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ON STORMY WATERS: SOUTH AFRICA'S JUDGES (AND POLITICIANS) TEST THE LIMITS OF THEIR AUTHORITY*

HUGH CORDER

*'THERE SHALL BE A SEPARATION OF POWERS BETWEEN THE LEGISLATURE, THE EXECUTIVE AND JUDICIARY, WITH APPROPRIATE CHECKS AND BALANCES TO ENSURE ACCOUNTABILITY, RESPONSIVENESS AND OPENNESS..'*¹

*"I THINK THAT THERE IS A DANGER...OF THE JUDICIARY ENTERING INTO THE FIELD OF THE EXECUTIVE, BUT VICE VERSA THERE ARE SIGNS OF THE EXECUTIVE ENCROACHING ON THE JUDICIARY. THEY SHOULD BOTH MIND THEIR STEPS."*²

a) THE PAST AND CURRENT CONTEXT

Few need reminding about South Africa's horrific record of racist abuse of the basic rights of the majority of its citizens. It may be less widely known that, with the exception of the dying years of the apartheid regime,³ such widespread denial of human dignity was typically pursued and achieved through the formally lawful grant of authority by the legislature to the executive and its administrative infrastructure. This was part of the Westminster legacy of British colonial rule⁴ in the first half of the twentieth century, in common with the other territories which enjoyed 'dominion' status. The central aspect of such a system of constitutional governance was the doctrine of Parliamentary sovereignty, as expounded by A V Dicey.⁵

The South African governmental experience contributed to the development of

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¹. Constitutional Principle VI, Schedule 4, *Constitution of the Republic of South Africa*, Act 200 of 1993.

². Lord Hailsham, former Lord Chancellor of the United Kingdom, speaking about the English judges, as reported in E. Lightfoot and M. Prescott, 'Too Big for their Wigs?', *Sunday Times*, 5 November 1995; quoted in Robert Stevens, *The English judges: Their Role in the Changing Constitution* (2002).

³. The country was ruled under a "state of emergency" effectively from July 1985 till mid-1990, duly declared under the provisions of the Public Safety Act of 1953.

⁴. South Africa's first constitution was the South Africa Act of 1909, passed by the Westminster Parliament, which united the four former British colonies of the Cape, Natal, Orange River Colony and Transvaal into a Union of South Africa in May 1910.

⁵. See *Introduction to the Study of the Law of the Constitution* (10th ed, 1959) Part I.

this notion in two starkly contrasting ways. On the ‘positive’ side, the jurisprudence produced as a result of the serious constitutional disputes in the 1930’s and the 1950’s about the binding nature of the entrenched clauses in the South Africa Act served to establish throughout the Commonwealth the inherent ‘manner and form’ constraints on unbridled legislative power.⁶ On the ‘negative’ side, the extremely limited manner in which the ‘rule of law’ was received into South African law and governance showed graphically—ultimately tragically--- the folly of Dicey’s assumption and arguments⁷ that the notion of the rule of law was a complement, and indeed strong ally, of Parliamentary sovereignty. This experience showed that, shorn of the innate inhibitions on legislative authority borne of the historical developments which undergirded the rule of law in England, the minority represented in Parliament hesitated little in using its formally unbridled law-making power to reinforce the disempowerment of those excluded from the franchise and to deal harshly with those within the fold who dared to dissent. I venture to suggest that the experience of most of South Africa’s dominion counterparts (and perhaps even the ‘mother country’ itself) demonstrates that, absent a culturally homogeneous citizenry, the concept of legislative sovereignty has proved inadequate to the demands of modern democratic practice, and that some mechanism through the law to circumscribe parliamentary power so as to protect minorities is essential. What else explains the protection of Fundamental Rights in Part III of India’s Constitution of 1947 and the Charter of Rights and Freedoms of 1982 in Canada, and more recently the 1990 Bill of Rights Act in New Zealand, and the Human Rights Act of 1998 in the United Kingdom?

