York 2000) 127.

The theme of the conference is the place of the judiciary in *a* Constitutional Democracy and not in a *specific* constitutional democracy? It is therefore a very broad one, and answers may vary according to the type of constitutional democracy involved. The answer given in respect of South Africa might well be different from that in respect of the United Kingdom, Australia or New Zealand.

The balance referred to in the theme relates not only to the doctrine of the separation of the three conventional state powers, but also to the checks and balance between them, without which the significance of the separation of powers cannot meaningfully be stated in the 21st Century.

I think that there has been unnecessary timidity in describing the role of the judiciary in our new constitutional state. The role, the power and the duty of the courts derive directly from the Constitution, in the first place. It may not, in respect of particular issues, presented in particular ways, to particular courts, be easy to decide what the Constitution decrees regarding the location of the authority to decide such issues. Does the authority rest with the judiciary, the executive, or the legislature. The answer is to be found in the Constitution, the nation's solemn pact, the nation's political and constitutional grundnorm. It is trite, and undisputed, that it is the function and duty of the courts, and if needs be that of the Constitutional Court, to answer this question. The courts have no discretion, no escape route, to avoid answering this question. If the correct construction of the Constitution, together with any relevant statutory instrument consistent with the Constitution, leads to the conclusion that a particular court is vested with the authority to decide such issue, it is obliged by the Constitution to do so. It has no discretion to refuse or avoid exercising such judicial power. There is no political consideration that entitles the court to escape such obligation, once the Constitution has been construed to impose it. In a substantive constitutional state such as ours, there can be no so-called 'political question' doctrine leading to a conclusion different to that dictated by the Constitution. In the adapted words of Professor Tribe: no member of the executive or the legislature can leap over the constitutional text in favor of some abstract principles that he or she might like to see embodied in our regime of separated powers, but that might not in fact have found their way into our Constitution's structure. Whatever difficulties the executive might initially have had in grasping this, I trust that this truth, arising from the Constitution, is now accepted. In the first session this morning we have the benefit of listening to two Chief Justices on this theme.

Constitutionalized administrative justice is, I hesitatingly hazard to say, an area where the dangers of serious clashes between arms of the state are less serious, at least insofar as the state administration is concerned. The peren-

nial problem, particularly acute in a developing society such as ours, is for the courts to ensure—in addition to procedural justice—an adequate quantum of substantive administrative justice for the citizen, without themselves exercising the function of the particular administrative or executive official in question, and precipitating logistical nightmares. It also seems to me that in this field, there is a greater opportunity for constructive dialogue between judiciary and administration. But, applying Wittgenstein's injunction—'whereof one cannot speak, thereof one must remain silent'. More than Wittgenstein, however, I fear Prof Hoexter's transfixing eye and robust cello-timbred admonitions, and the gentler corrections of Professors Corder and Klaaren.

Real difficulty arises, and creative delicacy is essential, in the field of constitutional remedies; particularly (but not exclusively) those that have financial consequences (actual or potential) for the other arms of state, and whether those consequences are in the sphere of socio-economic rights or in any other area. But there is a vast difference between delicate appreciation and diffidence, on the part of the courts. The Constitution requires appropriate remedies, and it is undisputed that an appropriate remedy must be an effective one for the aggrieved litigant, if necessary a remedy that has been newly and innovatively fashioned by the court. In this context I would venture one thought. Do our courts, in their mandatory orders, make adequate provision—in these orders—for proper supervision *by the court itself* of proper compliance with such orders. The obligation to ensure effective relief arises under the Constitution, and courts should not be diffident to ensure—by means of their own supervision of the order—actual and substantive relief, as opposed to paper relief. It should not be the function of successful litigants, to monitor compliance with the order, nor should they be saddled with either the cost or the burden of having to approach the court in order to compel compliance. Mr Geoff Budlender is exceptionally well-placed to inform us in this regard.

I remember very well, on an occasion in troubled times—sometime between 1988 and 1992 and in the period when I had exchanged the bench for an academic chair—listening in one of these halls to the powerful and frank contribution by our distinguished Australian visitor, Sir Michael Kirby. We look forward eagerly to his presentation, at a time when his great country is facing the impact and problems of new population migrations, the discontents of the seriously marginalized and the threat of international terror.

Whatever delicacy or sensitivity may be called for in the case of any clash (potential or otherwise) between the courts and the other arms of government, the discharge by the courts of their judicial duties is not derived from any largesse from the other branches, but demanded by the Constitution itself. In this regard, eternal vigilance is required.

We look forward to much illumination from our distinguished speakers and from the ensuing discussions at this conference, so fittingly organized in honour of our first Constitutional Court Chief Justice, Arthur Chaskalson.

*Opening remarks**

HE MR LODEWIJK BRIËT†

Good evening: Former Chief Justice Arthur Chaskalson, Chief Justice Pius Langa, Honourable chief justices, justices, delegates and guests.

To start on a lighter note: There was once a pompous judge who glared sternly over his spectacles at the tattered prisoner who had been dragged before the bar of justice on a charge of vagrancy.

‘Have you ever earned a dollar in your life?’ he asked in fine scorn.

‘Yes, your honour,’ was the response, ‘I voted for you at the last election.’

Now, we all know that this could not happen in South Africa, or the Netherlands for that matter, where justices and judges are appointed rather than elected.

It gives me great pleasure to say a few words at the opening of this symposium tonight. This symposium, in addition to being a fitting acknowledgment of an eminent judge and colleague to many of you, is well timed, as South Africa embarks on its second decade of democracy.

The provisions of the South African Constitution and the formidable corpus of institutions charged with its enforcement, its protection and its realization have served as an inspiration to many countries in transformation. From the Constitutional Court to the state institutions created under Chapter 9, the South African system is coveted by many newly emerging democracies and feared by those who benefited from previously abusive and corrupt regimes in these countries.

Through the European Programme for Reconstruction and Development in South Africa, the EU has been able, in a modest way, to contribute to tackling the challenges faced in consolidating democracy that sees well over £100 million in grants flow into the country annually [and another £100 million from the EU Member States, and another £100 million but in the form of loans from the European Investment Bank (EIB)]. More specifically, in relation to supporting constitutional democracy, the EU co-funded Foundation for Human Rights (FHR) has done superb work in making the rights guaranteed under the Constitution accessible to many of the country’s most impoverished and marginalized communities.

* These remarks contain, in part, personal views.

† Ambassador of the European Commission Delegation to South Africa.

During a recent visit by the European Commission President Mr. Barroso, I had the privilege of seeing a paralegal advice office, funded by the FHR in Orange Farm, helping extremely vulnerable people to access justice and rights guaranteed by the Constitution. Fittingly, on the same day President Barroso also met with the new Chief Justice Pius Langa who impressed upon us both the importance of the rule of law and of high quality decisions, particularly in the context of socio-economic rights.

I have also had the privilege to come into close contact with the Human Rights Commission, the Public Protector's Office and the Commission on Gender Equality, facilitated, I am sure, by the EU's £10 million support programme to these Chapter 9 institutions; and I recently had the privilege to visit the Independent Electoral Commission and its formidable chairwoman.

Growing access to rights guaranteed in the Constitution brings with it in turn great challenges for delivery. Judgements, despite being in line with both the Judiciary's mandate and jurisprudence, that run contrary to majority will (eg *S v Makwanyane* 1995 (3) SA 391 (CC) (death penalty)) or that highlight the state's, albeit temporary, inability to meet the needs of communities (eg *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) (evictions)) are likely to increase pressure on the Judiciary and thus on Constitutional Democracy during the consolidation stage.

Popular mobilization and action around issues such as HIV/Aids, access to land, high unemployment, and around crime, [and other issues,] ensure that the judiciary's counter-majoritarian dilemma remains in full public view.

Tomorrow you will address the issue of judicial review in the light of global terrorism. I can tell you that we in the EU take this issue most seriously. Balancing the tension between the protection, or should I say the loss, of fundamental individual freedoms with increased collective security is a difficult task at best — one that European Legislators and Judiciaries are currently also grappling with. Chief Justice Chaskalson, in his farewell speech, alluded to the fact that there is a delicate balance between the judiciary and the other branches of government. [The fact that parts of the current EU Treaties are not subject to judicial review serves to illustrate that we in Europe still have a long way to go.]

On Terrorism and Torture, allow me to stress my deeply held view that we [we in Europe, we in Africa, and we in the Americas] should not give in to the temptation to go down this slippery road. Senator John McCain argued this point convincingly last week in his letter to Newsweek: not only does torture not give one better intelligence, it also erodes the moral authority we are striving to uphold inside and outside of our borders.

The European Union is at present embroiled in its own constitutional development. The consultative and participative constitutional process undertaken

by South Africa has been emulated in Europe, in our case complicated by the fact that we are trying to get the agreement of the now twenty-five member states, all with different concerns, agendas and priorities. The recent 'no' votes in France and the Netherlands imply that our Constitutional development is currently on hold when we once again pursue the development of the European Constitution I sincerely hope that it may serve members of the Union as well as the South African Constitution serves and protects those in this country.

In closing, let me illustrate the old dictum that Size Matters: *This* is the Treaty Establishing a Constitution for Europe — and *this* is the Constitution of the Republic of South Africa! The draft EU Constitution is stuck in the water, at least for now, and the SA Constitution is flourishing. The conclusion is simple: small is beautiful!

Allow me to end off by thanking the School of Law (University of the Witwatersrand), the South African Journal on Human Rights and the Conference, Workshop and Cultural Initiative Fund for their involvement. May this symposium provide you with a forum for fruitful deliberation.

The Separation of Powers

A COMPARATIVE VIEW

CHIEF JUSTICE MARGARET H MARSHALL*

‘The *function* of the judge,’ wrote Professor Owen Fiss, is ‘to give a proper meaning to our public values.’¹ Since 1994, Chief Justice Arthur Chaskalson has given voice to the public values of the new South Africa, embodied in your Constitution. And what a voice his has been: precise, learned, thoughtful, compassionate, and highly persuasive. I am honored to participate in a symposium celebrating his extraordinary achievements, and to share this forum with his distinguished successor, Chief Justice Pius Langa.

And as always, I am delighted to return to my native South Africa and to Wits.

Knowing full well the costs of South Africa’s struggle for a just society, I address you with humility, born of great respect for the profound commitment to constitutional democracy now evident at every level of government, in your press, and among the South African people. I shall not presume to prescribe how the doctrine of separation of powers *ought* to function. Rather, I offer my views on how the separation of powers doctrine *does* function in the country where I received my legal training, was admitted to the bar, and became a judge: the United States of America.²

Today there is widespread agreement on the most effective way to secure an open, democratic state: enactment of a written charter of government that apportions public power, guarantees fundamental human rights, and entrusts protection of those rights to an independent judiciary. Every democratic government established since the end of the Second World War has adopted these fundamental principles of constitutional democracy. Yet for the greatest part of human history, these principles were unimaginable. The *establishment* of a government of separated powers, the working-out of its institutional and practical implications, was initially largely a product of the American colonial experience, and owes a large debt to the Massachusetts Constitution of 1780, the constitution I interpret every day. Our Constitution was the structural model for

* Chief Justice, Supreme Judicial Court, Commonwealth of Massachusetts.

¹ OM Fiss ‘The Supreme Court, 1978 Term—Foreword: The Forms of Justice’ (1979) 93 *Harv LR* 1, 30 (emphasis in original).

the United States Constitution of 1787. These historical events, to which I shall turn briefly, demonstrate vividly the remarkable power of a written constitution of separated powers and enumerated rights to reframe the expectations people have about government.

The Massachusetts Constitution was drafted by John Adams, a Massachusetts native and the leading political theorist of his day. It begins with a ringing Declaration of Rights: ‘All people [“men”, in Adams’s day] are born free and equal, and have certain natural, essential, and unalienable rights.’² Of that much Adams was convinced. The challenge lay in how to secure those fundamental rights. Adams, deeply read in the history of governments, and intimately familiar with abuses of governmental power, knew that, so long as the state’s authority rested in an all-powerful executive or an all-powerful parliament, no human right was truly unalienable.

The answer? Adams *invented* a structure of government. To the notion of bifurcated government that he inherited from Great Britain—a supreme executive (monarch) and a bicameral parliament—he grafted a third arm of the state: an independent judicial branch, comprised, in the words of the Massachusetts Constitution, of judges ‘as free, impartial and independent as the lot of humanity will admit.’³ These independent judges were to serve ‘as long as they behaved themselves well.’ They were to be subject to removal only by formal impeachment or upon address of both parliamentary branches. They would be ‘allowed honorable salaries ascertained and established by standing laws.’

For the first time, a Judicial Branch independent in the modern constitutional sense would be established. It was a radically new form of government. How soon was this radical experiment put to the test?

When the Massachusetts Constitution was adopted in 1780, slavery was ubiquitous throughout the American colonies. But slaves in Massachusetts had not been deaf to the robust discussions of liberty that preceded the adoption of our Constitution. Three years after the Massachusetts Constitution was adopted, the Supreme Judicial Court considered the first case concerning the new Constitution. Quock Walker, a black slave, sued Nathaniel Jennison, a white man, who had brutally assaulted him. Jennison claimed that Walker was his ‘property,’ and it was lawful to assault him. Before the Supreme Judicial Court, the case boiled down to this: *could* Jennison rightfully claim Walker as his ‘property?’

We do not have a decision of the Court, because none was published. But we do have Chief Justice William Cushing’s notes. I want to read from them to give you some of the texture of this extraordinary moment in history.

² The Constitution of the Commonwealth of Massachusetts, Declaration of Rights, Part the First, art 1, as amended in 1976 by art 106 of the Amendments of the Massachusetts Constitution.

³ The Constitution of the Commonwealth of Massachusetts, Declaration of Rights: art 29.

‘[W]hatever sentiments have formerly prevailed,’ Chief Justice Cushing wrote, ‘a different idea has taken place with the people of America, more favorable to the natural rights of mankind, and to that natural innate desire of Liberty, with which Heaven ... has inspired all the human race. And upon this ground our Constitution of Government, by which the people of this Commonwealth have solemnly bound themselves, sets out with declaring that all men are born free and equal—and that every subject is entitled to liberty to have it guarded by the laws, as well as life and property, and in short is totally repugnant to the idea of being born slaves. This being the case ... the idea of slavery is inconsistent with our conduct and Constitution; and there can be no such thing as perpetual servitude of a rational creature ... ’⁴ Quock Walker’s case was the first case in the United States, the first anywhere to my knowledge, to abolish slavery by judicial decision.⁵

The Quock Walker decision was a triumph for the principle of equality. It was also a triumph for the principle of judicial independence. In making their groundbreaking decision, the Justices of the Supreme Judicial Court looked for no other guidance than they found in the words of the Massachusetts Constitution. The decision fundamentally reordered society, but the decision appears to have provoked no outcry. It was accepted, and obeyed.

Pivotal decisions of independent judges, of course, are not always so well received. Massachusetts in the time of Quock Walker was an abolitionist stronghold. Would the court’s decision have been accepted in Virginia, where slave labor was integral to the economy, widely accepted by Thomas Jefferson, George Washington, and others?

⁴ *Proceedings of Massachusetts Historical Society* Vol 1873–1875 294 (1875). ‘Chief Justice Gray submitted for the inspection of the members of the Massachusetts Historical Society Chief Justice Cushing’s original note-book of the trials before the Supreme Judicial Court of Massachusetts at the terms held in the County of Worcester in 1783 (which had been intrusted to him for the purpose by Mr. William Cushing Paine, the namesake and great grand-nephew of Chief Justice Cushing), and read therefrom the minutes of the trial at the April Term 1783 of the case of *Commonwealth v Nathaniel Jennison*, in which it was established that slavery was wholly abolished in this Commonwealth by the Declaration of Rights prefixed to the Constitution of 1780.’ Op cit 292–293.

⁵ Cf *Lord Mansfield’s Case (The Somerset Ruling)* Trinity Term, June 22, 1772: ‘The state of slavery is of such a nature, that it is incapable of being introduced on any reasons, moral or political, but only by positive law, which preserves its force long after the reasons, occasion, and time itself from whence it was created, is erased from memory. It is so odious, that nothing can be suffered to support it, but positive law.’ See also The National Archives, Abolition of the Slave Trade.

http://www.nationalarchives.gov.uk/pathways/blackhistory/rights/slave_free.htm Lord Mansfield’s judgment had a profound effect on slaves. Many of them misunderstood the ruling to mean that slaves were emancipated in Britain. This was not the case. The decision was that no slave could be forcibly removed from Britain and sold into slavery.

‘Despite Lord Mansfield’s ruling, slave owners continued recapturing their runaway slaves and shipping them back to the colonies. Numerous newspaper advertisements of the time show that Black slaves were still being bought and sold in England. A few years later, in 1785, Mansfield himself ruled that ‘black slaves in Britain were not entitled to be paid for their labour’ (free Black people were, however, paid).’

The range of reactions that may greet a constitutional holding in United States courts—from civil disobedience to quiet acceptance—exemplifies the structural tension of American political life. The same Constitution that encourages participatory self-government, with its attendant negotiations and compromises, also takes some solutions entirely off the table, most particularly those freedoms enumerated in our Bills of Rights. The branch of government entrusted with the task of saying no to the majority's will, 'no' to the will of their elected representatives, is the courts. The judiciary acts as a fulcrum that balances the needs of the current majority against the constitutional limits on public action.

Judges have enormous power, within their courtrooms, to 'say what the law is.'⁶ That authority has been asserted in ways that have from time to time dramatically shifted political and social paradigms, and has excited heated responses. Several very recent decisions of the United States Supreme Court angered many in Congress, our national parliament. One such 2005 decision invalidated 1987 sentencing legislation⁷ that required tough mandatory sentences for Federal crimes. The Court concluded that the statute was beyond Congress's sphere of power.⁸ The Court's decision called into question thousands of criminal sentences. No United States Attorney has refused to obey the Court's command.

Another example: in *United States v Nixon*,⁹ the Court ordered a sitting President, over his objections on ground of executive privilege, to turn over to a prosecutor tape recordings of the President's most intimate conversations with his aides and advisors. Other of the Court's constitutional holdings have raised the ire of whole communities. One thinks immediately of *Brown v Board of Education*,¹⁰ prohibiting racial segregation in public schools.

Notwithstanding the impact of such 'big' constitutional cases, a leading American political theorist, Professor John Ferejohn, has observed that 'the remarkable fact is how reluctant the federal judiciary has historically been to take an expansive view of its jurisdiction or its authority.'¹¹ In the United States, it is a widely held view across the political spectrum that the role of independent judges in our constitutional democracy should be circumspect, limited.

How is it that in the United States, under a Constitution that keeps individual judges so well insulated from retaliation and corruption by political influ-

⁶ *Marbury v Madison* 1 Cranch 137, 177 (1803) ('[i]t is emphatically the province and duty of the judicial department to say what the law is').

⁷ The Sentencing Reform Act of 1984 (Title II of the Comprehensive Crime Control Act of 1984).

⁸ *United States v Booker* 543 US 220 (2005).

⁹ 418 US 683 (1974).

¹⁰ *Brown v Board of Education of Topeka* 347 US 483 (1954).

¹¹ JA Ferejohn & LD Kramer 'Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint' (2002) 77 *New York Univ LR* 962, 1037.

ences, the judiciary is generally held to be the weakest, the ‘least dangerous,’¹² branch of government?

Professor Ferejohn offers these insights. Judges in a constitutional democracy, he notes, will always face a complex, intertwined allegiance between faithfulness to the rule of law—judicial independence—and responsiveness to the people’s needs—judicial accountability. Both are means to the same end: a well-functioning judiciary.¹³ In the United States, the tension between judicial accountability and judicial independence is kept in equipoise, at least most of the time, by a design of government that allows individual judges an exceptional amount of independence while making the judiciary as an institution largely dependent on, and vulnerable to, the actions and reactions of political actors.

This institutional dependence can hardly be exaggerated. I can offer here only a brief summary, beginning with the legislative branch. The Legislature’s ‘power of the purse’ operates as an effective, although indirect, mechanism to ensure that individual judges do not stray too far into territory that offends the people’s will. Congress (and the fifty State legislatures) cannot reduce the salary of judges. But they can and do use their exclusive power to appropriate funds to exercise control over the Judicial Branch. It is constitutionally permissible for Congress to decline to fund courts at a requested level, and to decline to enact timely cost of living increases for judges, thereby effectively reducing judicial salaries. Whether practical considerations or animus motivates such decisions is, constitutionally speaking, irrelevant. The United States Constitution also gives Congress complete discretion to create and abolish inferior courts, as well as to redefine the jurisdiction of these courts. As I speak, the United States Congress is debating whether to restructure the major appellate district in the Western part of the country, the Ninth Circuit, against the wishes of the vast majority of the appellate judges in that circuit. What is the motivation? Some legislators have said that the Ninth Circuit needs to be broken apart because it is too liberal.¹⁴

The United States Constitution, and each of the fifty State Constitutions, also give to the other elected branch, the executive (a President or Governor),

¹² A Hamilton ‘The Federalist No. 78’ in R Scigialno (ed) *The Federalist: A Commentary on the Constitution of the United States* 496 (2001): ‘Whoever considers the different departments of power must perceive that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them.’ See generally AM Bickel *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (1962).

¹³ Ferejohn & Kramer (note 11 above) 963–964. See also J Ferejohn ‘Independent Judges, Dependent Judiciary’ (1998–1999) 72 *Southern California LR* 353; J Ferejohn ‘The Politics of Imperfection: The Amendment of Constitutions’ (1997) 22 *Law & Social Inquiry* 501.

¹⁴ See for example J Scheck ‘Latest Plan to Split 9th Circuit Aims to Sidestep Debate’ *The Recorder*, 8 November 2005, <http://www.law.com/jsp/article.jsp?id=1130953710177>

significant power over the courts, and with this power the opportunity to influence profoundly the courts' direction. The debates surrounding the confirmation of Chief Justice John Roberts and Associate Justice Samuel Alito to the United States Supreme Court, cast in high relief the importance of the President's power to appoint judges as a means to shape constitutional jurisprudence.

As this very incomplete list demonstrates, our constitutions provide significant checks and balances over the courts, the nonmajoritarian arm of government. The Constitution also weaves a complex web of checks and balances around executive and legislative (parliamentary) uses of power. In this sense, the American Constitution is different from that of South Africa. The phrase 'separation of powers' appears nowhere in the text of our national Constitution, although it is a central component of the Massachusetts Constitution. Neither Constitution has any provision specifically mandating that one branch of government respect and support the other branches, as does yours.¹⁵

The intricate design of checks and balances reflects a cautious approach to official authority that is a hallmark of the American view of government. John Adams and his compatriots distrusted, deeply distrusted, government power; they did not see government as a 'best friend.' They saw it as a ravenous beast to be shackled. As a result of that fundamental distrust of government, in the United States separation of powers means in the words of one writer 'separate institutions sharing power, [where] those separate institutions have their own independence, their own rationale, and their own ability to check and balance the other institutions.'¹⁶

No matter how ingenious its design, though, any nation's constitution is only as workable as its leaders wish it to be. Just as remarkable as the formal design of the Constitution are the rules, regulations, and customs each of the branches of government has devised to regulate *itself* conformably with the overall scheme of government.

I turn to the judiciary. To be sure, appellate review and the formal mechanisms for judicial discipline are self-regulating mechanisms for judges in the United States. Just as effective is the panoply of rules, regulations, and legal norms and customs that judges in the United States have developed over the past two hundred-odd years to avoid clashing too often or too harshly with the

¹⁵ See for example Constitution of the Republic of South Africa Act 108 of 1996 (1996 Constitution) s 41(1) ('All spheres of government and all organs of the state within each sphere must ... (e) respect the constitutional status, institutions, powers and functions of government in the other spheres; ... (h) co-operate with one another in mutual trust and good faith ... ') and s 165(3) ('No person or organ of the state may interfere with the functioning of the courts') and s 165(4) ('Organs of the state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts').

¹⁶ T Sargentich 'The Courts, The Legislature And The Executive: Separate and Equal?' (March-April 2004) 87 *Judicature* 209, 211.

coordinate branches. The list is long, but here are some examples: American courts have established elaborate restrictive doctrines concerning standing to sue even on constitutional claims. The controversy must be immediate, not theoretical, asserting some specific, individual harm, not some generalized unfortunate situation. Our rules of justiciability may permit broad categories of government action to go unexamined by the courts. American courts have developed robust doctrines of sovereign immunity, as well as policies of high deference to the statutory interpretations, administrative regulations, and adjudications of administrative agencies. Established rules of statutory interpretation developed over the decades counsel judges to avoid ruling on the constitutionality of acts of the coordinate branches unless absolutely necessary, and then only to the extent necessary. Rules of construction also require United States courts to choose the constitutional over the unconstitutional construction of a statute whenever possible.

These self-limiting doctrines respond to the unique historical context of American constitutional democracy. The United States Constitution, adopted in 1787, has been amended only twenty-seven times. The Constitution that limits governmental authority today is largely the product of an eighteenth century, Revolutionary War mentality, tempered most importantly by the post Civil War Amendments of the latter half of the nineteenth century. As originally written, it condoned slavery and presumed the total disenfranchisement of all women. It was written, in part, to prevent some dangers that never came to pass, such as the regional consolidation of powers. It failed utterly to anticipate and account for other dangers that arose soon after its adoption, such as the rise of national political parties and elections based on the cult of personality. The United States Constitution is not overly burdened by detail. Even the solemn guarantees of the Bill of Rights—‘freedom of speech,’ protection from ‘cruel and unusual punishments’—are maddeningly vague.