One of the most common constitutional devices for ensuring respect for ‘limited government’ is of course the idea of the separation of powers, which has for more than 250 years informed the constitution-making task in those societies aspiring to democratic government. It is trite that the type of separation of powers with its accompanying system of checks and balances which is to be found in the Constitution of the United States of America and of the French Republic has not been a feature of Westminster-based constitutional arrangements. Indeed, it would be more apt to speak of a ‘balance of powers’⁸ in the latter cases. At the same time, it would be wrong to describe the exercise of power in pre-democratic South Africa as being characterised by anything other than increasingly lawless executive discretion,⁹ with judicial review of administrative action at common law, as a potential inhibitor of such conduct, being hopelessly over-extended

⁶. Many lawyers in the British Commonwealth of several decades ago would be familiar with the judgments on which the franchise rights of some South African black and ‘coloured’ men were determined, such as *Ndlwana v Hofmeyr NO 1937 AD 229*; *Harris v Minister of the Interior 1952 (2) SA 428 (AD)*; and *Collins v Minister of the Interior 1957 (1) SA 552 (AD)*.

⁷. See Dicey, above n 5, Chapter XIII in particular.

⁸. See the discussion of Robert Stevens *The English Judges* (revised ed, 2005), especially in Chapters 6 and 7.

⁹. See in particular Geoff Budlender, ‘Law and Lawlessness in South Africa’ (1988) 4 *SAJHR* 139, and Stephen Ellmann *In a Time of Trouble* (1992).

and its limitations cruelly exposed.¹⁰

Thus it was that the negotiators of South Africa's transitional constitutional arrangements were determined to require some measure of separation of powers and checks and balances in any future, more lasting constitution, as is seen at the head of this piece. The interim Constitution¹¹ provided for the various branches of government in separate chapters, as well the power of judicial review of both legislative and executive action, and the supremacy of the Constitution, the last element being a key to the process of political transition. As is well known, the transition occurred in two stages, the first freely elected Parliament being responsible for drafting the 'final' Constitution,¹² in the years 1994 to 1996. The current Constitution begins with an entrenched statement¹³ of the values underlying the form of democracy which it seeks to express, including the primacy of human dignity, equality, rights and freedoms, the rule of law, constitutional supremacy, and multi-party government, 'to ensure accountability, responsiveness and openness'. These values summarise many of the Constitutional Principles¹⁴ which comprised the framework agreed to in the negotiations and which had to be respected in the final Constitution, as certified by the Constitutional Court (hereafter CC). Those not expressed in section 1 of the final Constitution are assumed to be impliedly incorporated in the rest of the text, among which is compliance with the doctrine of the separation of powers and some sort of arrangement for mutual checking and balancing.

There is no express reference to the separation of powers in the text itself, although the authority of the three branches of government is once again detailed in separate Chapters,¹⁵ and various means of checking and balancing such authority are to be found, most important among them judicial review as the final guarantor of constitutional supremacy.¹⁶ Significantly, the Constitution also provides expressly for legislative 'oversight' of the Executive¹⁷ and a series of 'State Institutions Supporting

¹⁰. See Hugh Corder, 'Crowbars and Cobwebs: Executive Autocracy and the Law' (1989) 5 *SAJHR* 1.

¹¹. *Constitution of the Republic of South Africa*, Act 200 of 1993, adopted by the last apartheid Parliament, but effectively 'acting under dictation' from the negotiating parties in the last months of its life.

¹². *Constitution of the Republic of South Africa*, Act 108 of 1996. Unless specified otherwise, references elsewhere in this piece to the 'Constitution' refer to this Act.

¹³. Section 1.

¹⁴. Contained in Schedule 4 of the interim Constitution of 1993, these Principles were drawn from the series of negotiating meetings which took place from 1991 to just before the first free election for Parliament in April 1994.

¹⁵. Chapter 4 sets out the legislative, Chapter 5 the executive, and Chapter 8 the judicial authority in the State, and each Chapter contains a provision vesting such authority in bodies which are subsequently established.