Even where American constitutions are more detailed, judges are often required to play an interpretive role. One example: the Massachusetts Constitution, like many State constitutions in the American scheme of government, contains positive rights provisions that may direct the government to take certain actions. Your Constitution has positive rights, the right ‘to a basic education ...’ for example.¹⁷ The Massachusetts Constitution of 1780 also has a detailed provision concerning education, but ours is—how shall I put it—less clear. ‘[I]t shall be the duty of legislatures ... in all future periods of this commonwealth, to cherish the interests of literature and the sciences ... especially

¹⁷ See for example s 29(1) (‘Everyone has the right (a) to a basic education, including adult education; and (b) to further education, which the state, through reasonable measures, must make progressively available and accessible’).

the university at Cambridge ...¹⁸ The reference to the ‘university at Cambridge’ is of course to Harvard University. I was the Vice President and General Counsel at Harvard. If memory serves, Harvard’s endowment is more than \$21 billion. What does the constitutional command to ‘cherish’ Harvard mean? Would it permit the university to succeed on a claim that it was constitutionally entitled to public funds? I raise these hypothetical questions to make a point about constitutional context. Section 29 of your Bill of Rights concerning the right to education is clear, direct, contemporary, and comprehensive. The command of the Massachusetts Constitution to ‘cherish’ the interests of ‘literature and the sciences,’ is not.

The historical context in which our federal and state constitutions were drafted often places American judges in an uncomfortable position when asked to give twenty-first century effect to principles of public power and human freedom grounded in the experiences of the eighteenth and nineteenth centuries. Does freedom of ‘speech’ mean freedom to contribute any amount of money to any political candidate? Does the right to life, liberty, and happiness mean the right of a brain-dead individual to remain on life support for decades? Aren’t these matters best resolved through the democratic process of debate, deliberation, negotiation, and compromise? Judges, who cannot convene study committees or broker compromises, understandably choose to tread lightly when presented with such disputes.

But sometimes this is not possible. When a matter is properly brought to court, the judiciary is placed in a position of high vulnerability that inevitably will impact the public’s perception of the court’s integrity. For where American courts are asked to construe their Constitutions in light of contemporary circumstances, a certain degree of exposition is necessary to fill the interstices between past and present and between the sometimes spare words of our Constitutions and the often rich and novel factual context of a particular case. This is particularly true because the American Constitution, unlike your own, contains no limitations clause.¹⁹ American constitutional adjudication is therefore more open to controversy about how the boundaries of constitutional interpretation should be set. Should individual liberty guarantees of the Bill of Rights be construed to give effect to the intentions of its Eighteenth-Century drafters, as Supreme Court Justice Antonin Scalia proposes?²⁰ Or should the Justices consider the likely consequences for contemporary democracy that their consti-

¹⁸ Constitution of the Commonwealth of Massachusetts, Part the Second, ch 5, s 2.

¹⁹ See s 36.

²⁰ See for example A Scalia ‘Originalism: The Lesser Evil’ (1989) 57 *Univ of Cincinnati LR* 849, 864 (‘Originalism ... establishes a historical criterion that is quite conceptually separate from the preferences of the judge himself’).

tutional interpretation will impose, as Justice Stephen Breyer advocates?²¹ In the American system, under a Constitution with few reference points as to its proper exegesis, the point of equilibrium between judicial independence and judicial accountability, between judicial construction and judicial lawmaking, is often difficult to discern. For that reason too, as a general rule, courts elect to proceed slowly. The cases in which this is not possible are the cases that cause judges to hold our breath: Will our decision be perceived in ways that will strengthen or weaken the ability of courts to function well?

Consider two examples of such incendiary cases, one from the national high court and one from the Massachusetts high court, my court. The national case is *United States v Nixon*, to which I alluded earlier. As I mentioned, the tapes the prosecutor sought were made by the President in circumstances where he could have no idea that the tapes might ever be made public, much less disclosed while he was still in office. The United States Supreme Court unanimously ordered the tapes produced, on the grounds that the President's generalized claim of executive privilege must yield to the specific requirements of the criminal law for due process and full disclosure of relevant evidence. It was a blunt ruling against a President who took expansive views of his executive powers and did not brook dissent lightly. Yet less than two weeks after the decision issued President Nixon produced the tapes, an act that disclosed his own part in an obstruction of justice and led to his resignation shortly thereafter.

A second example concerns a recent decision by my court. At issue was a law, the 'clean elections law,' that mandated appropriation of substantial public funds to certain electoral candidates who agreed to abide by limits on campaign contributions and spending.²² After its enactment, the law languished unfunded. Several candidates sued the Commonwealth to obtain the public funding. My court held that, because of the way in which the clean elections law had been enacted (with overwhelming public support), the Legislature was required either to provide the funds or to repeal the law.²³ The appropriation and allocation of public funds is a quintessentially legislative matter. Few things touch on the legislative branch more directly than the issues of how it must allocate public money and how its members may be elected. Some prominent elected officials denounced the ruling, criticized the Justices in the majority, including myself, and called for the end of lifetime tenure for judges.²⁴ The

²¹ See for example S Breyer *Active Liberty: Interpreting Our Democratic Constitution* 131 (2005) ('an examination of consequences [of a constitutional ruling] can help us determine whether our interpretations promote specific democratic purposes and general constitutional objectives').

²² See Mass. Gen. Laws c. 55A, ss 1 et seq.

²³ *Bates v Director of the Office of Campaign & Political Finance* 436 Mass 144 (2002).

²⁴ See for example R Klein, '[Massachusetts Speaker of the House Thomas] Finneran Suggests Election of Judges' *Boston Globe* 8 February 2002 A1 (brackets added); S Marantz 'Finneran Considers Reining in Judiciary Over Clean Elections' *Boston Herald* 8 February 2002 014.

public response to their proposal was immediate, loud, and critical.²⁵ Nothing came of the suggestion.

I would suggest that, at least in part, the reason these cases provoked no separation of powers crisis is that politicians faced with obeying the court orders found no great appetite among the general public to retaliate against the courts. Perhaps the people saw a greater evil in enfeebling the courts than in expecting elected officials to obey court orders. Perhaps they understood that the courts had taken extraordinary measures only in response to extraordinary events. In other words, the characteristic circumspection of American courts in cases implicating the separation of powers lent credibility to courts' decisions when they concluded they must state a strong position contrary to the wish of another Branch. In the United States, judicial restraint, judicial conservatism if you will, has permitted the courts to function effectively because it has secured the trust of the people in the integrity of the courts. The great Supreme Court Justice Robert H Jackson in a lecture at Harvard University in the 1950s eloquently expressed the goal of judicial restraint. 'Public opinion,' he said:

'seems always to sustain the power of the Court, even against attack by popular executives and even though the public more than once has repudiated particular decisions ... The people have seemed to feel that the Supreme Court, whatever its defects, is still the most detached, dispassionate, and trustworthy custodian that our system affords for the translation of abstract into concrete constitutional commands.'²⁶

All public officials have a kind of 'capital' with the public, to spend or squander as they choose. In the United States, the capital of the judiciary is not political but 'intellectual and reputational, limited to what it can acquire through effective job performance.'²⁷ Often, for American judges, this means knowing when and how to limit judicial involvement in a matter of public controversy. That calculation is never easy. No mathematical equation, no neat formula, unerringly guides the American judge to an inevitable conclusion when cases concerning the separation of powers arise, particularly when issues of fundamental freedoms are implicated. Reasonable minds can and do differ. Loudly. The most our courts can do is seek the right balance between accountability and independence in every case, knowing that we may not always get it right, but confident

²⁵ See for example 'Finneran in Contempt' *Boston Globe* 10 February 2002 C12 (editorial); Woodlief 'King Tom Plays Dirty on Clean Elections' *Boston Herald* 10 February 2002 025 (editorial); 'Finneran's Folly: The House Speaker Must Stop Waging War Against the Courts' *Phoenix* 14–21 February 2002 (editorial) (available at www.bostonphoenix.com/boston/news_features/editorial/documents/02161882.htm)

²⁶ RH Jackson *The Supreme Court in the American System of Government* 23 (1955).

²⁷ Ferejohn & Kramer (note 11 above) 977.

that if we get that balance woefully wrong, the people and their elected representatives will let us know, and that we shall listen carefully.

Finding the point of equilibrium between independence and accountability is perhaps the paramount task of the judicial branch in any constitutional democracy. The South African Constitution is newer than the American Constitution. It is the product of negotiations between internal divisions rather than a statement of liberation from an external enemy. The vision of constitutional rights is broader in the South African Constitution, encompassing social and economic, as well as political rights. And in many ways your Constitution is more detailed, more specific, about its aims and the processes required to achieve them. Yet for all of these differences in context, breadth, and specificity, your Constitutional Court has already been called on many times to gauge the proper scope of judicial authority, just as courts have been and will continue to be in the United States.

As both the American and the South African Constitutions seek to realize the liberating insight of our respective Founding Fathers—that the rights of the people are best secured by a written guarantee of fundamental freedoms, enforced by a judiciary composed of judges ‘as free, impartial and independent as the lot of humanity will admit’²⁸—there will be countless opportunities to address the fundamental tensions with which all democratic constitutions have wrestled. The tension between democratic rule and constitutional review. The tension between judicial independence and judicial accountability. In this area as well as many others, I trust we have much to learn from each other, as individuals at all levels of both judicial systems work to realize their people’s visions of human freedom.

²⁸ The Constitution of the Commonwealth of Massachusetts, Declaration of Rights: art 29.

The Separation of Powers

CHIEF JUSTICE PIUS N LANGA*

I INTRODUCTION

The Union of South Africa, founded in 1910, was modeled on the Westminster system of government. There were two Houses of Parliament—the House of Assembly (Lower House) and the Senate (Upper House). The executive was responsible to and formed part of the legislature,¹ while the judiciary occupied an independent position. I should mention here that the Executive was responsible for the appointment of judges. There was no provision for an independent body like the Judicial Service Commission as we have today.

Until 1983, the structure of South African government closely resembled that of the United Kingdom, from which it had inherited most of its governmental institutions. Like the United Kingdom, the executive and the legislature were closely linked. The 1983 Constitution, however, brought some changes, one of which was in respect of the position of the President who, as head of state, ceased to be a member of parliament. The interdependence between Executive and the Legislature however continued.

Before I go too far, I should give an example of the tensions that sometimes characterize the relationship between the different arms of government, in particular between the judiciary on the one hand and the executive and the legislature on the other. They are nothing new and this happens in many countries with stable democracies. In 1951 the National Party government, keen to hasten its scheme to entrench grand apartheid and to disenfranchise the majority of citizens of this country, introduced a Bill in Parliament the purpose of which was to remove coloured voters from the common voter's roll. They ignored the fact that the change they sought required an amendment of entrenched provisions in the Constitution. The Bill they introduced was passed by a simple majority in the two houses of parliament, sitting separately.

The validity of the new Act was challenged on the grounds that it had not been passed in conformity with the requirements for the amendment of

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¹ A change however occurred when, in terms of the 'Tricameral Constitution' (Constitution of the Republic of South Africa Act 110 of 1983) the State President ceased to be a member of the legislature.

entrenched provisions of the South Africa Act. The Appellate Division [in *Harris and Others v. Minister of Interior and Another*²] held that the Act in question was invalid as it had not been passed in conformity with the special procedures.

What followed was the promulgation of a so-called High Court of Parliament Act [35 of 1952]. It was passed by a simple majority in both houses, sitting separately. The Act was designed to override the authority of the Appellate Court by establishing a body known as the 'High Court of Parliament;' which would consist of every member of the House of Assembly and of the Senate. The Act conferred on this body the power to review and set aside any past or future judgments of the Appellate Division in which that court had declared an Act of Parliament to be invalid.

This hastily constituted High Court of Parliament was convened and in due course declared the Appellate Division decision in the *Harris* case invalid and upheld the validity of the Act that had been struck down by the Court.

The Appellate Division however had the final laugh when the matter was brought to it. The offending Act was promptly struck down.³

The Court held firstly that the entrenched sections of the South Africa Act contained certain constitutional guarantees and that these guarantees would be worthless unless the courts enforced them,⁴ secondly that the 'High Court of Parliament' was not a true court of law but 'simply Parliament functioning under another name.'⁵

Two important landmarks were posted by this unwelcome excursion by the legislature into the judicial domain. First, that 'laws' which have not been passed according to the prescribed parliamentary procedures are not real laws and can be struck down, even where there is no meaningful judicial review. Second, that there indeed was an important distinction between the constitutional role of the legislature and that of the courts.

II SEPARATION OF POWERS IN MODERN-DAY SOUTH AFRICA

When the interim Constitution came into force in 1994, it reversed decades of colonial and apartheid policies of racial fragmentation and marked the beginning of a new legal order in South Africa. Whereas previously the combination of the Executive and parliament had exercised a virtual monopoly of power, this was replaced with a system where the Constitution became the supreme law of the land and any law or conduct inconsistent with it was invalid.

Parliamentary supremacy had given constitutional form to a South African state characterized by inequality, racial discrimination and division. It gave way

² 1952 (2) SA 428 (AD).

³ *Minister of Interior v Harris* 1952 (4) SA 769 (A).

⁴ Op cit 779E-G (Centlivres CJ).

⁵ Op cit per Centlivres JA at 784D.

to the new constitutionalism which placed new values at centre stage. The core values became the achievement of equality, human dignity, the protection of human rights and freedoms, non-racism and non-sexism, a democratic system of governance and the rule of law. The separation of powers doctrine was employed to ensure that the new system of government contained within it the necessary 'checks and balances' to uphold the values which must now be part of our lives.

The Constitution protects and promotes the system of separation of powers although it does not refer to it explicitly. In *South African Association of Personal Injury Lawyers v Heath*, the Constitutional Court held that there 'can be no doubt that our Constitution provides for such a separation [of powers] and that laws inconsistent with what the Constitution requires in that regard, are invalid.'⁶

Section 165 vests the judicial authority of the Republic in the Courts. Corresponding provisions vest the legislative and executive authority in Parliament and in the President as head of the National Executive, respectively.

What is acknowledged is that the three branches of government perform separate functions. All three, separately, exercise governmental authority. The objective is to secure the freedom of every citizen by seeking to avoid an excessive concentration of power, which can lead to abuse, in one person or body.

The legislative branch cannot be responsible for the execution of the laws it makes, nor may it decide on the disputes such laws may provoke. In this arrangement, the role of an independent and impartial judiciary becomes critical. Without it, proper restraint on the unilateral exercise of governmental authority by the other two branches of government would be difficult indeed.

Currently some interdependence among the branches of government can be seen from the following. In terms of section 89 of the Constitution, the President is elected by Parliament and is sworn in by the Chief Justice. He can be removed by parliament in cases of misconduct, inability or serious violation of the law. He in turn has a responsibility in relation to both the Judiciary and Parliament. He participates in the appointment of judicial officers, albeit with the interposition of the Judicial Service Commission, and it is his function to assent to bills from Parliament before they become law.

III SEPARATION OF POWERS JUDICIALLY CONSIDERED BY THE CONSTITUTIONAL COURT

The Court has a primary role in safeguarding the rule of law and the supremacy of the Constitution. It performs its functions by considering the cases brought

⁶ *South African Association of Personal Injury Lawyers v Heath* 2001 (1) BCLR 77 (CC) at paras 18–22.

before it where parties allege that other branches have acted contrary to one or more of the provisions of the Constitution. The attitude of the Court to the doctrine of separation of powers can therefore be best gleaned from the Court's judgments, a brief discussion of which follows.

(a) *First Certification Judgment*

As in many parliamentary systems, the most conspicuous element in South Africa is that members of the executive—the cabinet—are also members of parliament. This is one of the questions the Court had to decide, whether the Cabinet's concurrent membership in Parliament was consistent with the doctrine of separation of powers. The Court held that the system of the separation of powers is not a fixed or rigid constitutional doctrine. It is given expression in many different forms or made subject to checks and balances of many kinds. No system of separation of powers is perfect or absolute. Further, the Court held that the South African variant of the system in any event strengthened accountability of the executive arm of government to the legislative branch and therefore did not violate the doctrine.

(b) *The Executive Council of the Western Cape Legislature v President of RSA*

In *Executive Council, Western Cape Legislature, and Others v President of the Republic of South Africa and Others*⁷ the majority of the Constitutional Court held that the 'manner and form' provisions of the Constitution prevent Parliament from delegating to the executive the power to amend the provisions of the enabling Act of Parliament; that sections 59, 60, and 61 of the Constitution are not merely directory, they prescribe how laws are to be made and changed and are part of the scheme which guarantees the participation of both Houses in the exercise of the legislative authority vested in Parliament under the Constitution.⁸

(c) *Bernstein v Bester*⁹

One of the findings of the Court in this case was that the right of access to courts was also important for the independence of the judiciary and therefore also as an aspect of the separation of powers principle. It was made clear that legislation that seeks to bring the judicial organs of State under the control of Parliament or the Executive could be struck down under the separation of powers doctrine even if that legislation did not conflict with any of the express provisions of the Constitution. Ackermann J stated that the provision of the interim Constitution which stated that:

⁷ *Executive Council, Western Cape Legislature, and Others v President of the Republic of South Africa and Others*, 1995 (4) SA 877 (CC).

⁸ *Op cit* p 904–5, para 62.

⁹ 1996 (2) SA 751 (CC).

“[t]he Judiciary shall be independent, impartial and subject only to this Constitution and the law,” has a clear purpose. It is to emphasize and protect generally, but also specifically ... the separation of powers, particularly the separation of the judiciary from the other arms of the State. The sections achieve this by ensuring that the courts and other *fora* which settle justiciable disputes are independent and impartial. The provisions are fundamental to the upholding of the rule of law, the constitutional state, the “regstaatidee”, for it prevents legislatures, at whatever level, from turning themselves by acts of *legerdemain* into “courts”.¹⁰

(d) *De Lange v Smuts*

The Court held that the judicial function of committing an uncooperative witness to prison could not be exercised by organs of other branches of government, such as an insolvency investigator.

(e) *South African Association of Personal Injury Lawyers v Heath*

Certain legislation required the President to appoint a judge to head a Special Investigations Unit. The Court, however, held that certain of the functions of the head of the unit were executive in nature and inconsistent with the functions of a judicial officer. The Act was accordingly declared to be unconstitutional.

(f) *S v Dodo*

In that case, the applicants alleged that the legislator, by prescribing a minimum sentence in relevant legislation had encroached on the exclusive area of jurisdiction of the judicial arm of government. The Court held that such legislative provisions were in fact not unconstitutional because Parliament also had a responsibility with regard to sentencing.

(g) *In re: Constitutionality of the Mpumalanga Petitions Bill, 2000*

The case dealt with the question whether the conferral on the speaker of a provincial legislature could confer on the speaker the power to make regulations and to determine the date a law comes into being. This was held not to be unconstitutional. The Court held that the powers in question did not violate the separation of powers.

(h) *United Democratic Movement (the UDM) and others v President of the Republic of South Africa and Others (Floor-crossing legislation).*

In this case, the Constitutional Court stressed that the merits or demerits of the disputed legislation are not the business of the Court decided is not whether the disputed provisions are appropriate or inappropriate, but whether they are not inconsistent with the Constitution. Also, amendments to the Constitution duly

¹⁰ Op cit para 105.

passed in accordance with the requirements of the Constitution become part of the Constitution. There is little scope for challenging amendments passed in accordance with the prescribed procedures and majorities.

(i) *Certification of the Constitution of the Western Cape*

In *Certification of the Constitution of Western Cape 1997*,¹¹ the Constitutional Court while considering whether the provincial constitution passed by the provincial legislature had complied with section 143 of the national Constitution as was the requirement, stated that; the provinces remained creatures of the national Constitution and could not, through their provincial constitution-making power, alter their character or their relationship with other levels of government;¹² stated that the doctrine of separation of powers is sufficiently broad to permit not only interdependence between the Executive and the Legislature but also strict independence as in the democracies of the United States of America, France and the Netherlands.¹³

(j) *Other decisions*

Where the judicial and legislative functions seem to collide, our Courts have been careful not to encroach on functions of other branches of government. Academics have referred to the Court developing mechanisms of self restraint.¹⁴ In *Soobramoney v Minister of Health, KwaZulu-Natal*¹⁵ the Constitutional Court refrained from giving orders that the State should provide expensive dialysis treatment to keep a critically ill patient alive.

In *Ferreira v Levin NO* it was noted that ‘it is important that we bear in mind that there are functions that are properly the concern of the courts and others that are properly the concern of the legislature. At times these functions may overlap. But the terrains are in the main separate, and should be kept separate.’¹⁶

One of the oft-heard criticisms leveled at Courts concerns the relief given in matters involving socio-economic rights. Critics would contend that the Court should make more use of structural interdicts or supervisory orders against the other branches of government. It does seem that where there is no evidence that the executive will not comply with an order of court, the courts are usually not enthusiastic about imposing such orders.

¹¹ *Speaker of the Western Cape Provincial Legislature, ex parte: In re Certification of the Constitution of the Western Cape, 1997*; 1997 (4) SA 795 (CC), 1997 (9) BCLR 1167 (CC).

¹² Op cit para 8.

¹³ Op cit para 62.

¹⁴ I Currie & J de Waal *The Bill of Rights Handbook* 5ed (2005) 22.

¹⁵ *Soobramoney v Minister Of Health, KwaZulu-Natal 1998* (1) SA 765 (CC).

¹⁶ *Ferreira v Levin No and Others; Vryenhoek and Others v Powell No and Others 1996* (1) SA 984 (CC), per Chaskalson P at para183.

IV SEPARATION OF POWERS IN COMPARATIVE PERSPECTIVE

Just to put everything in context, some comparisons with other countries may be useful.

(a) United Kingdom

The United Kingdom (UK) does not have a written constitution which would state the source of the authority of government. The doctrine of separation of powers in Britain is said to be applicable in only a limited sense.¹⁷ There is a considerable degree of overlap as far as the persons constituting government organs are concerned; the members of the cabinet are members of Parliament, the Law Lords sit in the House of Lords both as judges and as legislators, the Lord Chancellor is a cabinet Minister, is the head of the Judiciary and serves as a member of the House of Lords when it sits in its legislative capacity.

Although a form of separation of powers is observed we find that the House of Lords is at the same time part of the legislative branch and the highest judicial body in the kingdom.¹⁸ In addition, the courts cannot invalidate laws of parliament.

Parliament has ultimate authority over all affairs of government, including the monarch and the courts. Although this seems to be contrary to the concept of separation of powers, the fact is that there is a considerable amount of de facto independence among agents exercising various functions, and Parliament is constrained by various legal instruments, international treaties and constitutional conventions.

(b) United States of America

The United States system of government is arguably the strictest when it comes to separation of powers between the different branches of government.¹⁹ The Congress, the federal legislature, is not linked in any way to the executive. The President heads the executive branch of government and has the power to veto bills approved by Congress. United States courts are responsible for the administration of justice and are vested with authority to invalidate any law promulgated by Congress if it conflicts with the United States Constitution. Nonetheless some interdependence exists to give effect to the system which is known for its 'checks and balances'. As a result the President, for example, makes bench appointments, albeit with the consent of Congress.²⁰

¹⁷ Gretchen Carpenter, *Introduction to South African Constitutional Law*, 1987 Butterworths, at p 158.

¹⁸ Rautenbach IM and Malherbe EFJ (2004) *Constitutional Law* 4th ed. Durban: Lexis Nexis Butterworths at 79.

¹⁹ *Ibid.*

²⁰ *Op cit* 80.

V CONCLUSION

Regulation of government authority is very important in any country. The need for independence of various branches of government is, however, the key to ensuring that they function properly. Fortunately, the rule of law and supremacy of the Constitution are usually entrusted to courts, which safeguard the equilibrium of the power play within the government itself. There is no doubt that the proper balancing of government power and the transparency this entails enhances the accountability of government and its three branches and accordingly contributes to the stability of government thus yielding direct economic benefits for the country.

Judicial Review in a Time of Terrorism

BUSINESS AS USUAL

JUSTICE MICHAEL KIRBY*

I honour Arthur Chaskalson for his service as Chief Justice of South Africa and inaugural President of the Constitutional South of South Africa. I salute him, an *alumnus* of this famous University.

I first met him when he was practising at the Johannesburg Bar. I was taking part in a series of judicial conferences, organized by the Commonwealth Secretariat, on the domestic application of international human rights law. One of those conferences was convened, in happier times, in Harare, Zimbabwe under the leadership of Chief Justice Enoch Dumbutshena. He too was a hero of human rights and a noble African defender of the rule of law. Mr Chaskalson SC gave the principal after dinner speech for the assembled Commonwealth judges, most of them gathered from all parts of Africa.

The address was electrifying, not for any verbal tricks or false passion. It was the calm, measured voice of the advocate, able to describe the sorry pass to which the law and the judiciary had come in South Africa by that time. We knew that we were listening to an authentic voice of liberty, for we were aware that he had appeared in several important trials of members of the freedom movement in his country, including of Nelson Mandela. We also knew that he was one of the joint founders in 1978 of the Legal Resources Centre that provided legal assistance, including to those who contested aspects of apartheid rule. We listened with growing concern. How would this end? When would it end?

I was there on that sunny day in Pretoria when Nelson Mandela was inaugurated as the first President of the new democratic South Africa. The President had remembered how the International Commission of Jurists (ICJ) had sent observers to his trial and the trials of others in the freedom struggle. At that time I was the President of the ICJ. The invitation came to me because Nelson Mandela had not forgotten who were his friends in those grim days.

I remember Arthur Chaskalson's excitement about the opportunities that constitutional change presented. Responsibilities quickly, and naturally, were

* Justice of the High Court of Australia. This essay draws on earlier writings of the author on similar themes.

cast upon him as the first President of the Constitutional Court in 1994. He shepherded that Court, in an amazingly short space of time, to become one of the great courts of the English-speaking world. I have had the privilege of seeing him preside, directing argument in the same quiet, measured, lawyerly voice I heard at that dinner in Harare. When he was elevated to be, as well, Chief Justice of this country in 2001 the appointment was universally applauded. When this year he elected to resign after his Herculean labours, he had earned a grateful nation's thanks. He now is the President of the ICJ. We come together to honour his work for the rule of law and fundamental rights.

As an Australian, a fellow lawyer and a friend, I am grateful for the opportunity to join in the words of praise. But such words are not enough for our hero has always been a person of substance. So I turn to issues of substance. In that regard, there could be few more topical issues than the one assigned to me: the role of judicial review in a time of terrorist offences and allegations. The theme for my paper could not be simpler. It is brief. It is the message that the courts must give even—perhaps especially—at such a time. Here it is. Business as usual. Exceptionalism is truly exceptional. The usual rules. That is the message that the courts must give. They must give it without equivocation.

JUDICIAL REVIEW IN AUSTRALIA

The Australian Constitution, remarkably enough, is the fifth oldest written text still in service as a nation's basic law.¹ Australia seems a young country. Its modern culture, brought by settlers from virtually every part of the world, is young. Yet, in the world's terms, it is an old, long-standing parliamentary democracy, with independent courts and elected parliaments that preceded even the establishment in 1901 of the federal Commonwealth under the written Constitution.²

That Constitution was profoundly affected by the template of the United States Constitution, particularly in the provisions for a separate Judicature. In the American document this was provided for in Art III. In the Australian, the equivalent part is Ch III.

There was no explicit conferral in the Australian Constitution of the power of the courts to perform the functions of judicial review, to examine the validity and to declare authoritatively the meaning of legislation enacted by the Federal Parliament or by State and Territory legislatures or made by the Executive Governments of those component parts of the Federation. Yet, because of the federal structure of the Constitution, it was recognized from the beginning that

¹ After the Constitutions of the United States of America, Sweden, Canada and Switzerland.

² The Australian Constitution, substantially created within Australia, was a schedule to the *Commonwealth of Australia Constitution Act 1900* (UK), 63 & 64 Victoria, Ch 12.

a decision-maker was essential to resolve conflicts over the contested repositories of power.³

The courts and the people are bound by those federal laws that are ‘made ... under the Constitution’.⁴ But whether a law is made under, or pursuant to, the Constitution can only ultimately be decided with binding authority by a body that is obliged to administer the law, namely a court.

Thus, from the start, the Australian system of government accepted the rule that had been established in the early days of the United States Constitution. It was a rule involving the primacy of judicial review that had gradually petered out in England and, so far as parliamentary law was concerned, was basically dead in Britain by the end of the seventeenth century.⁵ Yet beyond the seas, Sir Edward Coke’s theory of judicial review⁶ had taken root on the American mainland. It was reinforced by the power asserted by the Privy Council to disallow laws, made by the early legislatures of the American colonies and settlements. As early as 1647, the General Court of Massachusetts had ordered copies of Coke’s *Reports* and his *Commentary upon Littleton*. By the end of that century, American judicial authorities had begun to invalidate legislation that violated ‘fundamental law in nature’. Even before the Revolution of 1776, the idea that judges could strike down laws was, a tradition ‘deep-rooted in the country’.⁷

It was out of these deep roots that the early decision of the United States Supreme Court in *Marbury v Madison*⁸ arose. It was there that Marshall CJ asserted that judicial review was a necessity in a case arising in a federal polity where validity of a law was questioned:

‘Those who apply the rule [i.e. the law] to particular cases, must of necessity expound and interpret that rule ... [They must] say what the law is’.

Distinguished scholars could find no explicit basis in the Australian Constitution for judicial review.⁹ Yet from the start, there had to be an umpire. Following the American precedent, the High Court of Australia asserted that role for itself.

³ *Baxter v Commissioners of Taxation (New South Wales)* (1907) 4 CLR 1087 at 1125; *James v The Commonwealth* (1936) 55 CLR 1 at 43; *R v Coldham; Ex parte Australian Social Welfare Union* (1983) 153 CLR 297 at 313.

⁴ Covering cl V. So the Court could not be required to enforce an industrial award going beyond federal constitutional power: *O’Toole v Charles David Pty Ltd* (1990) 171 CLR 232 at 272, 308.

⁵ A D Boyer, ‘Understanding Authority and Will: Sir Edward Coke and the Elizabethan Origins of Judicial Review’ 39 *Boston College Law Review* 43 at 59 (1997).

⁶ *Dr Bonham’s Case* (1610) 8 Co Rep 1136 at 118a; 77 ER 646 at 652; cf *Durham Holdings Pty Ltd v State of New South Wales* (2000) 205 CLR 399 at 420 [44].

⁷ Boyer, n 5, 90. See also now Bruce Ackerman, *The Failure of the Founding Fathers—Jefferson, Marshall, and the Rise of Presidential Democracy* (Harvard, 2005), 12, 113, 192, 263.

⁸ (1803) 5 US 137.

⁹ Eg Professors P H Lane and A C Castles. See P H Lane, *Lane’s Commentary on the Australian Constitution* (2nd ed, 1997), 14; A C Castles, ‘Some Uncertain Foundations of Judicial Review in Australia’ (1988) 62 *Australian Law Journal* 380.

Ultimately, there has been no serious challenge to the assertion, resting as it does on the usual foundation for constitutional implications, namely a necessity inherent in the text.

Every now and again, in Australia, judicial voices have been raised to explain and justify the asserted power of judicial review. Thus, in 1951, in the *Communist Party Case*,¹⁰ in a very fractious disagreement between the Federal Government and Parliament and the High Court of Australia, Fullagar J observed:¹¹

‘[T]here are those, even today, who disapprove of the doctrine of *Marbury v Madison* and who do not see why the courts, rather than the legislature itself, should have the function of finally deciding whether an Act of the legislature in a Federal system is or is not within power. But in our system the principle of *Marbury v Madison* is accepted as axiomatic’.

In that case, the Australian Federal Parliament had attempted conclusively to declare, by the preambular recitals of the Act, that the Australian Communist Party was prejudicial to the defence of the Commonwealth and that, therefore, the statute dealing with that Party was within the federal power to make laws with respect to defence. A majority of the High Court of Australia, in an act of great wisdom that contrasted with the contemporary decisions on similar legislation in the United States¹² and in South Africa,¹³ invalidated the law. It was a decision later confirmed by the electors of Australia when, on 22 September 1951, they rejected the attempt to alter the Constitution at referendum to overcome the Court’s decision.¹⁴

In Australia, in approaching the issues of the current age, much attention is focussed on the approach adopted in 1951 when the Government and Parliament sought to ban the communists. Let there be no doubt that the communists were then the equivalent of contemporary terrorists. There was much fear and not a little hysteria about them. Certainly, communists in the Soviet Union and China had access to novel weapons of mass destruction. Their ideology threatened the democracies. Their local actors were hated. Yet Dixon J, in explaining why the legislation was invalid, said:¹⁵

¹⁰ (1951) 83 CLR 1. See M Crommelin, ‘Constitutional Challenges Posed by National Security: An Australian Story’ in P O’Brien and B Vaughn, *Amongst Friends*, 2005, 121.

¹¹ (1951) 83 CLR 1 at 262; cf Crommelin, op cit 127.

¹² *Dennis v United States* 341 US 494 (1951). By six Justices to two, the *Smith Act* restricting the American Communist Party and its members was upheld.

¹³ *Suppression of Communism Act 1950* (SAf). See M D Kirby, ‘Terrorism and the Democratic Response 2004’ (2005) 28 *University of New South Wales Law Journal* 221 at 222–223; cf ‘Nobel author [J M Coetzee] sees parallel in terror law’, *Australian*, 24 October 2005, 1.

¹⁴ The referendum failed to pass in accordance with the Australian Constitution, s 128. It failed to gain a majority of the electors voting nationally and in a majority of the States.

¹⁵ *Australian Communist Party v The Commonwealth* (1951) 81 CLR 1 at 187.

‘History and not only ancient history, shows that in countries where democratic institutions have been unconstitutionally superseded, it has been done not seldom by those holding the Executive power. Forms of government may need protection from dangers likely to arise from within the institutions to be protected. In point of constitutional theory the power to legislate for the protection of an existing form of government ought not to be based on a conception, if otherwise adequate, adequate only to assist those holding power to resist or suppress obstruction or opposition or attempts to displace them or the form of government they defend’.

In one particular respect, the Australian Constitution contains an express provision that reinforces the centrality of judicial review and the accountability, at least of all federal officials, to the law as declared by the courts. This is the inclusion, in s 75(v) of the Constitution, of the express power, enjoyed by the High Court of Australia in the exercise of its original jurisdiction, to issue ‘a writ of Mandamus or prohibition or an injunction ... against an officer of the Commonwealth’. This is a constitutional source of jurisdiction and power. Because of its source, it is not susceptible to legislative abolition nor to parliamentary regulation that would impede its effectiveness.

This point was made in 2003 in an Australian case concerned with an application for refugee protection of a person said to have been put outside effective judicial review by a federal legislative provision,¹⁶ expressed as a ‘privative clause’. The provision was aimed at restricting the questioning of official decisions in such cases in some circumstances. The High Court of Australia unanimously found that the constitutional review jurisdiction was not ousted by the legislative attempt:¹⁷

‘The reservation to this Court by the Constitution of the jurisdiction in all matters in which the named constitutional writs or an injunction are sought against an officer of the Commonwealth is a means of assuring to all people affected that officers of the Commonwealth obey the law and neither exceed nor neglect any jurisdiction which the law confers on them. The centrality, and protective purpose, of the jurisdiction of this Court in that regard places significant barriers in the way of legislative attempts (by privative clauses or otherwise) to impair judicial review of administrative action. Such jurisdiction exists to maintain the federal compact by ensuring that propounded laws are constitutionally valid and ministerial or other official action lawful and within jurisdiction. In any written constitution where there are disputes over such matters, there must be an authoritative decision-maker. Under the Constitution of the Commonwealth the ultimate decision-maker in all matters where there is a contest, is this Court. The Court must be obedient to its constitutional function. In the end, pursuant to s 75 of the Constitution, this limits the power of the Parliament or of the Executive to avoid, or confine, judicial review’.

¹⁶ *Migration Act 1958* (Cth), s 474(1).

¹⁷ *Plaintiff S 157/2002 v The Commonwealth* (2002) 211 CLR 476 at 513–514 [104].

From what might, therefore, have seemed at first a flimsy textual foundation for judicial review under the Australian Constitution, from more than a century of decisional law it is clear that judicial review is actually a strong remedy in the Australian constitutional setting. It could be stronger. It is sometimes ensnared in uncertain doctrines of so-called 'jurisdictional error', a category that has been abandoned in other countries.¹⁸ Nevertheless, the provision of constitutional writs and the direct access to the highest court to challenge federal official conduct are distinctive and beneficial features of judicial review in Australia. Thus, in Australia, there could be no suggestion that judicial review was unavailable in respect of Australian officials operating an off-shore prison camp, such as the one maintained by the United States of America at Guantánamo Bay. In Australia, so long as officers of the Commonwealth were deployed, they would be answerable to the courts, ultimately the High Court of Australia, by virtue of provisions of the Constitution that cannot be over-ridden by statute law.

What began in judicial review on somewhat shaky ground in Australia can thus be seen today to rest on settled legal foundations. What is sometimes needed to give it effect is a foundation in substantive law and the judicial will to afford relief where excess or neglect of power are demonstrated on the part of officers of the Commonwealth.

COUNTER-TERRORISM LEGISLATION

Since September 2001 most countries of the developed world have enacted new laws designed to afford police, security agencies and the military larger powers to deal with alleged terrorists and terrorist organizations. In this respect, Australia has been no exception.

In the middle of 2002 new federal laws were enacted by the Federal Parliament. The necessity for such laws and the utility of the laws enacted were questioned in submissions made to a Senate Committee.¹⁹ However, as passed, the legislation involved amendments to the Act governing the Australian Security Intelligence Organization (ASIO); the federal Criminal Code; broader security legislation; telecommunications interception legislation; and new provisions for the suppression of the financing of terrorism.

From the start, the greatest controversy in Australia surrounded legislative provisions permitting federal agents to take suspects into custody for ques-

¹⁸ *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611; *Enfield Corporation v Development Aid Commission* (2000) 199 CLR 135.

¹⁹ M Gani and G Urbas, 'Alert or Alarmed? Recent Legislative Reforms Directed at Terrorist Organizations and Persons Supporting or Assisting Terrorist Acts' (2004) 8 *Newcastle Law Review* 23 at 25 n 5. Note that State counterpart laws were enacted throughout Australia such as the *Terrorism (Police Powers) Act 2002* (NSW) and the *Terrorism Legislation Amendment (Warrants) Act 2005* (NSW).

tioning for the purposes of intelligence gathering in relation to alleged terrorism.²⁰ As finally passed by the Senate (which at the time the Government did not control), the legislation restricted such detention to cases authorized by judicial warrant, with provision for questioning before a judicial officer and on videotape over a period of twenty-four hours and with detention during a one week period. Subsequently, the legislation was further amended to extend the maximum time for questioning under a warrant from twenty-four to forty-eight hours. Most controversially, it was provided that an offence was committed where a person disclosed information relating to the issuing of a warrant or the questioning of the subject of a warrant, potentially during a period of two years.²¹

The federal Criminal Code was amended to incorporate prohibitions on engaging in a terrorist act (maximum penalty life imprisonment); providing or receiving training in connection with terrorist acts (maximum penalty 25 years); possessing things connected with a terrorist act where the person knows of the connection (maximum penalty 15 years imprisonment); collecting or making documents knowing of the prohibited connection (penalty 15 years); and doing any act or preparation for or planning a terrorist act (life imprisonment).²²

The mental element for the foregoing offences extended from relevant knowledge to recklessness. As well, offences were provided in the Criminal Code in relation to membership of 'terrorist organizations'. Such provisions were justified on the basis of accessorial or corporate liability, which are important features of any modern criminal law. However, they were criticized as amounting to a form of 'guilt by association'. Parallels were sometimes drawn to the offences and restrictions imposed by the *Communist Party Dissolution Act 1950* (Cth) which involved criminal and civil consequences for members of the Australian Communist Party, without more.

Following the terrorist attacks on the London transport system in July 2005, the Australian Government moved to amend the foregoing legislation still further. By July 2005, as a result of a federal election, the Government had secured a majority in the Senate. It was therefore no longer obliged to compromise with the Opposition or with minor Parties to secure passage of its legislation through the Parliament. The 2005 proposed legislation introduces enlarged powers for warrants for a range of security-related questioning. In its first manifestation, it provided for 'shoot to kill' powers and other enlargements of official authority, criticized in some quarters because of what were said to be ineffective facilities of judicial review.²³

²⁰ Gani and Urbas, above n 19, 25.

²¹ Op cit 26. See also *National Security Information (Criminal and Civil Proceedings Act 2004* (Cth).

²² Op cit 28.

²³ Anti-Terrorism Bill (No 2) 2005 (Cth), see esp cll 105.51(2), (3), (4), 105.52(4).

The great power of the idea of independent judicial examination of ‘control orders’ and other decisions, made under the foregoing legislation shows, once again, the potent metaphor that judicial review represents in modern democratic constitutional arrangements. It is as if many people recognize the need to counter-balance the swift, decisive, resolute and opinionated actions of officers of the Executive Government with the slower, more reflective, principled and independent scrutiny by the judicial branch, preformed against timeless criteria of justice and due process.

This is an old dialogue, at least in common law countries. In an earlier manifestation, it may be seen most vividly in the requirements normally imposed on officials who interfere in the liberty of the individual to bring the suspect without delay before the independent judicial branch of government so as to demonstrate to an uncommitted and unexcited outsider the lawfulness of such a serious disturbance of the norms of civilized society.²⁴

Rarely, at least in recent times, has there been such a debate in Australia about civil liberties and legislation. Of course, the legislation has had supporters.²⁵ Some critics have concentrated not on the content of the laws but on the extreme secrecy surrounding their preparation and presentation to the legislatures of Australia.²⁶ In the end, with modifications, the Australian State Premiers agreed to the substance of the Federal Government’s legislative amendments. They committed themselves to enact counterpart laws.²⁷ However, many commentators have expressed concern over the preventive detention regime being created in Australia. The critics have included former Prime Ministers on both sides of politics.²⁸ Senior judges and former judges have raised their concerns.²⁹ So have representatives of the Law Council of Australia and civil

²⁴ *Williams v The Queen* (1986) 161 CLR 278 at 283.

²⁵ N James, ‘Security Laws Will Not End the World: Memo to Civil Libertarians—Islamist Terrorists Want to Attack Our Democracy’, *Australian*, 18 October 2005, 12; Editorial ‘A Map of Madness’, *Australian*, 29 October 2005, 11; J Albrechtsen, ‘This level of hysteria suggests anti-terror laws are sound’, *Australian*, 2 November 2005, 12; Editorial, ‘The Terror Beat’, *Australian*, 10 November 2005, 13.

²⁶ L Oakes, ‘Skittling the Licksittles’, *Bulletin*, 25 October 2005, 15; ‘The Public Has a Right to Know’, *Canberra Times*, 26 October 2005, 14; N Roxon (Shadow Attorney-General), ‘Terror Laws Need Public Scrutiny’, Media Release, 26 October 2005, 17; ‘Government “bypassing public”’, *Canberra Times*, 15 November 2005, 20.

²⁷ ‘States Give Terror Laws the Green Light’, *Australian*, 28 October 2005, 6.

²⁸ ‘Whitlam and Jurists Condemn Legislation’, *The Age*, 25 October 2005, 4; ‘Whitlam Laments Labor Silence on New Laws’, *Sydney Morning Herald*, 25 October 2005, 6; ‘Time to be Alarmed—Malcolm Fraser’s Warning’, *Sydney Morning Herald*, 21 October 2005, 14; T Sweetman, ‘Where has all the good sense gone?’, *Sunday Mail*, 23 October 2005, 63.

²⁹ Such as Sir Anthony Mason, noted *Sydney Morning Herald*, 8 October 2005, 8; and another former Chief Justice of Australia, Sir Gerard Brennan, noted *Sydney Morning Herald* 25 October 2005, 1; former Chief Justice of the Family Court, A B Nicholson, noted *The Age*, 12 October 2005, 4; and ‘Laws the greatest attack on freedom says former judge’ [A B Nicholson], *The Age*, 5 November 2005, 4; Chief Justice of the Australian Capital Territory, Terence Higgins, noted *Canberra Times*, 14 October 2005;

liberties bodies.³⁰ So too have members of the Bar³¹ and legal academics.³² Even within the Government Parties, voices of concern about aspects of the law have been expressed.³³

My purpose is not to evaluate the Australian criticisms. There have been similar controversies in the British House of Commons and doubtless elsewhere. My purpose is to record the variety, intensity and persistence of the concerns. Often they have come back to the need to counterpoise any new official powers to deal with terrorist threats with judicial supervision of any Executive conduct under effective provisions for judicial review.

The support for judicial review of Executive action affecting persons accused of terrorism offences in Australia probably has its parallels in most democracies. On the other hand, the high importance of intelligence gathering and sharing and the urgency of action in some circumstances involving suspected terrorists, have led Executive authorities—especially security agencies but also the military and police—to resist moves to subject their conduct to swift and continuous external examination by independent judges as urged by the critics.

It is of the nature of such agencies (some might say of Executive Government generally) that it ‘knows’ that it is acting in the best interests of society. Officials commonly believe that external scrutiny by ‘non-experts’ is slow, technical and needlessly suspicious, involving an unwarranted intrusion into the resolute action necessary to respond to urgent modern perils.

In Australia, there has not so far been a major legal challenge to the raft of national and sub-national counter-terrorism laws enacted in great number since 2001. However, Australia did face a challenge to the legislation against the earlier form of international terrorism, namely global communism. When that challenge came, the High Court had no entrenched Bill of Rights upholding freedom of association and freedom of expression. Nor did it have a developed jurisprudence on fundamental human rights. The Government had an express electoral mandate for its law. Opinion polls showed initially that 80% of the

³⁰ ‘Law Council Sees Dangers’, noted *Northern Territory News*, 3 November 2005, 4. See also ‘Lawyers Ask for Terror Bill Boycott’, *Australian*, 27 October 2005, 6 and ‘Anti-Terror Orders a “Legal Minefield”’, *The Age*, 25 October 2005, 4.

³¹ I Barker and R Toner, ‘Ruddock Lowers the bar on Legal Terror Tactics’, *Sydney Morning Herald*, 1 November 2005, 11; G Carne, ‘A Betrayal of the Values of Democracy’, *Canberra Times*, 27 October 2005, 17; D Neal, ‘Anti-Terrorism Bill Ignores Basics of Due Process’, *Australian*, 28 October 2005, 25. See also I Barker, ‘Human rights in the Age of Counter- Terrorism’ (2005) 26 *Australian Bar Review* 267.

³² G Williams, ‘Essential Liberties are Lost in Imitation’, *Sydney Morning Herald*, 27 October 2005, 13; D Rothwell, ‘Expert Says States could be Sidelined on Terror Laws’, *ABC PM Programme*, 25 October 2005; P Keyzer, ‘States Shut the Door on Civil Liberties’, *Sydney Morning Herald*, 2 November 2005, 15.

³³ ‘Costello Fuels Doubts on Law Changes’, *The Age*, 27 October 2005, 6; ‘ACT First to Reject Anti-Terror Legislation’, *Canberra Times*, 27 October 2005, 1. See also J Morrow, ‘the Conservative Case Against the Anti-Terrorism Laws’, *Australian*, 7 November 2005, 8.

population supported it. The Opposition in Parliament had even allowed the law to pass without a parliamentary division.

The Government supported the law at a time on the basis that an Australian battalion was fighting in Korea against communist invaders. It relied on the defence power under the federal Constitution and also on the nationhood power. Chief Justice Latham upheld the constitutional validity of the law, citing Cromwell's famous words: 'Being comes before well-being'.³⁴ He said:³⁵

'The Parliament of the Commonwealth and the other constitutional organs of the Commonwealth cannot perform their functions unless the people of the Commonwealth are preserved in safety and security'.

However, Latham CJ was alone. The other five participating Justices of the High Court of Australia upheld the challenge. They declared the legislation constitutionally invalid, in totality. Justice Dixon grounded his opinion in the affront that he saw in the legislation, with its severe restrictions on the rights and privileges of individuals, to the implications of the Constitution that the Australian Commonwealth was a rule of law society in which the great power of Executive Government was always, and necessarily, limited by law:³⁶

'[Ours] is government under the Constitution and that is an instrument framed in accordance with many traditional conceptions, to some of which it give effect, as, for example, in separating the judicial power from other functions of government, others of which are simply assumed. Among these I think that it may fairly be said that the rule of law forms an assumption. In such a system I think that it would be impossible to say of a law of the character described, which depends for its supposed connection with the power upon the conclusion of the legislature concerning the doings and designs of the bodies or persons to be affected and affords no objective test of the applicability of the power, that it is a law upon a matter incidental to the execution and maintenance of the Constitution and the laws of the Commonwealth'.

More recent decisions have not always been so respectful of the fundamental assumptions to which Justice Dixon referred. Some may perhaps be read to uphold unlimited powers of legislative or Executive detention, at least in some circumstances.³⁷ Others have upheld State laws providing for unlimited detention orders following completion of a judicial sentence for criminal wrongdoing.³⁸ Others have reversed earlier judicial authority and expanded the powers over Australian citizens of military tribunals, outside the independent courts.³⁹

³⁴ *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 141.

³⁵ (1951) 83 CLR 1 at 141–142.

³⁶ (1951) 83 CLR 1 at 193.

³⁷ See e.g. *Al-Kateb v Godwin* (2004) 78 ALJR 1099; 208 ALR 124.

³⁸ *Baker v The Queen* (2004) 78 ALJR 1483, 210 ALR 1; *Fardon v Attorney-General (Q)* (2004) 78 ALJR 1519, 210 ALR 50.

³⁹ *Re Colonel Aird; Ex parte Alpert* (2004) 78 ALJR 1451, 209 ALR 311.

Still others have failed to uphold equality rights before the law of vulnerable or unpopular litigants, such as prisoners.⁴⁰ Yet none of these cases has involved an Australian court facing an explicit challenge to counter-terrorism legislation.

In answering the question of how the courts will respond to counter-terrorism legislation, it is therefore necessary to look to other countries, including to South Africa. In considering whether the courts have shown themselves worthy of the apparent confidence of those who demand the inclusion of effective opportunities of judicial review in such legislation—or whether it is misconceived to expect the courts to guard basic rights in the context of such laws⁴¹—it is timely to look to a series of decisions of national courts. My thesis is that, when such decisions are examined, they indicate, as a general statement, the utility of the provision of judicial review and the general wisdom with which final courts in a number of countries have exercised their powers in this connection.

INSTANCES OF JUDICIAL REVIEW

South Africa and the Tanzanian bombing

An early instance of the unwillingness of national courts to bend basic legal principles in the face of accusations of terrorism was the decision of the Constitutional Court of South Africa in *Mohamed v President of the Republic of South Africa*⁴² ('*Mohamed*'). The case concerned Khalfan Mohamed, who was wanted by the United States of America on a number of capital charges relating to the bombing of the United States Embassy in Dar es Salaam, Tanzania, in August 1998.

The appellant had been indicted in the United States. A warrant for his arrest had been issued by a judge of the United States District Court. The accused had entered South Africa unlawfully as an alien. He was detained by the authorities, acting in cooperation with United States officials. In his interrogation, the accused was not given the rights provided to a suspect by South African law for such a case. The South African authorities offered him a choice of deportation to Tanzania or the United States. He preferred the latter but applied to the courts for an order that the Government of the United States be required to undertake that the death penalty would not be sought, imposed or carried out on him. That order was refused at first instance and the appellant was promptly deported.

This notwithstanding, an application to the Constitutional Court was pursued on behalf of the deportee on the grounds that he had been denied the

⁴⁰ *Muir v The Queen* (2004) 78 ALJR 780, 206 ALR 189.

⁴¹ N Roxon, 'Don't Look to the Courts to Guard Terror Laws', *Canberra Times*, 26 October 2005, 15.

⁴² 2001 (3) SA 893 (CC).

protection of South African constitutional law, under which it has been held that capital punishment is contrary to fundamental guarantees.⁴³

The Constitutional Court of South Africa held that Mr Mohamed's *deportation* was unlawful and that the law relating to *extradition*, not deportation, was the national law applicable to his case. Under South African law, extradition was required to be negotiated with the requesting state under conditions obliging receipt of an assurance that the death penalty would not be imposed following a conviction. In this respect, the Court below, and the Government of South Africa, had failed to uphold a commitment implicit in the Constitution of South Africa. It was held that there had been no waiver by the accused, consenting to deportation or extradition.

By the time the Constitutional Court made its orders, Mr Mohamed was on trial in the United States before a federal court and so it was outside the effective power of the Constitutional Court, by its orders, to afford him physical protection. Nevertheless, the decision of the primary judge in South Africa was formally set aside. A declaration was made that the constitutional rights of the appellant in South Africa had been infringed. The Constitutional Court directed its Chief Officer, as a matter of urgency, to forward the text of its decision to the relevant United States federal court.⁴⁴ Following his trial in the United States, the appellant was convicted. However, he was not sentenced to death. The South African court did what it could to uphold the accused's fundamental legal rights, notwithstanding the charge of terrorist offences. The government officials in South Africa were held to have been insufficiently attentive to those rights.

In July 2004, a somewhat similar application was before the same South African court. An aeroplane had departed South Africa for Zimbabwe, en route to Equatorial Guinea. South African officials alerted their counterparts in Harare about certain suspicions that they held concerning the aircraft and its contents. The result was that the plane was searched in Harare. A quantity of weapons was found. The alleged mercenaries were arrested and brought before the courts of Zimbabwe, where they resisted deportation to Equatorial Guinea on the basis that, if convicted, they would be subject to the death penalty. They also complained about the standards of the Guinean courts.

Whilst this application was pending in Zimbabwe, the applicants also sought relief in the Constitutional Court of South Africa. They alleged that the South African officials had acted without regard to the applicants' rights under the South African Constitution. They also asserted that, in the exercise of its international relations and in any representations to be made to Zimbabwe and

⁴³ *S v Makwanyane* 1995 (3) SA 391 (CC).

⁴⁴ *Mohamed v President of the Republic of South Africa* 2001 (3) SA 893, 923 (CC).

Equatorial Guinea, the South African Government was bound, by the terms of the Constitution, to take into account the requirements of the Constitution obliging the State to defend, uphold and protect the constitutional rights of those within its protection.

The decision of the Constitutional Court in this case was delivered in August 2004.⁴⁵ It included a limited finding of the South African Government's duty in the case. In the course of argument, the Court was reminded of the famous words of Brandeis J in *Olmstead v United States*,⁴⁶ cited earlier in *Mohamed*:⁴⁷

'In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously ... Government is the potent, omnipresent teacher. For good or ill, it teaches the whole people by its example ... If the government becomes a law-breaker, it breeds contempt for the law; it invites every man to become a law unto himself; it invites anarchy.'

These last words have a special resonance in South Africa as the Constitutional Court explained in *Mohamed*:⁴⁸

'we saw in the past what happens when the State bends the law to its own ends and now, in the new era of constitutionality, we may be tempted to use questionable measures in the war against crime. The lesson becomes particularly important when dealing with those who aim to destroy the system of government through law by means of organized violence. The legitimacy of the constitutional order is undermined rather than reinforced when the State acts unlawfully.'

These words had been written by the South African judges in May 2001, before the events of 11 September of that year. Yet they remain true today; and not only in South Africa.

The United States and Guantánamo Bay

Probably the best known decision in this class of case is that of the Supreme Court of the United States in *Rasul v Bush*.⁴⁹ That decision was delivered in June 2004. The Supreme Court was divided 6:3. The opinion of the majority of the Court was written by Stevens J. Justice Scalia wrote the opinion of the dissenting judges, Rehnquist CJ, Thomas J and himself.

In the majority opinion, Stevens J cited the law authorizing President George W Bush, after 11 September 2001, to use 'all necessary and appropriate force against those nations, organizations or persons he determines planned, authorised, committed or aided the terrorist attacks ... or harbored such organizations

⁴⁵ *Kaunda and others v President of the Republic of South Africa* 2004 (10) BCLR 1009 (CC).

⁴⁶ 277 US 438, 485 (1928).

⁴⁷ 2000 (3) SA 893, 921 (CC).

⁴⁸ *Ibid.*

⁴⁹ 542 US 1 (2004).

or persons.⁵⁰ In reliance upon this law, President Bush had established a detention facility at the Naval Base in Guantánamo Bay on land leased by the United States from the Republic of Cuba. Two Australians (Mamdouh Habib and David Hicks), who were detained in the facility, together with others, filed petitions in the United States' federal courts for writs of habeas corpus. They sought release from custody, access to counsel, freedom from interrogation and other relief.

The United States District Court dismissed these petitions for want of jurisdiction. It relied on a decision of the United States Supreme Court of 1950.⁵¹ That decision had held that '[a]liens detained outside the sovereign territory of the United States [may not] invoke a petition for a writ of *habeas corpus*'. However, the Supreme Court reversed the federal court decision, granted *certiorari* and remitted the case to the federal courts. They have now been accepted again by the Supreme Court. In effect, in *Rasul*, Stevens J followed what he had earlier written in *Padilla v Rumsfeld*⁵² where he had said:

'At stake in this case is nothing less than the essence of a free society. Even more important than the method of selecting the people's rulers and their successors is the character of the constraints imposed on the Executive by the rule of law. Unrestrained Executive detention for the purpose of investigating and preventing subversive activity is the hallmark of the Star Chamber ... for if this nation is to remain true to its ideals symbolised by its flag, it must not wield the tools of tyrants even to resist an assault by the forces of tyranny'.

The decision of the majority of the Supreme Court in *Rasul* is reflective of similar notions. It traces the restraint on executive power in the United States to legal and constitutional 'fundamentals'. It does so through the history of the basic legal tradition which the United States shares with other common law countries.⁵³

As Lord Mansfield wrote in 1759, even if a territory is 'no part of the realm', there is 'no doubt' as to a court's power to issue writs of *habeas corpus*, if the territory was 'under the subjection of the Crown'.⁵⁴ Later cases confirmed that the reach of the writ depended not on formal notions of territorial sovereignty, but rather on the practical question of 'the exact extent and *nature* of the jurisdiction or dominion exercised in fact by the Crown'.⁵⁵

In *Rasul v Bush*, the rule of law was upheld by the majority of the United States Supreme Court. In the face of Executive demands for exemption from

⁵⁰ See Authorization for the Use of Military Force, Pub L No 107-243, 116 Stat 1498, 1500 (2001).

⁵¹ *Johnson v Eisentrager*, 339 US 763 (1950).

⁵² 124 SCt 2711, 2735 (2004). In this case, Stevens J dissented on the availability of habeas corpus in the circumstances.

⁵³ *Rasul v Bush*, 542 US 1, 14 (2004) (Stevens J).

⁵⁴ *King v Cowle* (1759) 97 ER 587, 598-9.

⁵⁵ *Ex parte Mwenya* [1960] 1 QB 241, 303 (Lord Evershed MR).

court scrutiny because of the suggested exigencies of terrorism and the powers of the Commander-in-Chief, the Supreme Court asserted the availability of judicial supervision and the duty of judges to perform their functions, including on the application of non-citizens. To say the least, the case is an extremely important one.

By rejecting the contention that the Executive was not answerable in the courts for the offshore detention by United States personnel of alleged terrorists, the Supreme Court of the United States gave an answer to the fear that the United States military facility at Guantánamo Bay had become a 'legal black hole'. That fear had been expressed not only by civil libertarians, dogooders and the usual worthy suspects. It had been expressed by some of the most distinguished lawyers of the common law tradition including Lord Steyn, Lord of Appeal in Ordinary,⁵⁶ Lord Goldsmith, Attorney-General for the United Kingdom,⁵⁷ Sir Gerard Brennan, past Chief Justice of the High Court of Australia⁵⁸ and the English Court of Appeal.⁵⁹ Lord Goldsmith remarked on the duty of lawyers to influence and guide the response to terrorism of states and the international community:⁶⁰

'The stakes could not be higher—loss of life and loss of liberty. The UK government is committed to taking all necessary steps to protect its citizens. I am convinced that this can be done compatibly with upholding the fundamental rights of all, including those accused of committing terrorist acts'.

Israel and the security fence

At about the same time as the decision in *Rasul v Bush* was handed down by the United States Supreme Court, the Supreme Court of Israel, on 2 May 2004, delivered its decision upon a challenge brought on behalf of Palestinian complainants concerning the 'separation fence', or 'security fence', being constructed through Palestinian land.⁶¹

⁵⁶ Lord Steyn, 'Guantanamo Bay: The Legal Black Hole' (2004) 53 *International & Comparative Law Quarterly* 1.

⁵⁷ Lord Goldsmith, 'Terrorism and Individual Liberty: The Response of the State' (2003) 57(4) *International Bar News* 8 (edited version of an address at the ABA conference 2003 at San Francisco).

⁵⁸ F G, 'Australia and the Rule of Law' (2003) *Australian International Law Journal* 1, 2–8.

⁵⁹ *R (Abbasi) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ. 1598, [66].

⁶⁰ Goldsmith, above n 55, 11.

⁶¹ Subsequently, the International Court of Justice, in response to a request for an advisory opinion from the General Assembly of the United Nations, held that the construction of the wall or 'fence' on Palestinian land was contrary to international law. See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)*, [2004] ICJ Rep 1. In the result, the General Assembly of the United Nations voted to condemn the building of the wall. Only five states voted against the resolution, including the United States, Israel and Australia: GA Res, 27th Sess, UN Doc A/ES-10L18/Rev.1 (2004).

This 'fence' was justified by the Government of Israel and the Israeli Defence Force as being essential to repel terrorist (specifically suicide) attacks against Israeli civilians and military personnel carried out from adjoining Palestinian lands. In defence of the security wall, the Israeli authorities pointed to the substantial decline in the number of such attacks that had followed the creation of the barrier. It would not have been surprising if the Supreme Court of Israel had refused to become involved in such a case. Few lawyers would have blinked an eye if the Court had ruled the matter non-justiciable or had said that it had no legal authority to deal with such an issue, lying at the heart of the urgent responsibilities of the Executive for the defence of the nation.

However, from bitter experience, the Jewish people have learned about the great dangers of legal black holes. In the Germany of the Nazis, the problem was not a lack of law. Most of the actions of the Nazi state were carried out under detailed laws made by established law-makers.⁶² The problems for the Jewish people and other victims of the Third Reich arose from the pockets of official activity that fell outside legal superintendence. Legally speaking, these, truly, were 'black holes'.

It is evident that the Supreme Court of Israel was determined to avoid such an absence of effective judicial supervision. The Court did not call into question the basic decision of the Executive to build the fence or wall. However, applying what common law judges would describe as principles of administrative law or of constitutional proportionality, it upheld the complaints concerning the excessive way in which the wall had been created in several areas.

At the conclusion of his reasons, Justice Aharon Barak, President of the Israeli Court, said:⁶³

'Our task is difficult. We are members of Israeli society. Although we are sometimes in an ivory tower, that tower is in the heart of Jerusalem, which is not infrequently hit by ruthless terror. We are aware of the killing and destruction wrought by the terror against the state and its citizens. As any other Israelis, we too recognize the need to defend the country and its citizens against the wounds inflicted by terror. We are aware that in the short term, this judgment will not make the state's struggle against those rising up against it easier. But we are judges. When we sit in judgment, we are subject to judgment. We act according to our best conscience and understanding. Regarding the state's struggle against the terror that rises up against it, we are convinced that at the end of the day, a struggle according to the law will strengthen her power and her spirit. There is no security without law. Satisfying

⁶² Including, e.g., *Law for the Restoration of the Professional Civil Service* 1933 (Germ) and the *Law for the Protection of German Blood and Honour* 1935 (Germ). See discussion in *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 415–17. Note the hortatory titles of these German laws: a practice that has spread. The *Patriot Act* in the United States is an example.

⁶³ *Beit Sourik Village Council v Government of Israel* (Unreported, Supreme Court of Israel sitting as the Israeli High Court of Justice, Barak P, Mazza VP, Cheshin J, 2 May 2004) 44–5.

the provisions of the law is an aspect of national security. In *The Public Committee against Torture in Israel v The Government of Israel*, at 845 [I said]:

“We are aware that this decision does not make it easier to deal with that reality. This is the destiny of a democracy—she does not see all means as acceptable, and the ways of her enemies are not always open before her. A democracy must sometimes fight with one arm tied behind her back. Even so, a democracy has the upper hand. The rule of law and individual liberties constitute an important aspect of her security stance. At the end of the day, they strengthen her spirit and this strength allows her to overcome her difficulties.”

‘That goes for this case as well. Only a separation fence built on a base of law will grant security to the state and its citizens. Only a separation route based on the path of law, will lead the state to the security so yearned for.’

The Supreme Court accepted the petitions in a number of cases, holding that the injury to the petitioners was disproportionate to the asserted security needs. It ordered relief and costs in favour of those petitioners.⁶⁴

Indonesia and the Bali bombing

On 23 July 2004, the Constitutional Court of Indonesia set aside the punishment imposed on Masykur Abdul Kadir, convicted and sentenced to 15 years’ imprisonment for helping Imam Samudra in connection with the bombing in Bali on 13 October 2002. That bombing resulted in the killing of 202 people, including 88 Australians. The decision of the Indonesian Court was reached by a majority, five Justices to four.⁶⁵ The problem arose out of the decision of the prosecutor to proceed against the accused not on conventional charges of homicide or crimes equivalent to arson, conspiracy, use of explosives etc. Instead, the accused were charged only under a special anti-terrorism law, introduced as a regulation six days *after* the bombings in Bali.⁶⁶

The amended Indonesian Constitution contains basic principles protecting human rights and fundamental freedoms. One of these principles, reflected in many statements of human rights,⁶⁷ is the prohibition on criminal legislation having retroactive effect. Under international law, an exception is sometimes

⁶⁴ For a collection of jurisprudence of Israeli cases on terrorism-related issues, see Israel Supreme Court, *Judgments of the Israel Supreme Court: Fighting Terrorism within the Law* (2005) Israel Ministry of Foreign Affairs.

⁶⁵ For an English summary with extensive extracts from the judgment, see Simon Butt and David Hansell, ‘Casenote: The Masykur Abdul Kadir Case: Indonesian Constitutional Court Decision No 013/PUU-I/2003’ (2004) 6 *Australian Journal of Asian Law* 176, 185. See also Ross Clarke, ‘Retrospectivity and the Constitutional Validity of the Bali Bombing and East Timor Trials’ (2003) 5 *Australian Journal of Asian Law* 2.

⁶⁶ Bali Bombers’ Convictions Ruled Illegal’, *Sydney Morning Herald* (Sydney), 24 July 2004, 1.

⁶⁷ See, e.g. *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171, art 15 (entered into force 23 March 1976); *European Convention on Human Rights*, opened for signature 4 November 1950, 213 UNTS 222, art 7(1) (entered into force 3 September 1953). The sub-article is not derogable under the *European Convention*: see art 15(2).

allowed to permit trial or punishment ‘for any act or omission which, at the time it was committed, was criminal according to the general principles of law recognized by civilized countries’.⁶⁸ This exception is drawn from the *Statute of the International Court of Justice*.⁶⁹

The decision of the Indonesian Court was not wholly unexpected amongst lawyers who were following the Bali trials. During the Bali hearings, the problem of retroactive punishment had been repeatedly canvassed in the Australian media.

There would have been many reasons of a psychological kind for the Indonesian judges to reject the accused Bali bombers’ appeal to the prohibition against retrospective punishment. The evidence against the accused, demonstrating their involvement in the bombings was substantial and often uncontested. The behaviour of some of the accused, in the presence of grieving relatives, was provocative and unrepentant. The pain for the families of victims was intense. The damage to the economy of Bali and Indonesia, caused by the bombings, was large. The affront of the bombings to the reputation of Indonesia was acute. In this sense, the case was a severe test for the judges of the Constitutional Court sworn to uphold the rule of law.

The rule of law is itself one of the fundamental principles which democrats, the world over, defend against terrorists.⁷⁰ As Latham CJ once said in another Australian case,⁷¹ it is easy for judges of constitutional courts to accord basic rights to popular majorities. However, the real test comes when they are asked to accord the same rights to unpopular minorities and individuals. The Indonesian case of Masykur Abdul Kadir was such a test.

Other proceedings may now be brought against Mr Kadir. The others convicted, who have exhausted their rights of appeal, may have no further remedies. Time will tell. But in the long run, the fundamental struggle against terrorism is strengthened, not weakened, by court decisions that insist upon adherence to the rule of law.

In a comment on the Indonesian court’s decision, an Australian editorialist said:⁷²

‘The Constitutional Court decision should be seen for what it is—part of a proper legal process in which every person has the right to exhaust all avenues of appeal.

⁶⁸ *European Convention*, opened for signature 4 November 1950, 213 UNTS 222, art 7(2) (entered into force 3 September 1953).

⁶⁹ Art 38. See Lord Lester and D Pannick, *Human Rights: Law and Practice* (2nd ed, 2004), 260 par [4.7.7].

⁷⁰ See D Kerr, ‘Australia’s Legislative Response to Terrorism’ (2004) 29 *Alternative Law Journal* 131 at 134.

⁷¹ *Adelaide Company of Jehovah’s Witnesses Inc v Commonwealth* (1943) 67 CLR 116, 124.

⁷² Editorial, ‘One Step Back Over Bali’, *Sydney Morning Herald* (Sydney), 27 July 2004, 10.

This is a positive development for Indonesia. The ensuing legal uncertainty, and the inevitable distress it will cause ... could and should have been avoided’.

Recent British security decisions

Other cases arose dealing with aspects of the response to terrorism. Indeed, such cases are beginning to appear in many jurisdictions. On 18 March 2004, the English Court of Appeal delivered its judgment in *Secretary of State for the Home Department v M*.⁷³ The reasons of the Court of Appeal were delivered by Lord Woolf CJ. The case was an application by the Home Secretary for leave to appeal against a decision of the Special Immigration Appeals Commission. That body had been established by the United Kingdom Parliament in response to an earlier decision of the European Court of Human Rights.⁷⁴ The latter had criticized the procedures that then existed under the legislation then in force to respond to terrorism in Northern Ireland.

By law, the Special Commission is a superior court of record. Its members are appointed by the Lord Chancellor. A Special Commission judge must hold, or have held, high judicial office. This provision was in place when the events of 11 September 2001 occurred. Under the *Anti-Terrorism, Crime and Security Act 2001* (UK), the British Home Secretary enjoys the power to issue a certificate in respect of a person whose presence in the United Kingdom is deemed a ‘risk to national security’ or who is suspected to be a ‘terrorist’.⁷⁵ The then Home Secretary, Mr David Blunkett, granted such a certificate in the case of ‘M’, a Libyan national present in the United Kingdom. M was thereupon taken into custody with a view to his deportation.

Early in March 2004, the Special Commission, presided over by Collins J, allowed M’s appeal against the Home Secretary’s certificate. The Home Secretary challenged this action, which he declared was an unwarranted judicial interference in an essentially political and ministerial judgment. He therefore sought leave to appeal to the Court of Appeal. He complained that the Commission had reversed a decision for which he was accountable to Parliament and, through the democratic process, to the electorate.

The English Court of Appeal rejected the Home Secretary’s application. It affirmed the decision of the Commission. It described the role played by the ‘special advocate’ under the new arrangements established by the British Parliament for participation of that advocate in the procedures of the Commission in such a case. The aim of the ‘special advocate’ is to make the attainment of justice possible in a legal proceeding where certain information

⁷³ [2004] 2 All ER 863 at 879 [13].

⁷⁴ *Chahal v United Kingdom* (1996) 23 Eur Court HR 413. See Lord Lester of Herne Hill and David Pannick, *Human Rights Law and Practice* (2nd ed, 2004) 182.

⁷⁵ *Anti-Terrorism, Crime and Security Act 2001* (UK) s 21(1).

cannot be disclosed to the accused or the accused's lawyers, because of the suggested interests of national security:⁷⁶

'The involvement of a special advocate is intended to reduce (it cannot wholly eliminate) the unfairness which follows from the fact that an appellant will be unaware at least as to part of the case against him. Unlike the appellant's own lawyers, the special advocate is under no duty to inform the appellant of secret information. That is why he can be provided with closed material and attend closed hearings. As this appeal illustrates, a special advocate can play an important role in protecting an appellant's interest before the [Commission]. He can seek information. He can ensure that evidence before [the Commission] is tested on behalf of the appellant. He can object to evidence and other information being unnecessarily kept from the appellant. He can make submissions to [the Commission] as to why the statutory requirements have not been complied with. In other words, he can look after the interests of the appellant, in so far as it is possible for this to be done, without informing the appellant of the case against him and without taking direct instructions from the appellant.

Ironically, the alleged terrorist, M, had refused to cooperate with the 'special advocate'. Presumably, he thought that this was no more than a typical British formality, designed to give a veneer of protection where none would in fact be afforded. At the beginning of the proceedings, M stated that he did not wish to take any part in the hearing. However, he affirmed that he was not involved in, nor did he support, acts of terrorism. It was then left to the Commission's own procedures to scrutinize the decision of the Home Secretary to the contrary effect.

In the result, the Commission ruled against the Home Secretary. The Court of Appeal, like the Commission, conducted part of its hearing in closed session. Only a portion of the Court's reasons was given on the public record. The Court of Appeal insisted that the suspicion of the Minister had to be a *reasonable* suspicion. It stated that the Minister had failed to demonstrate error on the part of the Commission. In his concluding remarks, Lord Woolf CJ, for the Court of Appeal, said:⁷⁷

'Having read the transcripts we are impressed by the openness and fairness with which the issues in closed session were dealt with ... We feel the case has additional importance because it does clearly demonstrate that, while the procedures which [the Commission] have to adopt are not ideal, it is possible by using special advocates to ensure that those detained can achieve justice and it is wrong therefore to under-value the SIAC appeal process. ... While the need for society to protect itself against acts of terrorism today is self-evident, it remains of the greatest importance that, in a society which upholds the rule of law, if a person is detained as "M" was detained, that individual should have access to an independent tribunal or court which can adjudicate upon the whether of whether the detention is lawful or not. If it is not lawful, then he has to be released'.

⁷⁶ [2004] EWCA Civ 324, [13].

⁷⁷ [2004] EWCA Civ 324, [34].

There have been more recent developments in the British House of Lords—one judicial and the other political. In December 2004, the House of Lords judicial board handed down its decision in *A (FC) v Secretary of State for the Home Department*.⁷⁸ The case arose out of the arrest of nine persons under the United Kingdom Terrorism legislation, including the *Anti-Terrorism (Crime and Security) Act 2001* (UK). The detainees had been taken into custody in December 2001. They were all non-citizens. None had been charged with offences or brought to trial, still less convicted. They sought release. Their case came before the Special Commission previously mentioned. That Commission upheld their objection to the lawfulness of their detention. However, on this occasion the Commission's order was set aside by the English Court of Appeal. It emphasized the importance of judicial deference in such matters to the Minister's decision.

By a decision of eight to one, the Law Lords reversed the Court of Appeal. They restored the decision, obliging release of the detainees. Lord Bingham, the Senior Law Lord, in his reasons, responded to the suggestion that interference by the courts in such matters would amount to 'judicial activism'. This was an accusation commonly levelled at the courts in the United States by the former United States Attorney-General John Ashcroft. Citing the reasons of Simon Brown LJ in *International Transport Roth GmbH v Secretary of State for the Home Department*,⁷⁹ Lord Bingham said:⁸⁰

'The Court's role under the [*Human Rights Act*] is as the guardian of human rights. It cannot abdicate this responsibility ... [J]udges nowadays have no alternative but to apply the *Human Rights Act* ... Constitutional dangers exist no less in too little judicial activism as in too much. There are limits to the legitimacy of executive or legislative decision-making, just as there are to decision-making by the courts'.

Lord Nicholls opened his reasons with the following remarks:⁸¹

'Indefinite imprisonment without charge or trial is an anathema in any country which observes the rule of law. It deprives the detained person of the protection a criminal trial is intended to afford. Wholly exceptional circumstances must exist before this extreme step can be justified. The government contends that these post-9/11 days are wholly exceptional ... The principal weakness in the government's case lies in the different treatment accorded to nationals and non-nationals'.

Lord Hoffmann, in his reasons, said:⁸²

'This is a nation which has been tested in adversity, which has survived physical destruction and catastrophic loss of life. I do not under-estimate the ability of fanatical groups of terrorists to kill and destroy, but they do not threaten the life of

⁷⁸ [2005] 2 AC 68 (HL).

⁷⁹ [2003] QB 728, [27].

⁸⁰ [2005] 2 AC 68 at 109–110 [41].

⁸¹ [2005] 2 AC 68 at 127.

⁸² [2005] 2 AC 68 at 132.

the nation. Whether we would survive Hitler hung in the balance, but there is no doubt that we shall survive Al Qaeda. The Spanish people have not said that what happened in Madrid, hideous crime as it was, threatened the life of their nation ... Terrorist violence, serious as it is, does not threaten our institutions of government or our existence as a civil community'.

Baroness Hale, the only woman member of the House of Lords judicial board, observed:⁸³

'No one has the right to be an international terrorist. But substitute "black", 'disabled', 'female', 'gay' or any other similar adjective for 'foreign' before 'suspected international terrorist' and ask whether it would be justifiable to take power to lock up that group but not the 'white', 'able-bodied', 'male' or 'straight' suspected international terrorists. The answer is clear'.

Lord Walker dissented from the majority. However, the Law Lords' majority voice was clear. Unlimited detention of non-nationals was inconsistent with their Lordships' view of the British Constitution, with British legal history and with the provisions of the *Human Rights Act 1998* (UK).

This decision led to a flurry of political measures aimed at increasing ministerial powers. However, the Prevention of Terrorism Bill was held up, in late night sittings in March 2005, by the repeated insistence of the House of Lords upon amendments. In the end, on 11 March 2005, the British Government backed down. It continued to insist that decisions, affording the Home Secretary the power to impose 'control orders' should be made on the civil, and not the criminal, onus. But it agreed to insert an effective sunset clause of one year, after which the legislation must be reviewed. More importantly, it agreed that the Ministerial power to impose 'control orders' on terrorist suspects, restricting their liberties, could only be made with the approval of a judge.⁸⁴

After the July 2005 bombings in the London Underground, a still further enhancement of official powers was proposed to the British Parliament. In a major reverse for Mr Blair, in early November 2005, the proposed period of detention of suspects without charge was reduced from 90 days to 28 days.

CONCLUSIONS

Four hundred years of terrorism

This conference in South Africa occurs four hundred years after the Gunpowder Plot of 1605. This fact represents one of those ironical historical coincidences. On 5 November 1605, Guy Fawkes and his co-conspirators planned to blow up

⁸³ [2005] 2 AC 174–175.

⁸⁴ James Kirkup, 'Blair's Olive Branch Ends Struggle Over Terrorism Bill', *The Scotsman* (Edinburgh), 12 March 2005, 1.

the Houses of Parliament at Westminster and to kill King James I and the leaders of the kingdom expected to be gathering there.⁸⁵

Fawkes and his colleagues aimed to restore Roman Catholic supremacy in Britain. Their plot, when discovered, led to State trials in the Court of Star Chamber, multiple executions and renewed legal disadvantages for Catholics in Britain.⁸⁶ King James authorized 'the gentler tortours ... to be first used', so as to extract confessions from the accused. The imposition of torture upon terrorists suspects has been a feature of modern, as well as historical, events.⁸⁷

The happening four hundred years ago has certain parallels for the events of our own time. A plot against the State. Fanatical devotees of a religious minority believing that God was on their side. The planned use of new weapons of mass destruction. Civil fear and outrage. Calls for the use of extreme retaliatory measures. Atypical and unfair trials. Extreme punishments. One hopes that, in modern democratic states, we have learned something from the intervening four hundred years, including about a sense of proportion and the need to tackle threats of terrorism in an effective but law-complying and non-extreme way.

A common thread runs through most of the decisions of the final courts that I have reviewed concerning terrorist cases and anti-terrorist measures. This is the insistence of the courts that, however novel some of the methods used by terrorists and the dangers presented, the proper course of a democratic legal order is to adhere closely to the rule of law and to uphold fundamental human rights. Of course, there are some Executive officials, together with assorted allies in sections of the media, who at the very accusation of terrorist involvement will throw away the book, forget basic liberties and demand open-ended exceptionalism. The lesson of history is that such a course plays into the hands of terrorists. It reduces civilized nations to the terrorists' level. It allows the terrorists to determine the rules of engagement. It risks diminishing the quality of democratic life which is hard thereafter to repair and reinstate.

The experienced voice of Aharon Barak

The need to maintain judicial review in the face of terrorist attacks has been a constant theme of the judicial and extra-judicial writings of Aharon Barak, President of the Supreme Court of Israel. In his foreword, 'The Role of a Supreme Court in a Democracy',⁸⁸ Justice Barak wrote:

⁸⁵ N Neligan, 'The Gunpowder Plot: The First Act of Modern Terrorism' (2002) 7(4) *Bar Review* 27.

⁸⁶ D Carswell (ed), *Trial of Guy Fawkes and Others (The Gunpowder Plot)* (1995), 40.

⁸⁷ See e.g. Amnesty International, *Guantánamo: An Icon of Lawlessness* (2005); Human Rights Watch, *Guantánamo: Three Years of Lawlessness* (2005).

⁸⁸ 116 *Harvard Law Review* 19, 151–152 (2002).

'Terrorism does not justify the neglect of accepted legal norms. This is how we distinguish ourselves from the terrorists themselves. They act against the law, by violating and trampling it. A democratic State acts in its war against terrorism within the framework of the law and according to the law. This was well expressed by Justice Haim Cohen more than twenty years ago when he said:

"What distinguishes the war of the State from the war of its enemies is that the State fights while upholding the law, whereas its enemies fight while violating the law. The moral strength and the objective justification of the government's war depend entirely on upholding the laws of the State: by conceding this strength and this justification, the government serves the purposes of the enemy. Moral weapons are no less important than any other weapon, and they are perhaps more important. There is no weapon more moral than the rule of law. Everyone who ought to know should be aware that the rule of law in Israel will never yield to its enemies."

On the scope of judicial intervention (and thus of judicial review) Justice Barak proceeds:⁸⁹

'Judicial review of the war against terrorism by its nature raises the question of the timing and scope of judicial intervention. There is no theoretical difference between applying judicial review before or after combat. In fact, however, Chief Justice Rehnquist was correct in noting that the time of judicial intervention affects its content. Indeed, "courts are more prone to uphold war-time claims of civil liberties after the war is over". He asks, then, whether it isn't better to abstain from judicial application during warfare. The answer, from my point of view, is clear: I will adjudicate a question when it is presented to me. I will not defer it, because the fate of a human being may hang in the balance. Protection of human rights would be bankrupt if, during combat courts—consciously or unconsciously—decided to review the behaviour of the Executive branch only after the period of emergency. The adjudication must be effective; it cannot be delayed until after the period of emergency has passed. Furthermore, the decision need not make do with general declarations about the balance of human rights and the need for security. The judicial ruling must impart guidance and direction to the specific cases before it. Justice Brennan [of the United States Supreme Court] correctly noted that, '[Abstract] principles announcing the applicability of civil liberties during times of war and crises are ineffectual when a war or crisis comes along unless the principles are fleshed out by detailed jurisprudence explaining how those civil liberties will be sustained against particular national security concerns'.

And Justice Barak faces the hard question of whether courts should back-off completely, and deny judicial review in times of an alleged terrorist crisis and the need for urgent of Executive action. His answer—coming from a man and judge who, as a boy, was rescued from the jaws of the Holocaust in a hessian bag—is strong and clear:⁹⁰

⁸⁹ Op cit 156–157.

⁹⁰ Op cit 158–159.

‘Is it proper for judges to review the legality of the war on terrorism? Many argue that the Court ought not to become involved in these matters. These arguments are heard from both extremes of the political spectrum. On one side, they argue that judicial intervention undermines security; on the other side they argue that judicial activity gives legitimacy to actions of the government authorities in their war against terrorism. Both arguments are unacceptable. Judicial review of the legality of the war on terrorism may make the war against terrorism harder in the short term. It fortifies and strengthens the people in the long term. The rule of law is a central element in national security ... In the final analysis, this subservience does not weaken democracy but actually strengthens it. It makes the struggle against terrorism worthwhile. ... The role of the court is to ensure the constitutionality and legality of the fight against terrorism. It must ensure that the war against terrorism is conducted within the framework of the law and not outside it. This is its contribution to the struggle of democracy to survive. In my opinion it is an important contribution, one that realizes the judicial role in a democracy’.

I remind any sceptics and the critics of these words that they are written not by an ivory tower professor, safe in his comfortable study on a university campus, far from battle. These are the words of the highest judge in a country that has had to confront the daily challenges of violent acts, amidst as many legal challenges demanding immediate responses from judges who are themselves in the front line of the anger of the disparate interests who disagree with their rulings.

Business as usual in the courts

No one doubts that new dangers are presented to contemporary society by fanatics of all religions; by suicide bombers; and by their access to new and powerful weapons of death and destruction that endanger individuals and frighten peaceful civilian populations. Against such dangers, democratic societies are certainly entitled to protect themselves. But they must do so in accordance with the norms of constitutionalism.

This means that democratic societies must afford basic protections for suspects. The world of intelligence and surveillance, and of Executive government action, can often make mistakes. Such mistakes may be based on excitement, false facts and wrong presumptions. The death of the Brazilian worker in the London Underground in July 2005 testifies to this danger. So does an event in Australia which recently led to a substantial damages payout after ASIO and other federal operatives entered the wrong address at gunpoint, causing great alarm and distress to the residents there.⁹¹ Mistakes and human errors inevitably occur. Courts know this. It is what makes them vigilant to scrutinize Executive action against the possibility of error, excess and unlawfulness.

⁹¹ Australian Broadcasting Corporation, *Online*, ‘Couple win payout over ASIO, AFP raid’, 1 November 2005.

Centuries of experience demonstrates that judicial review has the enduring merit of subjecting governmental and other enthusiasms to the scrutiny of detached, independent-minded people well versed in history, including legal history. The experience of history and of the cases that I have collected, old and new, suggests the wisdom of this form of scrutiny. That is why the message of the courts for the present age is, and should be, a simple one. Nothing fundamental has changed. Indeed, the fundamentals remain in place. Constitutionalism and the rule of law prevail. Judicial and constitutional review are crucial attributes of liberty. They must still apply. Business as usual.

Standards of Review of Administrative Action

REVIEW FOR REASONABLENESS

PROF CORA HOEXTER*

Review for reasonableness naturally springs to mind in any discussion of the standards of review applicable to administrative action and possible variations in those standards. One explanation for this is more or less universal. Reasonableness seems to invite review on the merits, or substantive review, and on that basis it is probably a controversial ground of review in every administrative-law jurisdiction where it is found. But there are some distinctively South African explanations too. This ground of review is laden with political and emotional baggage for South African administrative lawyers because we had to make do with such a feeble version of it for so long, and because we had to fight so hard for a more vigorous one.

That battle was won decisively. Today s 33 of the Constitution¹ gives us an unqualified right to administrative action that is 'reasonable'. With the enactment of the Promotion of Administrative Justice Act 3 of 2000, however, a new problem arose: although the purpose of the statute was to 'give effect to' the rights in s 33, there was a marked and unfortunate contrast between the right to reasonable administrative action in s 33(1) and the corresponding provision in the Act, s 6(2)(h). That difficulty, too, has been overcome by the decision of the Constitutional Court in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & others*²—a case that illuminates several aspects of review for reason-

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¹ Constitution of the Republic of South Africa, Act 108 of 1996. Section 33(1) and (2) read as follows:

'(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
(2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.' Section 33(3) required the enactment of national legislation to 'give effect to' the rights in subsecs (1) and (2), and was the spur behind the creation of the Promotion of Administrative Justice Act (PAJA).

² 2004 (4) SA 490 (CC).

ableness. In the considerable light shed by the main judgment of O' Regan J³ in *Bato Star*, this paper briefly examines the meaning of reasonableness as a ground of review in our administrative law, the standard of review called for, and related issues such as the relationship between reasonableness and judicial deference.

I REASONABLENESS IN THE PAST

Reasonableness played a strictly limited role in pre-democratic South African administrative law. There was a test for the reasonableness of administrative action of a legislative⁴ kind, and in 1976 we acquired a test for 'purely judicial'⁵ decisions, but our courts steadfastly denied that mere 'administrative'⁶ decisions could be tested for reasonableness per se—and of course such decisions made up by far the largest category in the courts' stilted and stultifying system of classifying administrative functions. Instead we had what came to be called 'symptomatic' unreasonableness.⁷ Only in the presence of gross⁸ or strikingly gross⁹ unreasonableness were the courts willing to infer some sort of abuse of discretion: mala fides, ulterior motive or failure to apply the mind.

In the early days of the constitutional negotiations it was dispiriting to find that the ANC, then a liberation movement, supported just the sort of test that might have found favour with the National Party government: a standard of 'such gross unreasonableness ... as to amount to manifest injustice'.¹⁰ Indeed, reasonableness was such a touchy subject during the negotiations that the word 'reasonable' did not itself appear in the administrative justice clause in the interim Constitution;¹¹ instead, s 24(d) promised administrative action that

³ Her judgment was concurred in by all the other member of the court. However, Ngcobo J added a separate judgment in order to underscore the importance of transformation in the context of the enabling legislation (see para 69).

⁴ In terms of the venerable principle in *Kruse v Johnson* [1898] 2 QB 91.

⁵ As a result of the decision in *Theron v Ring van Wellington van die NG Sendingkerk in Suid-Afrika* 1976 (2) SA 1 (A).

⁶ As Stratford JA indicated in *Union Government (Minister of Mines and Industries) v Union Steel Corporation (South Africa) Ltd* 1928 AD 220 at 236–7, 'nowhere has it been held that unreasonableness is sufficient ground for interference'.

⁷ The phrase was invented by Jérôld Taitz: see 'But 'Twas a Famous Victory' 1978 *Acta Juridica* 109 at 111.

⁸ *Union Government v Union Steel Corporation Union Government (Minister of Mines and Industries) v Union Steel Corporation (South Africa) Ltd* 1928 AD 220 at 237.

⁹ In *National Transport Commission v Chetty's Motor Transport (Pty) Ltd* 1972 (3) SA 726 (A) at 735G–H Holmes JA held that only gross unreasonableness of a 'striking degree' would warrant such an inference.

¹⁰ See the ANC's draft Bill of Rights published in (1991) 7 *SAJHR* 110.

¹¹ Constitution of the Republic of South Africa, Act 200 of 1993.

was ‘justifiable’ in relation to the reasons given for it.¹² In view of this history, it is remarkable that the drafters of the 1996 Constitution were able to overcome their fears so thoroughly as to include an unqualified right to reasonable administrative action in s 33(1).

Some regard this lack of qualification as an open invitation to merits review and its dangers. The fear is that notwithstanding their lack of qualification to interfere with administrative matters, or what one might call their institutional incompetence, judges will be allowed and even encouraged to step outside their constitutional competence—their proper and confined constitutional role.¹³ Apprehensions of this kind no doubt explain why the legislature opted for such a heavily qualified ground of review for reasonableness in the PAJA. They also explain why reasonableness is the context in which one would expect to see the initial development of a doctrine of deference or respect in administrative law—which is precisely what has happened here in South Africa. In *Bato Star*,¹⁴ a case concerning the reasonableness of allocations of deep-sea fishing quotas, the Constitutional Court builds on the foundations laid by the Supreme Court of Appeal in this regard.¹⁵

II REASONABLENESS TODAY

(a) *The elements of reasonableness*

These days it is uncontroversial that reasonableness in South African administrative law, as in several other jurisdictions, has two components: rationality and proportionality.¹⁶ This echoes a distinction that has been made in the juris-

¹² ‘Justifiable’ may have sounded safer than ‘reasonable’, but in fact it was widely thought to mean exactly the same thing. However, the responses of the courts varied considerably, with some of them continuing to employ the framework of symptomatic unreasonableness. See C Hoexter ‘Unreasonableness in the Administrative Justice Act’ in C Lange & J Wessels (eds) *The Right to Know: South Africa’s Promotion of Administrative Justice and Access to Information Acts* (2004) 148 at 151.

¹³ Traditional conceptions of institutional and constitutional competence are challenged in the particular context of socio-economic rights in M Pieterse ‘Coming to Terms with the Judicial Enforcement of Socio-Economic Rights’ (2004) 20 *SAJHR* 383. Several of Pieterse’s arguments are relevant to administrative law as well, and will be of considerable interest to anyone seeking an account of the separation of powers in South Africa today.

¹⁴ *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & others* 2004 (4) SA 490 (CC).

¹⁵ In the same matter and in an earlier case: see the judgment of Cameron JA in *Logbro Properties CC v Bedderson* NO 2003 (2) SA 460 (SCA) paras 20–22 and that of Schutz JA in *Minister of Environmental Affairs and Tourism v Phambili Fisheries (Pty) Ltd; Minister of Environmental Affairs and Tourism v Bato Star Fishing (Pty) Ltd* 2003 (6) SA 407 (SCA) paras 47–53.

¹⁶ The acceptance of proportionality, in particular, tends to vary across jurisdictions. As De Ville notes, the principle derives from German law and has application in a number of European countries. In English law proportionality tends to be confined to human-rights cases and those involving European Community law. The principle has a foothold in Canadian law, particularly where Charter rights are concerned, but is less well accepted in Australia and New Zealand: J R de Ville *Judicial Review of Administrative Action in South Africa* (2003) 203. For a recent account of the application

(... continued on next page)

prudence of the Constitutional Court more generally between a standard of mere *rationality* and a more onerous requirement of *reasonableness*.¹⁷

Rationality refers to the 'structure' rather than the effects of an administrative action. As I have explained more fully elsewhere,¹⁸ a rational action is one that is supported by the evidence available to the administrator and the reasons given for it, and one that is objectively capable of furthering the purpose for which the power was given and for which the action was purportedly performed. The point of proportionality, on the other hand, is to avoid an imbalance between the adverse and the beneficial effects or consequences of an action¹⁹ and to encourage the administrator to consider both the need for the action and the possible use of less drastic or oppressive means to accomplish the desired end.

Proportionality is by no means unknown to our common law,²⁰ and in recent years there has been appreciable growth in judicial support for the concept in administrative law.²¹ Its two essential components, balance and necessity, were nicely encapsulated in one of the grounds of review proposed by the South African Law Commission in the report that preceded the enactment of the PAJA.²² Clause 7(1)(g) of the Commission's Administrative Justice Bill covered 'disproportionality between the adverse and beneficial consequences of the action' and 'less restrictive means to achieve the purpose for which the action was taken'.²³ The element of 'suitability', which relates to the

(continued from previous page ...)

of unreasonableness and proportionality in England, India and Sri Lanka, see S Felix 'Engaging Reasonableness and Proportionality as Standards of Review in England, India and Sri Lanka'; and in relation to Hong Kong, see J Chan 'A Sliding Scale of Reasonableness in Judicial Review' (unpublished papers presented at a Comparative Administrative Justice Conference at the University of Cape Town, 20–22 March 2005).

¹⁷ See e.g. *Bel Porto School Governing Body v Premier, Western Cape* 2002 (3) SA 265 (CC) para 46; *Khosa v Minister of Social Development*; *Mahlaule v Minister of Social Development* 2004 (6) SA 505 (CC) para 67. The distinction is pursued by H Corder in his contribution.

¹⁸ See C Hoexter 'Unreasonableness in the Administrative Justice Act' in C Lange & J Wessels (eds) *The Right to Know: South Africa's Promotion of Administrative Justice and Access to Information Acts* (2004) 148 at 153–4.

¹⁹ *Ibid.*

²⁰ For instance, parts of the test in *Kruse v Johnson* [1898] 2 QB 91 are based on proportionality. For further examples see J R de Ville *Judicial Review of Administrative Action in South Africa* (2003) 203 at 206n96.

²¹ See e.g. the much-cited test of 'suitability, necessity and proportionality' called for by Van Deventer J in *Roman v Williams* NO 1998 (1) SA 270 (C) at 281D–E; *Schoombie v MEC for Education, Mpumalanga* 2002 (4) SA 877 (T) at 885D–E; *Mafongisi v United Democratic Movement* 2002 (5) SA 567 (Tk) paras 14–15; and the minority judgment of Mokgoro and Sachs JJ in *Bel Porto School Governing Body v Premier, Western Cape* 2002 (3) SA 265 (CC), especially para 166.

²² South African Law Commission *Report on Administrative Justice* (August 1999).

²³ *Op cit* 29.

use of appropriate means, has sometimes been referred to by the courts²⁴ but did not appear explicitly in the Bill.

(b) *The scope and standard of review for reasonableness*

As has been confirmed by the judgment of O' Regan J in *Bato Star*, the PAJA is now the main pathway to judicial review in our administrative law.²⁵ The next question, then, must be to what extent the PAJA gives effect to the two elements of rationality and proportionality.

The answer in relation to rationality is that s 6(2)(f)(ii) of the PAJA expresses this element in full measure. Section 6(2)(f)(ii) is a fairly searching provision which enables a court to check that action is rationally connected to 'the purpose for which it was taken; the purpose of the empowering provision; the information before the administrator; [and] the reasons given for it by the administrator'. But the element of proportionality does not appear in the Act, at least not explicitly. Parliament rejected the Law Commission's proposal in this regard and replaced it with s 6(2)(h), which is very reminiscent of the *Wednesbury*²⁶ test of English law. Section 6(2)(h), while it does contemplate unreasonable effects, does not mention any kind of balance between means and ends or the use of less restrictive means, as the Law Commission's recommended clause did. Instead, it says that action is subject to review if it is 'so unreasonable that no reasonable person could have so exercised the power or performed the function'. How are we to read this ground of review? In particular, what standard of reasonableness does it set; and can proportionality be read into it?

It might be argued that it is entirely appropriate to set a low standard for the review of reasonableness on the basis that courts must necessarily show deference to the judgment of administrators in this area. On this argument one would want to interpret s 6(2)(h) as requiring something similar to gross unreasonableness. For instance, counsel in the case of *Trinity Broadcasting (Ciskei) v Independent Communication Authority of South Africa*²⁷ argued that 'perversity' was what was intended by s 6(2)(h). I do not myself support such arguments. Far from it: I have argued in the past that the ordinary dictionary meaning of 'reasonable' sets exactly the right standard—it finds a balance between a standard

²⁴ Eg *Roman v Williams NO 1998 (1) SA 270 (C)* at 282C and 284I. Kidd points out that because this element contemplates the use of means that are not unlawful or incapable of implementation, it often relates more to lawfulness than to reasonableness. See M Kidd 'Following *Bato Star*: A Guide to Pinpointing Unreasonableness' (unpublished paper presented at a conference of the Society of Law Teachers of South Africa in Bloemfontein, January 2005) 7.

²⁵ See *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & others 2004 (4) SA 490 (CC)* para 25.

²⁶ *Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223* at 230 and 234, where Lord Greene MR asks whether a decision is 'so unreasonable that no reasonable authority could ever have come to it'.

²⁷ 2004 (3) SA 346 (SCA) para 21.

so low that it allows for capricious decision-making and a standard of correctness or perfection that is clearly too high because it allows judges to substitute their own view for that of the administrator.²⁸ The ordinary meaning of 'reasonable' allows for what I have termed legitimate diversity, or a space within which a range of reasonable choices may be made; and, I should add, this approach is in line with the Constitutional Court's interpretation of reasonableness in the context of socio-economic rights.²⁹

Fortunately this second interpretation was preferred by the Constitutional Court in *Bato Star*, where the judgment of O' Regan J made it clear that we are not to read s 6(2)(h) as new wording for the old standard of gross unreasonableness. Her judgment emphasized two crucial points: that s 6(2)(h) must be read in conformity with s 33 of the Constitution; and that the standard called for by s 33(1) is simply that of reasonableness, whose converse is simply unreasonableness and not some exaggerated version of it. Drawing on the judgment of Lord Cooke in *R v Chief Constable of Sussex, ex parte International Trader's Ferry Ltd*,³⁰ she stated:

'Even if it may be thought that the language of s 6(2)(h), if taken literally, might set a standard such that a decision would rarely if ever be found unreasonable, that is not the proper constitutional meaning which should be attached to the subsection. The subsection must be construed consistently with the Constitution and in particular s 33 which requires administrative action to be 'reasonable'. Section 6(2)(h) should then be understood to require a simple test, namely that an administrative decision will be reviewable if, in Lord Cooke's words, it is one that a reasonable decision-maker could reach.'³¹

Kidd³² makes the objection that this test is somewhat circular: since a decision is unreasonable if *it is one that a reasonable decision-maker could not reach*, the unreasonableness of the decision seems to depend on an evaluation of the reasonableness of the decision-maker in the circumstances. This, he rightly observes, does not make it any easier to work out 'the precise positioning of the reasonableness bar'.³³ But circularity is perhaps unavoidable whenever a court

²⁸ See eg C Hoexter 'The Future of Judicial Review in South African Administrative Law' (2000) 117 SALJ 484 at 510; C Hoexter with R Lyster (I Currie ed) *The New Constitutional and Administrative Law* vol II *Administrative Law* (2002) 182–4.

²⁹ See eg *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) para 41; *Khosa v Minister of Social Development*; *Mahlaule v Minister of Social Development* 2004 (6) SA 505 (CC) para 48.

³⁰ [1999] 1 All ER 129 (HL) at 157.

³¹ *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & others* 2004 (4) SA 490 (CC) para 44.

³² M Kidd 'Following *Bato Star*: A Guide to Pinpointing Unreasonableness' (unpublished paper presented at a conference of the Society of Law Teachers of South Africa in Bloemfontein, January 2005) 2.

³³ *Ibid.*

attempts to make sense of the repetitious wording³⁴ of *Wednesbury*-inspired formulations. More important, at least from my point of view, is that the test allows a judicious amount of administrative space. The *Bato Star* formulation succeeds in this regard, I believe, particularly since O' Regan J goes on to list a number of factors relevant to determining whether a decision is reasonable:

'[T]he nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing interests involved and the impact of the decision on the lives and well-being of those affected.'³⁵

I shall revert to this list below, but it is worth noting now that it gives plenty of scope for the element of proportionality as well as that of rationality. The 'impact of the decision' obviously adverts to the effects of a measure, and thus invites a proportionality enquiry in a direct way. However, broad factors such as 'the nature of the competing interests involved' and 'the range of factors relevant to the decision' are arguably flexible enough to allow for enquiries relating to balance, necessity, suitability and the use of less restrictive means.

Before *Bato Star* I argued that the best option in relation to s 6(2)(h) would be to amend it along the lines of the proportionality provision originally recommended by the Law Commission; and since legislative intervention seemed a most unlikely eventuality, I hoped that proportionality would be read into s 6(2)(h) or the catch-all ground of 'otherwise unconstitutional or unlawful' in s 6(2)(i).³⁶ The decision in *Bato Star* does not rule out the last option, but the scope it gives in relation to s 6(2)(h) is especially to be welcomed.

(c) *Review and appeal*

'Although the review functions of the Court now have a substantive as well as a procedural ingredient, the distinction between appeals and reviews continues to be significant. The Court should take care not to usurp the functions of administrative agencies. Its task is to ensure that the decisions taken by administrative agencies fall within the bounds of reasonableness as required by the Constitution.'³⁷

³⁴ O' Regan J herself notes the feature of repetitiousness in para 44 of *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & others* 2004 (4) SA 490 (CC), and there also cites Lord Cooke's criticism in the *Trader's Ferry* case (above) of the *Wednesbury* formula as 'tautologous'.

³⁵ *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & others* 2004 (4) SA 490 (CC) para 45.

³⁶ See further C Hoexter 'Unreasonableness in the Administrative Justice Act' in C Lange & J Wessels (eds) *The Right to Know: South Africa's Promotion of Administrative Justice and Access to Information Acts* (2004) 148 at 160–1.

³⁷ *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & others* 2004 (4) SA 490 (CC) para 44.

Here the court in *Bato Star* acknowledges that reasonableness review has a ‘substantive element’, but it tells us in the same breath that the distinction between appeal and review must be maintained. Is this feasible?

I have always asserted that the distinction between appeal and review is illusory when judges are scrutinizing administrative action—even when they are using some of the most innocent-sounding grounds of review.³⁸ In most cases it is practically impossible to tell whether a decision is within the limits of reason, or defensible, without looking closely at matters such as the information before the administrator, the weight given to various factors and the purpose sought to be achieved by the decision. Only cases decided on the narrowest and most technical of grounds will not entail such scrutiny—for instance, failure to comply with a mandatory formality would not necessarily entail scrutiny of the merits. But otherwise I think it is unavoidable. It seems to me that courts have always immersed themselves in the merits in this way, even in the cases that most support a test of gross or otherwise egregious unreasonableness—cases like *Union Government v Union Steel Corporation*³⁹ and *National Transport Commission v Chetty’s Motor Transport (Pty) Ltd.*⁴⁰ And so I have argued that qualifications such as ‘gross’ are no real help in maintaining the distinction between review and appeal.⁴¹

In fact scrutiny,⁴² even of the merits, is not harmful in itself. The important thing is that judges should not use the opportunity of scrutiny to prefer their own views as to the correctness of the decision. The danger lies not in careful scrutiny but in judicial overzealousness in setting aside administrative decisions that do not coincide with the judge’s own opinions. No one has ever summed this up better than Froneman DJP did in the *Carephone*⁴³ case:

‘In determining whether administrative action is justifiable in terms of the reasons given for it, value judgments will have to be made which will, almost inevitably,

³⁸ See eg C Hoexter ‘The Future of Judicial Review in South African Administrative Law’ (2000) 117 SALJ 484 at 512; C Hoexter with R Lyster (I Currie ed) *The New Constitutional and Administrative Law* vol II *Administrative Law* (2002) at 185. Referring to English law, J Chan ‘A Sliding Scale of Reasonableness in Judicial Review’ (unpublished paper presented at a Comparative Administrative Justice Conference at the University of Cape Town, 20–22 March 2005) notes likewise that ‘it is almost impossible to determine rationality without at the same time considering the merits of the decision’ (at 2), and that even in the most extreme formulation of the *Wednesbury* test, ‘the courts accepted the necessity of entering into the arena of merits of the decision’ (ibid).

³⁹ *Union Government (Minister of Mines and Industries) v Union Steel Corporation (South Africa) Ltd* 1928 AD 220.

⁴⁰ 1972 (3) SA 726 (A).

⁴¹ See especially C Hoexter ‘The Future of Judicial Review in South African Administrative Law’ (2000) 117 SALJ 484 at 512.

⁴² Many writers speak about the *intensity of scrutiny* and *levels of scrutiny*. For me it is not so much the scrutiny that varies, or for that matter the basic applicability of grounds of review, but the court’s inclination to interfere with the decision in question.

⁴³ *Carephone v Marcus* NO 1999 (3) SA 304 (LAC).

involve the consideration of the “merits” in some way or another. As long as the judge determining [the] issue is aware that he or she enters the merits not in order to substitute his or her own opinion on the correctness thereof, but to determine whether the outcome is rationally justifiable, the process will be in order.’

(d) *Is there more than one standard of reasonableness?*

To me it seems a matter of logical necessity that there be more than one standard of review for reasonableness for administrative action.⁴⁴ If reasonableness is a monolithic and unvarying concept it makes no sense to speak of deference or respect, as there will be no room for it—or at least not deference in the proper sense of variation in the court’s inclination to interfere with the decision.

However, it is essential to be clear about the nature of the variation, which today does not lie as it once did in the applicability or non-applicability of certain grounds of review to different kinds of administrative action. That was the way in which our pre-democratic law sought to achieve the right balance, and it proved to be a parsimonious, formalistic and altogether unsatisfactory method.⁴⁵ Fortunately the classification of administrative functions on which it was premised is not built into the PAJA. As a matter of logic, all the grounds of review set out in the PAJA apply to all administrative action as defined in the Act. If something qualifies as administrative action under the Act, every one of the grounds is applicable to that action. This feature points away from a scheme in which, for instance, rationality alone would apply to some kinds of administrative action while both rationality and proportionality would apply to others.⁴⁶ One might add that the PAJA makes no overt distinctions between different kinds of action or degrees of unreasonableness, so on the statutory face of it the standard of reasonableness is the same for all administrative action—even if it is different for non-administrative action, such as executive action.⁴⁷

But notwithstanding the applicability of all the *grounds* of review to all administrative action, there remains room for variation of the *standard* used in particular cases. Indeed, it is this inherent variability that allows for the develop-

⁴⁴ It goes without saying that reasonableness may have different meanings outside of this particular context. The various meanings of reasonableness in the context of socio-economic rights, administrative law, s 36 of the Constitution and the area of ‘general public duties’ are explored by C Steinberg in an unpublished research report: *Can Reasonableness Protect the Poor? A Review of South Africa’s Socio-Economic Rights Jurisprudence* (University of the Witwatersrand, 2005) 22ff. Cf A Pillay ‘Reviewing Reasonableness: An Appropriate Standard for Evaluating State Action and Inaction?’ (2005) 122 SALJ 419.

⁴⁵ For a full discussion see C Hoexter ‘The Principle of Legality in South African Administrative Law’ (2004) 4 *Macquarie Law Journal* 165.

⁴⁶ Cf J R de Ville *Judicial Review of Administrative Action in South Africa* (2003) 203 at 213–16.

⁴⁷ As to this, see the contribution by H Corder; and see A Pillay ‘Reviewing Reasonableness: An Appropriate Standard for Evaluating State Action and Inaction?’ (2005) 122 SALJ 419 at 420, 424ff, who argues that the standard for review of administrative action must be higher than for executive action.

ment of a theory of deference. As already noted, in *Bato Star* the Constitutional Court offers us a list of factors relevant to determining whether a decision is reasonable;⁴⁸ and that is in itself an unequivocal indication of the inherent variability of the standard of reasonableness. While the factors are merely stated and the court offers no instructions as to how they might be applied, I would venture to note here that the potential variation may be considerable. For instance, the decision-maker's expertise, which is just one of the six factors mentioned, is probably capable on its own of making a real difference to a court's assessment of reasonableness in a particular case. In *Bato Star* itself the range of competing interests involved in the allocation of fishing quotas and the resultant complexity of the decision proved significant,⁴⁹ and in another case they could conceivably be decisive even if there were some doubt as to the decision-maker's expertise.

The role played by the factors has to do with the nature of the relationship between reasonableness and deference, an issue dealt with more directly under the next heading.

(e) The relationship between reasonableness and deference or respect

There is in some quarters the misconception that deference is a sort of evil trump card that upsets the normal playing of the game of review. On this misguided approach, deference is an extraneous factor that prevents a court from denouncing unreasonableness where it finds it. So an administrative decision may be obviously irrational or unreasonable, but if the decision-maker happens to have particular expertise or the decision is a complex one then the court somehow loses its power to intervene.

In fact it is a mistake to regard deference as something outside constitutional and administrative law in this way. Rather, as the court makes clear in *Bato Star*, it is *part of the law*. This emerges from the judgment of O' Regan J in several ways. First, she cites a dictum of Lord Hoffmann in the *BBC* case⁵⁰ in which he is critical of the term deference—partly because of its 'overtones of servility',⁵¹ and partly because it suggests something extraneous to the law, such as courtesy to the other branches of government. In the quoted portion of his judgment Lord Hoffmann soon banishes both of these misapprehensions. 'When a court decides that a decision is within the proper competence of the

⁴⁸ Para 45.

⁴⁹ The enabling legislation, the Marine Living Resources Act 18 of 1998, listed a range of diverse and sometimes opposing interests to be taken into account by the decision-maker. See para 49 et seq of *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & others* 2004 (4) SA 490 (CC).

⁵⁰ *R (on the application of ProLife Alliance) v British Broadcasting Corporation* [2003] 2 All ER 977 (HL).

⁵¹ *Ibid* para 75, quoted in para 47 of *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & others* 2004 (4) SA 490 (CC).

legislature or executive’, he says, ‘it is not showing deference. It is deciding the law.’⁵² O’ Regan J, too, helps to banish any suggestion of servility by preferring the term ‘respect’ in her judgment. She begins by talking of ‘deference’ as it was described and applied by the Supreme Court of Appeal in the same matter,⁵³ but almost immediately shifts to ‘respect’, used both as a verb and a noun.

Secondly, O’ Regan J leaves her reader in no doubt that deference/respect flows from ‘the fundamental constitutional principle of the separation of powers itself’⁵⁴ and ‘the proper role of the Executive within the Constitution’⁵⁵ rather than judicial courtesy or etiquette. Thirdly, she states explicitly⁵⁶ that deference does not mean rubber-stamping an unreasonable decision simply because of the complexity of the decision or the identity of the decision-maker.

III REASONABLENESS IN FUTURE

Reasonableness has a long history in our administrative law, but in many ways the past seems like an extended lesson on what *not* to do in relation to this ground of review—and *Bato Star* feels like the proper beginning of things. Fittingly enough, in *Bato Star* Justice O’ Regan answers some of the ‘difficult questions of administrative law’ she herself identified in a published conference paper: ‘the requirement of “reasonable” administrative action, ... the question of the appropriate judicial scrutiny of administrative decision-making [and] the relationship between the PAJA standards and the constitutional standards’.⁵⁷ Plenty of work remains to be done, of course. A pressing task is to explore the meaning of the factors outlined by the Constitutional Court—an area in which Kidd⁵⁸ has already made a valuable contribution. Another question is whether those factors are compatible with the Canadian model of working out fairly clear levels of review,⁵⁹ and whether we might borrow from that model.

⁵² *R (on the application of ProLife Alliance) v British Broadcasting Corporation* [2003] 2 All ER 977 (HL) para 76, quoted in para 47 of *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & others* 2004 (4) SA 490 (CC). Here ‘deference’ is of course intended to mean servility or courtesy.

⁵³ *Minister of Environmental Affairs and Tourism v Phambili Fisheries (Pty) Ltd; Minister of Environmental Affairs and Tourism v Bato Star Fishing (Pty) Ltd* 2003 (6) SA 407 (SCA) para 47 in the judgment of Schutz JA, quoted in para 46 of *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & others* 2004 (4) SA 490 (CC).

⁵⁴ *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & others* 2004 (4) SA 490 (CC) para 6.

⁵⁵ *Ibid* para 48.

⁵⁶ *Ibid*.

⁵⁷ Kate O’ Regan ‘Breaking Ground: Some Thoughts on the Seismic Shift in our Administrative Law’ (2004) 121 *SALJ* 424 at 437, originally a paper presented at the *SALJ* Jubilee Conference held in Johannesburg in October 2003.

⁵⁸ M Kidd ‘Following *Bato Star*: A Guide to Pinpointing Unreasonableness’ (unpublished paper presented at a conference of the Society of Law Teachers of South Africa in Bloemfontein, January 2005).

⁵⁹ See e.g. J M Evans ‘Deference with a Difference: Of Rights, Regulation and the Judicial Role in the Administrative State’ (2003) 120 *SALJ* 322.

In some ways *Bato Star* also feels like the start of a ‘coherent political and constitutional theory to underpin administrative law and legitimize it’—and again, it was Kate O’Regan herself who called for such a theory.⁶⁰ In this respect, too, there remains a good deal of theorizing to be done. Nevertheless, in a dozen paragraphs in *Bato Star* the Constitutional Court contributes more to the foundations of such a theory than we seem to have managed in as many decades of wrangling about reasonableness.

⁶⁰ Kate O’Regan ‘Breaking Ground: Some Thoughts on the Seismic Shift in our Administrative Law’ (2004) 121 *SALJ* 424 at 428.

Reviewing 'Executive Action'

PROF HUGH CORDER*

I welcome the opportunity to pay tribute to Chief Justice Arthur Chaskalson on this occasion. As National Union of South African Students (NUSAS) national law co-ordinator 27 years ago, I had the effrontery, if not downright bad manners, to challenge Arthur Chaskalson at question time after an eloquent after-dinner speech at Wits. I asked what he, a successful practitioner, was going to do about access to justice. I did not know at that stage that planning of the Legal Resources Centre was far advanced, nor did I imagine that the person I was challenging with such bravado would in sixteen years be the first Chief Justice of a free South Africa. I would like to use this occasion to apologize formally.

The aspect of reasonableness review allocated to me in this three-hander is 'review in the context of executive as opposed to administrative action'.

In approaching any distinction between types of official action I have always found it very useful, for teaching purposes and to help me try to make sense of the common-law casuistry which was our administrative law till the mid-90s, to take what I term a 'spectrum-like' (rather than spectral) approach to the empowerment and accountability of administrators. This is like the 'variability' for which Cora Hoexter has called¹ and can be used to explain why deference to the decision of an administrator is appropriate in certain circumstances while abhorrent in others. It seems to me that this is preferable to the much-maligned 'classification of functions' approach which became an end in itself in middle to late apartheid and which is making an altogether more nuanced comeback in the administrative review of the constitutional era. Being spatially challenged, I tend to see a spectrum as a straight line or sometimes a graph, but the dictionary meaning also fits. So we see that a spectrum² is an

'image formed by rays of light or other radiation or sound in which the parts are arranged in a progressive series according to the refrangibility i.e. according to wavelength; this is characteristic of a body or substance when emitting or absorbing radiation.' Or the 'entire range of anything arranged by degree, quality, etc.'

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¹ 'The Future of Judicial Review in South African Administrative Law' (2000) 117 *SALJ* 484, 504 and 514–517

² Concise Oxford Dictionary 7 ed (1982), 1019

Seeing things spectrally can help as a working model. For example, if one places the degree of discretion authorized to a particular administrator from zero to one hundred on a spectrum, one can predict with a fair degree of confidence that the scope, depth or intrusiveness of accountability (and thus review-authority of a judge) will be highest where the discretion is lowest and rise in inverse proportion to the decline in discretion. Similarly if one wishes to draw a distinction between the notions of rationality, justifiability and reasonableness which have been so central to administrative review since 1994, it may help to situate them on a spectrum which starts with (narrow procedural) review and ends in 'wide appeal', where all evidence may be disputed, new evidence led, and the appellate body has full freedom to substitute its own view for that of the original decision-maker. None of this is hugely novel, but it may assist administrative lawyers in one of their most urgent tasks, that of establishing a certain measure of certainty and predictability of outcome where disputes arise when the executive branch acts.

It is therefore understandable, when confronted by the vast array of administrative acts and decisions taken and made on a daily basis in any modern state, that one would resort to some sort of classification; especially if, as a judge being required to review the validity of such action, one's decision would have serious consequences for the State and the parties affected by the action.

Thus the well-known 'doctrine' of the classification of functions, that would divide administrative action into legislative, judicial, quasi-judicial, ministerial and purely administrative functions. The judicial response when using this classification was to vary the intensity of review, the lightest touch being used where the administrative discretion exercised was greatest (judicial, legislative), the judicial scrutiny becoming more intrusive as one moved across the spectrum. This is not an illogical or improper approach; sadly, despite the prescient warning of Schreiner JA fifty years ago in *Pretoria North Town Council v AI Electric Ice Cream Factory*,³ that such classification should be used as the means to an end, it gradually became an end in itself. This obtained until the dying days of the apartheid era, when the adoption by the Appellate Division of the legitimate expectation idea,⁴ the willingness to review administrative action of a legislative nature,⁵ and eventually the adoption of the general duty to act fairly⁶ returned

³ 1953 (3) SA 1 (A), 11.

⁴ *Administrator, Transvaal v Traub* 1989 (4) SA 731 (A).

⁵ *South African Roads Board v Johannesburg City Council* 1991 (4) SA 1 (A).

⁶ *Du Preez v Truth and Reconciliation Commission* 1997 (3) SA 204 (A), the most significant judgment delivered in the area of administrative law by the Appellate Division in the short period in which it was denied jurisdiction in 'constitutional matters' and so focussed on developing the common law.

us to the original purpose of classification. Now, after *Bato Star*⁷ and *New Clicks*,⁸ we seem to be heading for a new form of classification of administrative action: at least to draw a distinction between 'legislative' and 'adjudicative' (all other?) acts. I am not sure yet how helpful this will be, particularly in the context of the developing influence of the Promotion of Administrative Justice Act (PAJA),⁹ but we should monitor this aspect of the work of the courts.

Against this background, I wish to focus on another class of state action which occurs in the remit of the executive branch of government, but which is not regarded as administrative action, either as generally understood or as defined¹⁰ in PAJA. What seems to set executive action apart is the nature of the action (characterized by a very high policy content, very large doses of discretion and a high level of decision-making) as well as the identity of the actor (typically the Head of State, the Head of the Executive, a Minister or a Premier). Every system is familiar with this—in our common law constitutional history, these are the prerogatives which, once established to the satisfaction of the reviewing judges, were immune from review until relatively recently.

There has been a shift in the last two decades, however, as judicial authority globally has grown, and as the reach of the rule of law has deepened.¹¹ In our own system, of course, the advent of democratic constitutionalism means that governmental action of whatever nature is subject to constitutional review. What is critical naturally, is the intensity or intrusiveness of that review and the standards against which review takes place. Judges must take a lighter touch by virtue of the consciousness of their role under the separation of powers when action is deemed to be 'executive', yet the clear duty to insist on compliance with the constitutional mandate remains. In the Constitutional Court, *Hugo*¹² set the scene, and *Pharmaceuticals*¹³ and *SARFU*¹⁴ have entrenched that view. There have been a number of other such instances in the courts, set out admirably by Jacques de Ville in his *Judicial Review of Administrative Action in*

⁷ *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & others* 2004 (4) SA 490 (CC), in which the Constitutional Court for the first time grappled authoritatively with the concept of reasonableness review in the context of the Constitution and the Promotion of Administrative Justice Act, 3 of 2000.

⁸ *Minister of Health and Another v New Clicks South Africa (Pty) Ltd & others (Treatment Action Campaign and Innovative Medicines South Africa, Amici Curiae)* Case CCT 59/04, judgment delivered 30 September 2005, as yet unreported.

⁹ Act 3 of 2000.

¹⁰ *Op cit* s 1(i) attempts an extensive yet indecisive definition of 'administrative action'.

¹¹ For a discussion of the extent of the reviewability of the prerogative powers in English Law, see De Smith, Woolf and Jowell *Principles of Judicial Review* (1999), 5-037 to 5-046.

¹² *President of the Republic of South Africa v Hugo* 1997 (1) SA 1 (CC).

¹³ *Pharmaceutical Manufacturers Association of South Africa: In re Ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC).

¹⁴ *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC).

South Africa,¹⁵ and of course PAJA has now prescribed¹⁶ that executive ‘powers or functions’ at national, provincial and local levels are to be excluded from the concept of administrative action. There was much discussion in *New Clicks* about whether ‘legislative action of an administrator’ was generally subject to PAJA or not—my own sense is to be with the Chief Justice¹⁷ on this—but the Court as a whole declined to take a position.¹⁸ As to what will be ‘executive action’, we have some good guidelines in the sections of the Constitution listed in section 1(i)(aa), (bb) and (cc) of PAJA, but there will no doubt be future disputes in the courts which will explore the limits or boundaries of this idea. Where the judiciary draws the line will be critical.

Perhaps more important is the variability of the standard of review. About 18 months ago, Justice O’ Regan predicted at an informal gathering¹⁹ that administrative justice and socio-economic rights would be the major areas of activity for the Constitutional Court in its second decade. The exercise of executive powers often impacts directly on socio-economic concerns, as we saw in *New Clicks*. What basis for review will the courts use? The answer seems to be clear: whatever the directly applicable sections of the Constitution prescribe, bolstered by the principle of legality.²⁰

Until *New Clicks*, legality seemed to imply the notion of a basic measure of rationality (in the decision-making process) as opposed to reasonableness (the proportionality of outcome).²¹ While *New Clicks* was not directly concerned with ‘executive action’ as I have outlined it, the contrasting styles of Chaskalson CJ and Sachs J provide the limits of a spectrum of judicial views, I would argue, in terms of how ‘executive action’ will be reviewed in future. The Chief Justice was concerned to take a ‘unified’ approach to judicial review of administrative

¹⁵ JR de Ville *Judicial Review of Administrative Action in South Africa* (2003) 59–60.

¹⁶ Act 3 of 2000, s 1(i) (aa), (bb) and (cc).

¹⁷ Chaskalson CJ in *Minister of Health and Another v New Clicks South Africa (Pty) Ltd & others (Treatment Action Campaign and Innovative Medicines South Africa, Amici Curiae)* Case CCT 59/04, judgment delivered 30 September 2005, as yet unreported, paras 120 to 135. Reading PAJA as a whole, in the light of my involvement in its drafting and the history of judicial review of administrative action in South African law, leaves me in little doubt that the Chief Justice’s interpretation is faithful to the constitutional enterprise. See, too, in support, C Hoexter ‘The Future of Judicial Review in South African Administrative Law’ (2000) 117 SALJ 484.

¹⁸ See particularly Moseneke J in *New Clicks* (above) paras 722–724, with whom Madala, Mokgoro, Skweyiya and Yacoob JJ concurred. The rest of the court held for various reasons to support the application of PAJA to Ministerial law-making authority in the circumstances of *New Clicks*.

¹⁹ Held on 6 May 2004, attended mainly by graduates of the Faculty of Law of the University of Cape Town, at the offices of a leading firm of attorneys in Gauteng.

²⁰ This is the composite outcome of the judgments of the Constitutional Court in *Pharmaceutical Manufacturers Association of South Africa: In re Ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC), *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & others* 2004 (4) SA 490 (CC), and *New Clicks* (above)

²¹ See in particular the judgment of Chaskalson CJ in *Pharmaceutical Manufacturers Association of South Africa: In re Ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) at para 85.

action including legislative action of the executive within the strained definition of administrative action in the PAJA. He repeatedly stressed the importance of PAJA and of s33 of the Constitution, with its notions of lawfulness, procedural fairness and reasonableness as justiciable standards of review.²²

Sachs J took a different approach: let the definition of administrative action in PAJA be narrow, let it apply to the myriad of 'adjudicative' administrative acts done on a daily basis.²³ For him, the making of subordinate legislation does not fit the statutory definition, so don't make administrative review do all the hard work (as it did under apartheid).²⁴ He would rather have us use an expanded notion of 'legality' as the standard for review of acts of the executive branch which do not fit the definition of administrative action.²⁵ These must include 'executive action' as well as legislative action taken by an administrative body. Justice Sachs then referred²⁶ to any number of constituent parts of 'legality' to be found in the Constitution: such as s33 (right to just administrative action), s1 (founding values) and s195 (standards for the public service), as well as the principles underlying the Constitution. These requirements were repeatedly summarized as a striving for the constitutional values of openness, responsiveness and accountability.²⁷ One of the consequences of the Sachs approach is effectively to allocate greater scope to the judiciary in its interpretive role, in determining which values of the Constitution to stress. Judicial policy thus comes more clearly to the fore.

In conclusion, it seems to me that the judgments in *New Clicks* collectively set the benchmark for the review of 'executive action' in the future.²⁸ I have no doubt that all the judgments bear detailed study and that the case as a whole is the most significant in the sphere of administrative law, and perhaps more widely, that has been delivered in the constitutional era. I end with the following extract from an article published twenty years ago:

²² See *Minister of Health and Another v New Clicks South Africa (Pty) Ltd & others (Treatment Action Campaign and Innovative Medicines South Africa, Amici Curiae)* Case CCT 59/04, judgment delivered 30 September 2005, as yet unreported, at paras 147–192, for extensive discussion of these requirements by Chaskalson CJ.

²³ Op cit at paras 592–596.

²⁴ Op cit at para 587. It is widely acknowledged that an application for judicial review of administrative action was almost always the only means available through the law to those discriminated against or oppressed by the apartheid regime to challenge such governmental action. For an account of such court challenges in the areas of race and security, see John Dugard *Human Rights and the South African Legal Order* (1978), especially at 303–390.

²⁵ Op cit at paras 611–615, per Sachs J.

²⁶ Op cit at para 585 ff, and the footnotes referred to there.

²⁷ Op cit at para 625, for example.

²⁸ Although it must be acknowledged that the range of the judgments and the variations of viewpoints and alliances of opinion make the determination of an authoritative ratio a complex process.

'Our law, in so far as the judicial control of the administrative process is concerned, is at the crossroads. The path which is now taken will determine whether the administrative process will be opened up to public scrutiny and judicial control, or whether it will remain secretive and in many respects beyond the control of the courts. It is ultimately in the interests of good administration and good government that what Lord Devlin has described as the "timorous view of the supervisory functions of the court" should not prevail. The judgment of Jansen JA in *Theron v Ring van Wellington* has shown the path that can be taken. If others follow, our law can be developed to provide the protection which is needed against the abuse of power by the executive authorities. The question is: will this path be followed?'

The writer was Arthur Chaskalson.²⁹ I have used this to emphasize our hon-ourand's leading role in the field over a long period. Perhaps we are once more at a crossroads in our administrative law? I would suggest that the different opinions apparent in the several approaches to the reviewability of subordinate legislation encountered in *New Clicks* point to at least three directions in which the law of administrative justice could develop in South Africa. Underlying such divisions are contrasting judicial styles and policies towards the exercise of the review powers which they are enjoined by the Constitution to wield.

The choice of roads ahead appears to be the following. As the Constitutional Court increasingly frequently is confronted with challenges to 'executive action', it will have to choose whether to hold the executive to account after quite intense scrutiny (the Chaskalson approach), or to test it against the elevated and more flexible principle of legality (that of Sachs J), or to be more cautious and restrained, preferring to reserve their view as long as possible (the approach of Moseneke J and those who concurred with him). There are strengths in each of these approaches. Given the history of judicial responses to the development of executive power, however, especially in times of political and socio-economic crisis, both in South Africa and abroad, I would argue that Chief Justice Chaskalson's bold and clear statement of the court's authority to review is a significant milestone in our law, one that ought in time to be established as the preferred judicial stance. We will look back at it in the future with appreciation.

²⁹ 'Legal Control of the Administrative Process' (102) 1985 *SALJ* 419,433.

Five Models of Intensity of Review

PROF JONATHAN KLAAREN*

The aim of this presentation is to sketch the outlines for a debate over a theory that can specify the intensity of judicial review of administrative and executive action in terms of the Constitution.¹

THREE BASELINE PROPOSITIONS

This inquiry takes for granted three propositions that may not be completely obvious but appear nonetheless to be accepted in mainstream South African constitutional scholarship and, perhaps more importantly, in daily legal practice.

The first proposition is that all actions by state actors are subject to constitutional review and to judicial review under the Constitution. This proposition takes us back to questions of the meaning and interpretation of *S v Makwanyane*, including unresolved issues such as the basic structure doctrine.² This proposition informs the inquiry pursued here, although not directly.

The second proposition is that the concept of intensity of judicial review is significant and can usefully be guided by a theory or model of judicial review. This would be an example of a middle-level theory, a theory that guides our travel along the distance from the acceptance of the constitution to the reality of deciding cases.³ An early contest over appropriate guidance or principles

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¹ One could contest this exercise on the grounds that it hastily and without justification collapses the categories of executive and administrative action. However, the intention to look for a single theory that can guide review of both categories of action is a considered one, aiming to explore the question substantively and without committing to the distinction between types of government action (see model three, distinguishing between executive and administrative action). See also *Minister of Health v New Clicks South Africa (Pty) Ltd (Treatment Action Campaign and Innovative Medicine South Africa, Amici Curiae)* 2006 (1) BCLR 1 (CC). Likewise, this exercise sees all action as affecting rights and avoids answers based on the categorization of action as 'infringing rights' or 'implementing policy' (see model four).

² F Michelman 'Constitutional Authorship, "Solomonic Solutions", and the Unoriginalist Mode of Constitutional Interpretation' (1998) *Acta Juridica* 208; R Bunche 'Unconstitutional Constitutional Amendments: Should the Basic Structure Doctrine of the Indian Supreme Court Apply to the South African Constitution?' (unpublished student paper).

³ One example of a contribution towards such a theory (in the specific context of reasonableness review of administrative action) was proposed by Justice O'Regan in October 2003 when she identified at least four factors that needed to be taken into account in identifying appropriate standards of scrutiny: factors of 'expertise of the tribunal, polycentric decisions, the need for an efficient administration, the constitutional commitment to responsiveness, transparency and accountability'. 'Breaking Ground: Some thoughts on the seismic shift in our administrative law'. The theoretical models of judicial review outlined here are intended to operate at a higher level of abstraction than strictly within administrative law.

to govern judicial review occurred prior to and during the 1993 Breakwater Conference in the form of the hard-nosed/soft-nosed debate.⁴

A third proposition is that we can and should make a useful distinction at the constitutional level between the concepts of constitutional competence and judicial jurisdiction on the one side (eg the SCA is not the highest court of appeal 'in constitutional matters') and the concept of standards of judicial review on the other (eg the intensity of the scrutiny a court will give to a matter).

FIVE INTENSITY-GUIDING MODELS OF JUDICIAL REVIEW

Given these three baseline propositions, one could say that there are (at least) five ways to specify an intensity-guiding model of judicial review.⁵

(1) *Inherent variability*

The first model would be one that is close to denying the second assumption (that it is possible to outline a theory of intensity of review). It would claim that judicial review is inherently variable. This would be close to the theory of judicial review of administrative action articulated by the Supreme Court of Appeal in *Container Logistics*.⁶ This is an all circumstances view. This model, at least in a strong version, does not really allow for the building of any model to guide the standard of judicial review.

(2) *Deference and the separation of powers*

A second model would be that of deference. There have been debates running at least to some extent in parallel on this terminology and concept in England and South Africa which go beyond what can be covered here. The South African result has been so far that the concept turns on a concept of the separation of powers and not on an attitude of respect (in the ordinary sense of the word) owed by the judiciary to the executive.⁷ In one version of this model, it could amount to a rejection of the third proposition (the distinction between jurisdiction and standard of review), claiming instead that wherever a court has

⁴ See G Marcus & D Davis 'Judicial review under an ANC government' (1991) 7 SAJHR 93; A Sachs 'From the violable to the inviolable: a soft-nosed reply to hard-nosed criticism' (1991) 7 SAJHR 98.

⁵ An arguably distinct model that cannot be fully explored here is one that bases the intensity of judicial review on the distinction between review and appeal. While the review and appeal distinction is a formalistic and blunt instrument, it may be seen to capture elements either or both of the theory of separation of powers (in cases of statutory review) or of the structure of the judiciary (in cases of review of inferior courts). In the scheme of this presentation, it thus combines elements of model two (the separation of powers) and model five (constitutional competence). See also *S v Boesak* 2001 (1) BCLR 36 (CC) (analysing review in the context of competent jurisdiction of the Constitutional Court).

⁶ *Commissioner of Customs and Excise v Container Logistics (Pty) Ltd* 1999 (3) SA 771 (SCA).

⁷ See *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (O'Regan J) para 46 (discussing C Hoexter 'The Future of Judicial Review in South African Administrative Law' (2000) 117 SALJ 484 and D Dyzenhaus 'The Politics of Deference: Judicial Review and Democracy' in M Taggart (ed) *The Province of Administrative Law* (1997)).

jurisdiction such a court is bound to exercise constitutional review and to do so with a consistent degree of intensity or scrutiny.⁸

While this must be true, it is not always clear how far the conceptual linkage to separation of powers gets one. While helpful, this linkage often seems to lead to a multi-factor kind of analysis, factors the weight of which themselves must of course be measured against shifting notions of the doctrine of separation of powers.⁹ The judgment of the Constitutional Court in *Heath*¹⁰ is arguably an example of a judgment that explicitly reasons on the basis of separation of powers and results in a multi-factor analysis and yet does not articulate a replicable theory of the independence of the judiciary. If deference leads us to separation of powers it does not appear that separation of powers leads us—at least in any middle-level obvious sense—to a model that can guide the intensity of judicial review. Nor, at least from one perspective, is it clear that it should.¹¹

(3) *Subject matter jurisdiction*

The third model would build directly upon the third proposition that there is a hard distinction between jurisdiction and intensity of review. It allows for review to vary by type of subject matter jurisdiction. This third model specifies the types of subject matter jurisdiction through jurisdictional concepts, such as the distinction between administrative and executive action. At least for those judges who viewed the making of delegated legislation as definitely falling inside or outside the category of administrative action, *New Clicks* can thus be understood as an example of the operation of this sort of model.¹² An earlier example would be *President of the Republic of South Africa v Hugo*¹³ where the action of the President in pardoning was clearly defined as executive, with a resultant real but relaxed standard of review. The predictive power of this model does not lie in the identification of a set of factors but rather in the categorization of government action.

(4) *Subject matter jurisdiction*

A fourth model is also one that builds upon the third proposition and allows for review to vary by type of subject matter jurisdiction. However, it starts from the other end of the subject matter jurisdiction concept than does the third model.

⁸ Such a rejection and the strong version of this model works better for judicial review based on the principle of legality than for judicial review outside of the principle of legality.

⁹ In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & others* 2004 (4) SA 490 (CC) para 48, this linkage elaborated upon the factors relevant to reasonableness review identified earlier by O'Regan J.

¹⁰ *South African Association of Personal Injury Lawyers v Heath* 2001 (1) SA 883 (CC), 2001 (1) BCLR 77 (CC).

¹¹ I Currie 'Judicious Avoidance' (1999) 15 SAJHR 138.

¹² *Minister of Health v New Clicks South Africa (Pty) Ltd (Treatment Action Campaign and Innovative Medicine South Africa, Amici Curiae)* 2006 (1) BCLR 1 (CC).

¹³ 1997 (4) SA 1 (CC).

Model four provides guidance for the intensity of review not from the starting point of jurisdictional concepts but rather from the starting point of the subject matter as found in the Bill of Rights. To the extent that a matter affects rights as specified in the Bill of Rights, it will receive more intense review.¹⁴ In a different institutional setting, this approach has been put into place in England as has been noted by the Court here: ‘The approach now adopted by the courts of England to judicial review in public law cases, is that “the intensity of review ... will depend upon the subject matter in hand”.’¹⁵

(5) *Constitutional competence*

A fifth model works more with ideas of constitutional competence than with the idea of subject matter jurisdiction. It would base its guidance for the intensity of review in a structural understanding of the working of the Constitution. This is a model that fits closely with the jurisprudence of some of Justice Sachs’ judgments.¹⁶ This model would pay close attention to the provenance of action within the structure of the constitutional state. For instance, where subordinate legislation has been approved (or at least not disapproved) by a committee of the legislature, the implication is that a court would presumably exercise a less intensive form of scrutiny, recognizing that the Constitution has given such competence at least in the first instance to another body (in this example a democratically elected legislature).

EVALUATION

It seems likely that as South African constitutional jurisprudence develops, the first two models will not have as much direct impact on the intensity of review employed as will some combination of the last three (indeed, in my prediction, mostly models three and four). Still, this scheme is only one of middle-level theory: the doctrine of the separation of powers—perhaps the key concept of a ‘delicate balance in a constitutional democracy’—is and will remain foundational to judicial review.

¹⁴ This model may be understood to have its own version of ‘jurisdictional concept’. Where a matter is concerned with ‘policy’, it will not affect rights and will not attract the more intense version of review.

¹⁵ *Bel Porto School Governing Body v Premier of the Western Cape Province* 2002 (3) SA 265 (CC) quoting *R v Secretary of State for the Home Department, ex parte Daly* [2001] 3 All ER 433 (HL) at para 28.

¹⁶ *Executive Council of the Western Cape Legislature v President of the Republic of South Africa* 1995 (4) SA 877 (CC); *Democratic Alliance v Masondo* NO 2003 (2) SA 413 (CC); *Minister of Health v New Clicks South Africa (Pty) Ltd (Treatment Action Campaign and Innovative Medicine South Africa, Amici Curiae)* 2006 (1) BCLR 1 (CC).

A Delicate Balance

REMEDYING BREACHES OF THE CONSTITUTION

ADV GEOFF BUDLENDER

I am very grateful to have been given the opportunity to participate in this symposium to pay tribute to Arthur Chaskalson, who for so many years and in so many ways has been my teacher, my colleague, and my friend.

In *Minister of Health v TAC (no 2)*,¹ the Constitutional Court indicated that ‘a mandamus and the exercise of supervisory jurisdiction’ may be necessary to ensure an effective remedy for a breach of a constitutional right. A year later, the Supreme Court of Canada held in *Doucet-Boudreau v Nova Scotia*² that a trial judge could, after ordering that a government build minority-language schools, retain jurisdiction over the case and require the government to report back to the judge with affidavits on its progress in complying with the order. These decisions make clear that both South African and Canadian judges are not limited to declaratory or one-shot remedies. However, in *TAC* the Constitutional Court refused to follow the structural interdict or injunction ordered by the High Court, on the basis that ‘the government has always respected and executed orders of this Court. There is no reason to believe that it will not do so in the present case.’³

Although it is now clear that judges can issue structural injunctions and retain supervisory jurisdiction, it is not yet clear when they should do so, and how such relief should be fashioned. In an article which Kent Roach and I recently published in the *South African Law Journal*,⁴ we attempted to set out some principles for determining when mandatory and on-going structural relief will be appropriate and just. We recognized that complex remedial issues raise difficult issues implicating the separation of powers and the appropriate role of the judiciary, the executive and the legislature. The convergence of South African and Canadian law on this issue is not surprising given the influence of the Canadian Charter on the drafting of our Bill of Rights. Both Constitutions

¹ 2002 (5) SA 721 (CC) [*TAC*]. See also *Pretoria City Council v Walker* 1998 2 SA 363 (CC)

² [2003] 3 SCR 3

³ *TAC* at para 129

⁴ K Roach and G Budlender ‘Mandatory Relief and Supervisory Jurisdiction: When Is It Appropriate, Just and Equitable?’ (2005) 122 *South African Law Journal* 325–351.

contemplate wide remedial powers for courts.⁵ Both bills of rights contain positive rights and recognize that simply to strike down state actions and state laws will not be enough to secure constitutional justice. And it is particularly where positive action is required, that some ongoing judicial supervision may be appropriate.

In the first and second parts of our article, Kent Roach and I outlined South African and Canadian law on mandatory relief and supervisory jurisdiction both before and after the *TAC* case and *Doucet-Boudreau*. I am not going to rehearse that material here. I am however going to speak to the third part of the article, which proposed some guidelines and principles for when mandatory relief and supervisory jurisdiction may be appropriate in constitutional cases. I am then going to say something about the issue of deference or respect and its relation to remedies.

Guidelines and principles

In South Africa, the starting-point has to be the judgment in *Fose v Minister of Safety and Security*, in which Justice Ackermann, for the majority, said the following:

‘Appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a *mandamus* or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all-important rights.’
‘Particularly in a country where so few have the means to enforce their legal rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated. The courts have a particular responsibility in this regard and are obliged to ‘forge new tools’ and shape innovative remedies, if needs be, to achieve this goal.’⁶

The touchstone is therefore effectiveness. The test is deceptively simple, but the touchstone is clear: the test is what will be effective in vindicating the right. In *TAC* the Constitutional Court said that a structural interdict should be granted where ‘it is necessary to secure compliance with a court order’. When is it necessary? I want to suggest four circumstances at least.

⁵ Section 24(1) of the Canadian Charter of Rights and Freedoms contemplates that courts of competent jurisdiction can grant whatever remedy is appropriate and just in the circumstances. The analogues to s 24(1) are ss 38 and 172(1)(b) of the South African Constitution which contemplate the award of appropriate, just and equitable relief.

⁶ *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) at para 19 and 69. The reference to the obligation to ‘forge new tools’ is derived from the judgment of the Supreme Court of India in *Nilabati Behera v State of Orissa* [1993] AIR 1960 (SC) at 1969 (para 19)

The Court identified one circumstance, and that is where there has been ‘a failure to heed declaratory orders or other relief granted by a Court in a particular case’. This was the circumstance which arose in the CPD in *City of Cape Town v Rudolph*, which is still running, and where remedies are still being pursued.⁷

A second circumstance is demonstrated by *Sibiya v Director of Public Prosecutions (Johannesburg High Court)*,⁸ where the Constitutional Court dealt with the conversion of death sentences to jail sentences. That judgment makes it clear that it is not only an anticipated failure to comply an order of court which may trigger a structural interdict. A supervisory order may also be appropriate where the process of complying with the Constitution has taken so long that it is ‘inadvisable for the court to assume’ that the order will be carried out promptly.

A third circumstance, I suggest, is where consequences of even a good-faith failure to comply with a court order are so serious that the court should be at pains to ensure effective and prompt compliance. These are cases where remedial action after a failure to comply with the order will not be adequate. With the benefit of hindsight, *TAC* was such a case. After the Constitutional Court had made its order, the TAC made large efforts to ensure that the provincial governments complied fully. In at least one case, Mpumalanga, there was at best only token compliance. There was evidence that the responsible Member of the Executive Committee either did not understand, or was pretending that she did not understand, what she was required to do. It took a further application to the High Court for a contempt order before the province complied even materially with the order which had been made by the Constitutional Court.⁹ Meanwhile, six months had passed. It is not melodramatic to suggest that a significant number of babies may have been infected with HIV where this was avoidable, with probably fatal consequences, as a result of the failure by the province to comply effectively with the order of the Constitutional Court. This is plainly another sort of case in which a structural interdict ‘is necessary to secure compliance with a court order’—because the consequences of non-compliance are irremediable, and so serious that it is necessary to go beyond the mandatory order and do whatever is reasonably possible to ensure effective compliance.

A fourth type of case arises where the mandatory order is so general in its terms that it is not possible to define with precision what the government is required to do. A general order may be made either because of the nature of the duty involved (for example a duty to act reasonably), or because the court

⁷ 2004 (5) SA 39 (C).

⁸ 2006 (2) BCLR 293 (CC)

⁹ *Treatment Action Campaign v MEC for Health, Mpumalanga & Minister of Health* Transvaal Provincial Division case no 35272/02

is anxious to leave the government with as much latitude as possible to decide precisely how it will comply with its constitutional obligations. *Doucet-Boudreau v Nova Scotia*, the Canadian case, is an example of this. There, a school had to be provide, and reasonable measures had to be taken to achieve this. The Court wanted to leave it open to the government to choose how to do this. In such a situation, it is in the interests of all that the government be required to place its plan before the court or at least to make its plan known to the public within a certain time. The applicant is then in a position to analyse the government's plan and place its contentions before the court or, if no reporting back to the court is required, raise such concerns in the political process and civil society, and if necessary through further litigation. This approach to structural relief has real benefits. The approval of a plan by the court can allow the government to move forward with the implementation of its plan secure in the knowledge that this will constitute compliance with its obligations. And the court can make an order which is as non-intrusive as possible on the choices which the elected government makes, because it can be secure in the knowledge that this will not be an invitation to non-compliance but rather an invitation to the government to formulate a plan in order to achieve compliance with the Constitution.

Devising an effective remedy on the basis of the reason for the breach

I have suggested four circumstances, and there will be many others, in which a supervisory order may be appropriate. But there is another way of analysing the issue of how to determine appropriate relief, and that is by starting from an analysis of the reason for the government's breach. Understanding the reason for the breach will assist us in understanding what is likely to be necessary to ensure that the breach is remedied.

This analysis is demonstrated by an interesting article by Chris Hansen of the American Civil Liberties Union on the American experience of structural injunctions.¹⁰ Hansen is a practitioner: he looked at the American cases dealing principally with desegregation and custodial institutions. He identified three reasons for governmental non-compliance with constitutional standards. He calls them inattentiveness, incompetence, and intransigence. Each calls for different responsive techniques. What works with a government that is simply inattentive to constitutional standards may not work with a government that is incompetent. Other remedies, including ultimately the threat and use of contempt, may be necessary to deal with governmental actors that are simply opposed or intransigent to constitutional standards. Hansen was writing in the American context, where governments had at times been intransigent to con-

¹⁰ Hansen 'Making It Work: Implementation of Court Orders Requiring Restructuring of State Executive Branch Agencies' SR Humm ed. *Child, Parent and State* (1994) at 232.

stitutional standards with respect to desegregation and conditions of confinement in custodial institutions. In our context the problem of governmental incompetence, or more politely lack of capacity, may be more frequent and as important and difficult as the problem of intransigence.

Using Hansen's typology, one can come up with some guidelines which seem helpful. I hasten to add that these are broad guidelines and in some cases it may be apparent that the judge should intervene even initially at a higher level.

Level One is where the government is inattentive. What we suggested here was that ordinarily the appropriate relief will be declaratory or mandatory relief with possible reporting to the parties or the public.

Hansen comments that problems in complex systems 'often ... can be traced to the inattentiveness of high state officials and/or the legislature.' Those who are most in need of constitutional protections often do not have 'powerful political constituencies'¹¹ and their problems are often ignored by government. In such circumstances, declarations may be sufficient to make the problem visible and to have the government no longer ignore the need to comply with the constitution.

Declarations proceed on the assumption that governments will take prompt and competent steps to comply, and that continued judicial supervision and intervention will not be necessary to ensure compliance with the constitution.

Professor Owen Fiss has observed that the main difference between a declaration and an injunction is that whereas an injunction 'gives the defendant one more chance', because disobedience can result in a contempt citation, a declaratory judgment 'gives the defendant two more chances' because 'the plaintiff cannot get a contempt order, but only an injunction to prevent another act of disobedience.'¹²

But inattentiveness can continue even after the order of court. Examples of this are the failure of some public authorities to act promptly on the Court's declarations in *Grootboom*¹³ or even its mandatory orders in *TAC*. A means to address this is for courts to require governments to report to the parties or the public on the content of complex and on-going programs that are required to comply with the constitution. Such reports make it possible for civil society and political organizations to monitor compliance, and to take steps if there is not effective compliance. In the sequel to *TAC*, the result of an order for public reporting would have been earlier and more effective monitoring, which in

¹¹ Hansen at 232. See also Ely *Democracy and Distrust* (1980)

¹² Owen Fiss 'Dombroski' (1977) 86 Yale LJ 1103 at 1122-24.

¹³ *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC).

turn would have enabled earlier steps to ensure compliance in Mpumalanga, with a likely saving of lives.

As the Constitutional Court pointed out in *Metrorail*,¹⁴ accountability is a core feature of our Constitution. Transparency is a necessary precondition for accountability. And as the Court pointed out in *TAC*, public communication and transparency are also elements of reasonableness. A court that requires an elected government to communicate with its people about important matters of governance and steps taken to comply with constitutional rights cannot reasonably be criticized for being undemocratic or infringing the separation of powers.

The necessary precondition for accountability is transparency—unless you know what government is doing it can't be held to account. And as the Court pointed out in *TAC*, public communication and transparency are elements of reasonableness. And so it seems to me that we have really had it the wrong way around. We have assumed that there has to be some special showing to justify an order requiring government to report on what it is doing, to report to the public and to report to the parties about what it is doing to comply with an order of court. But when one thinks about it a little more closely, it seems to me that there is no need for any special showing at all. All that government is being required to do is to communicate with its people about important matters of government and what steps it is taking to comply with its people's constitutional rights. This cannot be criticized as being undemocratic, cannot be criticized as infringing on the separation of powers; it is simply a matter of government being transparent and accountable to the public in what it does. And so, it seems to me, that that is a reasonable and democratic means of ensuring democratic compliance of the constitution. It is a softer remedy than an order that the government should report to the Court and that the Court should approve the plan. In Fiss's terms, it means that it still gives the government at least two more chances.

So at Level One, the level of inattentiveness, what we suggested was—depending on the circumstances—a declaratory order or a mandatory order coupled with a declarator. This is a matter that doesn't require a special showing or place any onus: the government should say publicly, within a specified time, what it has done, what it is going to do, and when it is going to do it. Then we all know what the situation is, and government can be held to account. If there is non-compliance or if that doesn't match the standards, then the matter can be taken further.

¹⁴ *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others* 2005 (4) BCLR 301 (CC).

It seems to me that we have misconceived things in thinking that this is an intrusive order. An order of this kind was made very recently in the decision in the Mikro Primary School case in the Cape Provincial Division, which was upheld in the SCA.¹⁵ In that case, the provincial government there was ordered to make some provision for certain children to go to school next year, to take reasonable measures to enable them to receive education in the language of their choice. And what Judge Thring said in effect was ‘this is what you have got to do, you have got to do it by next year, and you must report to the parents and the other schools on the progress as you go along.’ That was taken on appeal and was upheld without difficulty by the SCA.

Level Two is incompetent government: here we suggest the ordinary remedies should be mandatory relief with reporting to the court. Hansen was primarily concerned with complex relief concerning conditions in custodial institutions. He commented that ‘probably the most common reason for non-compliance is incompetence.’ He pointed out that unconstitutional conditions in custodial institutions are often not the result of a deliberate decision by a single official to defy constitutional norms, but rather the product of decades of neglect, inadequate budgets and inadequate training of public officials. This is an important insight, which is even more important in the context of a developing democracy such as ours. It would therefore be a mistake to limit the use of mandatory relief and supervisory jurisdiction to cases where government has made a more or less deliberate decision to defy the court, and can be regarded as intransigent.

In *Doucet-Boudreau*, too, it would have been wrong to characterize Nova Scotia as a renegade province that was intransigently opposed to French language schools. The more mundane truth was probably that it was a province that because of a complex range of circumstances, including inertia, had simply not given minority language constitutional rights their deserved priority. The trial judge exercised supervisory jurisdiction not so much because he believed that the government was intransigent, but because he recognized that it would be difficult for the government to comply with the deadlines and he believed that supervisory jurisdiction and reporting requirements could assist the government in achieving the difficult goal.

Of course the greater the degree of the government’s incompetence or lack of capacity to provide for rights, the stronger the case for supervisory jurisdiction including requirements that the government submit a plan and progress reports for the court’s approval. All of the parties can be invited to provide comments on the report. In some cases, it may also be necessary for the judge

¹⁵ *Minister of Education, Western Cape, and others v Governing Body, Mikro Primary School, and another* 2006 (1) SA 1 (SCA).

to invite interveners with experience to participate or, as has been done in some American cases, for the judge to appoint experts to assist the courts and the parties in implementing the rights. All of this is novel compared to our usual one-shot remedies such as damages, and it can be seen as impinging on the separation of powers. Nevertheless, remedial activism appears in a different light when it is recognized as an attempt to remedy a lack of capacity that prevents the government from complying with the constitution. Supervisory jurisdiction with reports back to the court should not be seen as a punishment of government for defiance of the Constitution. Rather, it is simply a means of ensuring effective compliance with the Constitution, which is the core concern of the courts.

Level Three is intransigent government. Ordinarily the suggestion would be a detailed mandatory interdict which is reinforced by contempt. Hansen comments that 'by far the most difficult problem in implementation of decrees is executive branch officials who are simply intransigent'. In such cases compliance will not occur 'in the absence of an active and determined judge'¹⁶ who can credibly threaten and deliver punishment in the form of punishment for contempt. Attempts at persuasion and assistance have ended and the focus is on deterrence, punishment and the incapacitation of actors that have proven themselves to be thoroughly incompetent and/or intransigent or, in the words of Justice Iacobucci of the Supreme Court of Canada, 'have proven themselves unworthy of trust.'¹⁷

The main difference between remedies directed at an intransigent as opposed to an incompetent government relates to the need to ensure that the court's order is detailed and specific enough to make contempt citations a viable option should the government not obey the court. Report to the court provides the parties with the foundation for effective enforcement, which depends on the parties bringing an application to determine whether the government is in contempt of the order. The contempt threat will be illusory if the court has not been able to get to a point where it has enough information both to make detailed orders and to know that non-compliance is the result of defiance that should be punished as opposed to incompetence.

So what Roach and I concluded, borrowing heavily from Hansen, is that if one can understand better the reason why the government is not compliant, one can work in a more sensible and rational way towards constructing relief which will be effective. One then has a series of very practical principles which address what has happened, why has it happened, and what is necessary to fix it. That, of course, is what relief is supposed to be about.

¹⁶ Op cit at 233

¹⁷ *Little Sisters Book and Art Emporium v Canada (Minister of Justice)* [2000] 2 SCR 1120 at para 257.

Deference and remedies

I now move on to the second part of my presentation. Here, I look at the question of deference or respect in the context of remedies for the breach of constitutional rights and obligations. I start first with a brief review of the traditional grounds of deference or respect or what Jeffrey Jowell calls civility.¹⁸

First, there is what Sachs J in *Soobramoney*¹⁹ referred to as ‘appropriate constitutional modesty’. This is closely related to respect for the separation of powers. The major articulate premise of constitutional or institutional modesty is that the courts should not over-reach themselves constitutionally. The major inarticulate premise is that they should not also over-reach themselves politically, because this will damage both their short-term and their long-term roles in a constitutional democracy.

The second traditional reason for deference or respect is institutional capacity. I understand this to refer to the fact that when courts make decisions, they do so on the basis only of the evidence which is before them, and the submissions which are made by the parties before them. The interests of other persons, who are not parties, are generally not placed before the court, and if they are, this is so only from the vantage point of the contesting parties. Courts can not and do not have regard to information which is not placed before them in accordance with the rules of evidence. There are strict limits to the matters of which the judges may take judicial notice. And the judges generally have no particular expertise in the underlying subject matter of the dispute. By contrast, members of the legislature and executive are entitled (and indeed obliged) to have regard to the broadest possible range of public interests; they can and should have regard to a very wide range of ‘evidentiary’ material; and they, or at least some of them, have a degree of expert knowledge which is based on past experience, and which they are expected to bring to bear on the decisions which they have to make.

The third traditional reason for deference or respect is that judges are not democratically accountable for their decisions. Certain decisions, particularly decisions about where the greater good and the public interest lie, are more appropriately made by people who are accountable to the public for those decisions.

Those three reasons for deference or respect are generally used to explain why the courts should and do exercise some restraint, particularly in judicial review of administrative action, and also in judicial review of the validity of

¹⁸ Jeffrey Jowell ‘Judicial deference: servility, civility or institutional capacity?’ [2003] *Public Law* 592

¹⁹ *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC) at [58]

statutes. They come very strongly to the fore when questions of proportionality are in issue.

In the remaining time available to me, I want to look at how these concerns impact on the choice of remedy for breach of the Constitution, other than the question of validity of statutes, where the ground is pretty well trodden. In doing this, I will make some comments which I hope will also be relevant to the broader question of deference or respect in judicial review of administrative action and the validity of statutes.

First is the question of institutional or constitutional modesty. As I have said, this relates to the sense that a court should not over-reach itself. It seems to me that this is a factor which, at the level of principle, ought to have limited purchase in relation to remedies, if the courts ask themselves the right question. The courts have a job to do. One of those jobs is to ensure that there is no breach of the Constitution. That is a core function, which they are not entitled to compromise. The question is, I suggest, a relatively simple one, and appears from the judgment in *Fose*: what remedy will provide effective relief? The relief must be effective. In considering what will be effective—what will actually work—the court inevitably has to engage in a somewhat speculative exercise. Questions of over-reaching may be relevant in that exercise, on the basis that where the order of the court provokes extreme hostility on the part of the respondent, it may be difficult to obtain compliance. To this extent, notions of cooperation and comity are relevant. However, it seems to me that they are relevant more as pragmatic or strategic than as principled questions. They are mainly questions about how to ensure that the breach is remedied, and effectively remedied. The question remains one of effectiveness. If ‘constitutional modesty’ produces a remedy which is ineffective, then the court has failed in its function, for there is no room for ‘constitutional modesty’ in relation to the question whether the court should ensure that the breach is remedied. This is the job of the courts, and a watering down of that function is inconsistent with the role of accorded to the courts by the Constitution.

The second concern is institutional capacity, which goes to the wider range of materials and expertise available to legislators and the executive. This must be a very material consideration in the choice of remedy. As the Supreme Court of Canada put it in *Eldridge*,²⁰ ‘there are myriad options available to the government that may rectify the unconstitutionality of the current system. It is not this court’s role to dictate how this is to be accomplished’.

This must mean that there will be many instances in which the court, having found a breach, may declare the breach and order the government to remedy it, but will not tell the government how to do so. I am of course referring here

²⁰ *Eldridge v British Columbia* 151 DLR (4th) 577 (SCC)

to cases in which some programmatic or systemic relief is required, and not simply (for example), the payment of a social welfare grant or the admission of a person to residence in South Africa.

But I have to interrupt myself, and say that this requires an element of realism. As the Constitutional Court has told us, the rights in the Constitution are to be exercised by real people, living in the real world. The operation of the legal system must be evaluated in the context of this reality.²¹ The argument from institutional capacity is based on the premise that the respondent does indeed have competence, skill and expertise. Where a respondent has demonstrated that it does not have such competence—and it is impossible not to mention the Eastern Cape Welfare Department in this context—then deference on the grounds of institutional capacity becomes much more difficult to justify.

This leads me to the conclusion that what is needed when one considers deference—and this applies whether one is engaged in administrative review or the determination of remedy—is a much more textured approach than we often see in practice. There is a need to look at precisely who the respondent is, and what its competence is. In other words, the standard of deference or respect must be context-specific. Institutional competence requires a higher degree of deference to be shown where the respondent is a skilled administrator in a well-resourced and experienced public service. It is a fundamental error to transplant judicial *dicta* which emerge from that context into—I am sorry but I have to say it again—decisions made by the Eastern Cape Welfare Department. One can't simply say "Oh well, let's leave it to the executive, they know what they are doing, they know better than we do."

The third traditional ground for deference or respect is democratic accountability. The judges are not elected, they are not accountable for their decisions, and the decisions in many areas should be left to those whom the electorate can recall if they disapprove of the decisions. Here again, it is necessary to address this valid ground on the basis of a realistic view of life in the real world, rather than on the basis of the myth, the shibboleth, and frankly the humbug which have grown up around it.

In the first place, we need to recognize that democratic accountability is highly attenuated when it comes to virtually all of the matters which courts have to decide. A decision whether Mr. Soobramoney ought to have access to a dialysis machine—and most of the matters with which courts deal, even where they raise questions of social policy and priorities—will in fact never be the subject of any electoral process. For the most part we vote twice every five

²¹ *Coetsee v Government of the Republic of South Africa; Matiso v Commanding Officer, Port Elizabeth Prison* 1995 (4) SA 631 (CC) at [65], [67].

years, and it is an all-or-nothing vote. You cannot say I support the ruling party, and I vote for it, but I vote against policy on dialysis machines, its emergency housing policy, or its health policy. It is all or nothing, and it is only twice every five years. To suggest, therefore, that the decisions which are made on these issues are subject to a democratically accountable process is rather overstating it. At best, it is one of the very many matters which may be taken into account by voters in the choices they make twice every five years. That's about the size of it. Even in relation to a matter as large and affecting as many people as the housing policy questions raised in *Grootboom*, it is stretching the imagination to say that this decision is really democratically accountable.

Secondly, one has to recognize that the policy matters which the courts are sometimes required to address are seldom, if ever, matters which have been decided by elected office bearers. Take the most celebrated example: in *Soobramoney*, the decision was one made probably by the head of a unit in a provincial hospital. He or she was accountable to the democratic process only in the most indirect and attenuated way. The decision made was, as it happens, a good one. But it is hard to lay any claim for democratic accountability in respect of that decision. In *Grootboom*, it was not clear that any decision at all had been made. There was a gap in the policy. There was no evidence to suggest that the desirability of that gap had been considered, and that the matter had been decided on that basis. In truth, what we had was what one usually has, namely a series of *ex post facto* justifications, whether good or bad. Even if there was a considered decision not to provide emergency housing—which is frankly difficult to believe—that decision was taken by the officials and experts who constructed the housing program, and no doubt approved by the Minister. There was no suggestion that it was ever considered by a democratically accountable deliberative body. The third in the trilogy is of course *TAC*. Here we know (and the court must have known, although there was no evidence to that effect) that the policy of the Minister was supported and actively supported by no less a person than the President. There was also some evidence that the matter had been considered by the Minmec consisting of the national minister and the provincial ministers, although the government strove mightily and successfully to keep that evidence away from the court. (Those who had seen the minutes understood why this was so, because they contained information which was damaging to the government's case.) So we are left with a decision which was taken by the Minister, and in fact (although not on the evidence) supported by the President. It was also a decision which was of such high consequence that it was not unreasonable to conclude that it was electorally significant. But even there, the decision was made not by a deliberative body, but by the Minister and her advisors. One strongly suspects that if the matter had ever been put to

Parliament on a free vote, the members of Parliament would overwhelmingly have rejected the policy, because they live in the real world, and they know what HIV and AIDS are doing to the nation. Too many people have lost too many loved ones for members of Parliament not to be acutely aware of the wrongness of the policy. To the extent that it is relevant, a recent opinion poll shows that an extraordinary large majority of the population believes that the government (and particularly the Minister) has failed the nation on this score. But one does have to acknowledge that the claim of democratic accountability does have some purchase in respect of mother to child prevention of HIV/AIDS. The point, yet again, is the need for a contextual approach to the problem: there is more democratic accountability on some questions than on others. If democratic accountability is one of the criteria which the court is to apply, then it must be applied in a situation which is real, and not based on shibboleth.

The question becomes even more acute at the third level, when one looks at what accountability implies. The strongest form of accountability is through electoral decision. However, there is another form of accountability, and that is having to account for oneself and justify one's decisions. Here, I have to say, the reality is that there is a strong argument that the judiciary is more accountable than many people in the other branches of government. Most of the decisions which are taken on review are those of officials. They may hear no-one before they make their decision, they generally make their decisions behind a closed door, and they do not give reasons unless they are asked for them. When you compare that with a court—which has to hear the parties, has to do so in public, and has to give reasons for its decision—then one sees that there is often much greater accountability on the part of the courts. Administrators do their best, but they do their best behind closed doors, listening to the most limited advice, and often at great speed and under considerable pressure. I know that, because for nearly four years I was one of them. I made a substantial number of decisions every day. I had to make them based on the information that was before me, and do so quickly because there were twenty other decisions stacking up on my desk, and a decision has to be made.

Having sat as an acting judge in Johannesburg and Cape Town for just under a year, I can truthfully say that the pressures of accountability which I felt through having to hear the parties in public and justify my decisions, were greater than in respect of most of the decisions which I had to take as the head of a Government department.

So yet again, the question becomes one of context, looking at the actual decision-maker and the actual decision, instead of a rote recitation of the lack of accountability of judges. It truly is so that in many cases the courts are more accountable than the officials who have to make decisions on a daily basis.

As Jeffrey Jowell has said, 'There is no reason why courts should not acknowledge the shortcomings of their own institutional capacity to decide some of these matters. [He is here referring to decisions on what is in the public interest.] However, a realistic sense of their own limitations should not lead them to disparage their own legitimacy, or to deny their own authority, on account alone of their lack of accountability to the electorate.'²²

How does one apply this analysis of deference to the selection of remedy? If one goes back to *TAC*, where one finds the most detailed consideration of this question, the result is somewhat counter-intuitive. The Court really did two things: it ordered the Government to implement a mother-to-child prevention programme, through nevirapine or another medicine as well suited for the purpose; and it declined to order a structural interdict. A bit of realism tells one that given the high political profile of the case, questions of deference were very much in the minds of the members of the court. Some of the language suggests that. But if one applies the tests I have suggested, the results are somewhat surprising.

On the merits, the court made an unusually detailed order. It did not satisfy itself with declaring a breach, or even ordering the government to remedy the breach. It told the government that it had to provide a particular medicine or something as good as or better than it; it told the government that it had to make provision for counsellors to be trained for this purpose; and it told the government that it had to extend the testing and counselling facilities at hospitals and clinics throughout the public health sector to facilitate and expedite the use of this medicine. For good measure, it told the government that it had to do this 'without delay'.

If one now turns back to the reasons for judicial deference or respect, one sees that this is an order of an unusually intrusive kind, because having found the breach, the Court gave unusually detailed instructions as to how the breach was to be remedied. The reasons for this are not difficult to divine. The matter was one of life and death, on a very large scale. The obligation was clear. And the government had not suggested that there was any other way in which it could meet the obligation: indeed, the whole burden of the case was that this was the only means of doing do. An order of a kind which might have been regarded as intrusive under other circumstances, was in fact the only manner in which the court could ensure that its order would remedy the breach effectively. One of the paradoxes of the *TAC* case is that although it was so hotly contested and a matter of such high political debate, and of major significance in the development of the relationship between the courts and other parts of government, when one looks back one day one will be driven to the conclusion

²² Op cit 601

that from a strictly legal point of view it was a much easier case than very many of the cases which the court has had to decide.

So much for the remedy as far as the merits are concerned. When one comes to the refusal of the structural interdict, the criteria which I have suggested drive one to a conclusion which differs from that which the Court reached. What the TAC was asking was that the implementation of the order be made subject to a form of accountability: a report to the Court, and a subsequent determination of whether there had been compliance. In retrospect, I blame myself (because I argued the question of remedies) for the outcome of the case. The question of reporting was, in the way we presented the case, inextricably linked to a full structural interdict which would involve the matter coming back to the Court for consideration of the government's response to the order. The court's position, namely that it would not need to consider the matter again, because there was no reason to believe that the government would not comply, was reasonably defensible, though I have to say that it is difficult to avoid the sense that this reticence was driven at least as much by a concern about political over-reaching as by any other factor. But what was not defensible—except on the basis that we failed to place this option squarely enough before the court—was the failure to order the government to report what it was doing and was going to do—in other words to be accountable. That is not intrusive, and it does not involve the court asserting a greater expertise or other institutional competence than the Minister. All it says is that the Minister must tell the public what she is doing, what she is going to do, and when she is going to do it. It is simply a matter of accountability, no more and no less. In retrospect, one can see that if that order had been made, at least part of the Mpumalanga fiasco would have been avoided, for the TAC spent several months attempting to extract the information from the Mpumalanga government before it was able to form the justified conclusion that in fact there had been a breach of the order. And I have to say that one was left with the nagging suspicion that one or two of the other provinces had not done too well either, although at least there was some evidence of good faith effort.

So the TAC outcome is somewhat unexpected: on the merits, there is a sharp lack of deference—for good reason—whereas on the question of accountability, there is an excessive deference which, I suggest, is not justifiable. I should say that I think that there are two likely explanations for the latter failure: first, the failure of the respondents to present clearly the option of a reporting order which was not linked to a structural interdict; and second, a political (with a small 'p') concern on the part of the court that it had gone as far as its strategic view would permit. On that latter point, it was indeed seeking to find 'a delicate balance'.

Closing Remarks

ADV JODY KOLLAPEN*

We have deliberately decided to keep this session short as you had a long day; a very rich day full of wonderful presentations but I don't think the day would be complete if we don't say a few things about where we're at in this democracy 12 years down the line. I think there can be little doubt that the quality of our democracy with all its warts and all its difficulties has been made possible by a number of factors. One of the difficult factors has been the role of the courts in particular the role of the Constitutional Court. Through its work, it has enabled us as South Africans to begin to understand what it means to live in a constitutional democracy in a substantive way. It is to give a face and meaning to what the former Chief Justice Ismail Mahomed described as the constitutional contract. What does it mean to live and to honour and to discharge the terms of that constitutional contract? In doing its work, it has not always been popular either with government or with civil society or with the broad populace. If you look at some of the decisions like the equality decisions around gay and lesbian rights. But I think what it has done is 'cool', to use the words of Michael Kirby. I never thought there would come a day when I would come to describe the Constitutional Court as a 'cool' court.

I think if we look at our democracy one is reminded of the words of Amartya Sen who distinguished what he called the public participation perspective of democracy and the public reasoning perspective of democracy. The public participation perspective is quite easy—the adequate provision through the electoral system of the right of the public to choose — whereas the public reasoning perspective is the ability of government to respond to public reasoning, what he called government by discussion. And without a doubt the Court has contributed to that; it has created an environment for that; it has enhanced that ability of the State to respond to public reasoning. But I also think that we must be careful that we do not allow the courts to be substituted for what is in a sense the best guarantor for democracy: the ability of ordinary citizens to hold their government accountable and to engage their government. While the court has an important role to play, its primary objective is not to hold the government accountable but to ensure that the provisions of the Constitution are adhered

* Chairperson, South African Human Rights Commission.

to. Clearly, in doing so it would from time to time have to hold government accountable, but I do not believe that its primary responsibility is to hold government accountable.

Which brings me to the penultimate point and that is, we spoke of the balance, the delicate balance and it is an extremely delicate balance. I suppose the architecture of the Constitution sets out what the balance should be in the context of the separation of powers and in an ideal world where all the parties play their role that balance will be maintained and perhaps enhanced. But it is when there are slippages in terms of what organs and institutions have to do when that balance becomes threatened and considerable pressures are brought to bear in terms of how you remedy imbalances and ordinarily democratic processes should create the space to remedy those. But those imbalances happen and I think in our society we are beginning to see more and more pressure is brought to bear on the Court to play a role, the extent of which was not quite envisaged. I just caution, especially in the light of some remarks from judges here today, that there are cases that come before them that really should not, and on which they are perhaps not best placed to make decisions, but must do so. I think there is a lesson in this for civil society and for other institutions in society to use this space to mediate some of those issues and some of those problems but failing that ultimately the Court will have to do it with the consequences that go with that.

Finally from a human rights perspective: when we celebrated in 1994 the birth of a new society and the adoption of a Constitution and a Bill of Rights, we were mindful that our passion for justice was meant to shape our new legal and constitutional order. The court has, over the years, quite boldly created the space for a new approach, for a new understanding of the role of the law. While jurists have dispassionately analysed those judgments, we sometimes lose sight of the value that the judgments have had for ordinary people. What it has done because of the credibility of the Court and the legitimacy of the Court it has forced us as ordinary individuals and communities and organizations to use those judgments as the basis to undertake some introspection in terms of what human rights mean to us as individuals and organizations. And I think, while there will continue to be bias and prejudice, the value of those judgments in the area of gay and lesbian rights; in the area of gender equality; in the area of non-nationals; in the area of people living with HIV; and in the area of poor people has contributed immeasurably to developing a new consensus, a glue that attempts to bind us together as a society—dignity and the self worth of every individual.

Finally, given that this symposium is being held to mark the retirement of the former Chief Justice, I would like to say to the Chief Justice that when I

was a young articulated clerk in the late 70s, I went to a court and I saw you and I said you were a man of remarkable intellect. Later when I met you I saw that that remarkable intellect is matched by a remarkable sense of humanity. Today, 25 years later while this intellect emerges from the judgements that you have written, I think what you leave behind is a remarkable legacy of having used your intellect and your humanity to make this the country that it is, and I am certainly proud to live in a society where you have served us so well.

Thank you.

APPENDIX

Programme

THE SCHOOL OF LAW, UNIVERSITY OF THE WITWATERSRAND
and
THE SOUTH AFRICAN JOURNAL ON HUMAN RIGHTS
present

A DELICATE BALANCE

THE PLACE OF THE JUDICIARY IN A CONSTITUTIONAL DEMOCRACY

*A symposium to mark the retirement of Justice Arthur Chaskalson
former Chief Justice of the Republic of South Africa.*

24 NOVEMBER 2005

19h30 Dinner at the Grace Hotel, Rosebank, Johannesburg
Welcome: Professor Glenda Fick, Head, School of Law
Opening remarks: HE Mr Lodewijk Briët, Ambassador of the European
Commission Delegation to South Africa
Speaker: Adv George Bizos SC, Legal Resources Centre

25 NOVEMBER 2005

OPENING REMARKS ON THE CONFERENCE THEME

08h45–09h00 Speaker: Justice L Ackermann, former Justice of the
Constitutional Court of South Africa
09h00–09h15 Speaker: The Hon Mr Justice MM Lehohla, Chief Justice of
Lesotho
Chairperson: Professor Glenda Fick, Head, School of Law

SESSION ONE: THE SEPARATION OF POWERS

09h15–10h00 Speaker: Justice Pius Langa, Chief Justice of the Republic of
South Africa
10h00–10h45 Speaker: Justice Margaret Marshall, Chief Justice of the
Supreme Judicial Court, Massachusetts
10h45–11h15 Questions and discussion
Chairperson: Adv George Bizos SC, Legal Resources Centre
11h15–11h45 TEA

SESSION TWO: THE STANDARD OF JUDICIAL REVIEW OF EXECUTIVE AND ADMINISTRATIVE DECISIONS

11h45–13h00 Panel discussion

Participants: Professor Cora Hoexter, School of Law, Wits
Professor Jonathan Klaaren, School of Law, Wits
Professor Hugh Corder, Faculty of Law, UCT
Questions and discussion

Chairperson: Justice Yvonne Mokgoro, Constitutional Court of South Africa

13h00–14h00 LUNCH IN THE CHALSTY CENTRE FOYER

SESSION THREE: REMEDYING BREACHES OF THE CONSTITUTION

14h00–14h45 Speaker: Adv Geoff Budlender

14h45–15h15 Questions and discussion

Chairperson: Professor Marius Pieterse, School of Law, Wits

SESSION FOUR: JUDICIAL REVIEW IN A TIME OF TERRORISM

15h15–16h00 Speaker: The Hon Justice Michael Kirby AC CMG,
High Court of Australia

16h00–16h30 Questions and Discussion

Chairperson: Justice Kate O’ Regan, Constitutional Court of South Africa

16h30–17h00 Closing remarks: Mr Jody Kollapen, Chairperson, South African Human Rights Commission
Professor Cathi Albertyn, Centre for Applied Legal Studies, Wits

17h00 DRINKS AND SNACKS

THIS SYMPOSIUM IS FUNDED BY THE CONFERENCE WORKSHOP CULTURAL INITIATIVE FUND, AN EU-SA PARTNERSHIP PROGRAMME