¹⁶. Various aspects of this power are provided for in several places in the Constitution: ss 1(d), 165, 167(5), and 172.

¹⁷. Section 55(2) sets out this responsibility for Parliament, and the equivalent provision at provincial government level is to be found in section 114(2).

Constitutional Democracy’,¹⁸ among them a Human Rights Commission, a Commission for Gender Equality, and a Public Protector (the national ombudsman), each of which has the potential to ensure the vigour of the constitutional goals. However, if there was any doubt about the inclusion of the separation of powers, it was laid to rest relatively early in the life of the CC, in a case¹⁹ in which Parliament purported to delegate too much of its legislative power in respect of a specific matter to the executive, in the form of President Mandela. In several further judgments, the CC has explored the practical limits of the separation of powers, chiefly in defining the circumstances in which delegated legislation may be made by the executive,²⁰ and in which judicial officers may perform non-judicial functions²¹ (and vice versa).

In general, the approach of the Court can be characterised as essentially pragmatic, recognising that a complete separation of personnel between the executive and legislative bodies was neither necessary, nor intended, nor the practical expression of the doctrine in most Commonwealth countries;²² and that the independence of the judicial branch of government was sacrosanct, and to be defended at almost any cost.²³ This is the constitutional background against which, in what follows, I will consider two particular aspects of the relationship between the courts on the one hand, and the other two branches of government on the other: first, the manner in which the judiciary has sought to be sensitive to the demands and constraints placed on government in its mandated attempts to begin the construction of a more equitable distribution of power and resources, while nevertheless establishing a climate of accountability to the requirements of the Constitution; and second, the responses of the governing party, the African National Congress (ANC), to such jurisprudence, especially its perceptions of the

¹⁸. See the Constitution, Chapter 9.

¹⁹. *Executive Council of the Western Cape Legislature v President of the RSA*, 1995 (4) SA 877 (CC).

²⁰. Such as *Ynuico Ltd v Minister of Trade and Industry*, 1996(3) SA 989 (CC).

²¹. See *De Lange v Smuts NO*, 1998 (3) SA 785 (CC) and *South African Association of Personal Injury Lawyers v Heath*, 2001 (1) SA 883 (CC), for example. In an important reaffirmation of the vigour of the separation of powers, the Court in the latter case held (at paras 18 to 22) that there ‘... can be no doubt that our Constitution provides for such a separation..., and that laws inconsistent with what the Constitution requires in that regard are invalid.’

²². See paras 55 and 60 in the judgment of Chaskalson P in *Executive Council of the Western Cape*, above, n 19.

²³. See in general *Van Rooyen v S*, 2002 (5) SA 246 (CC). See also *S v Mamabolo*, 2001 (3) SA 409 (CC) at para 16:

In our constitutional order the judiciary is an independent pillar of state, constitutionally mandated to exercise the judicial authority of the state fearlessly and impartially. Under the doctrine of separation of powers it stands on an equal footing with the executive and the legislative pillars of state; but in terms of political, financial or military power it cannot hope to compete. It is in these terms by far the weakest of the three pillars; yet its manifest independence and authority are essential. Having no constituency, no purse and no sword, the judiciary must rely on moral authority. Without such authority it cannot perform its vital function as the interpreter of the Constitution, the arbiter in disputes between organs of state and, ultimately, as the watchdog over the Constitution and its Bill of Rights — even against the state.

‘counter-majoritarian’ nature of the Court’s constitutional task. In conclusion, I will attempt a prediction on future developments in these areas. Could the remarks of Lord Hailsham quoted above fairly represent the situation in South Africa today? I think not, and hope to justify this view in what follows, although his warning ought to be heeded.

b) THE JUDICIAL RECORD

Judicial politics in South Africa before 1994 were cast into stark relief by the courts having to implement fundamentally unjust statutes and in their interpretation of the rules of the common law. The courageous stance of the Appellate Division in resisting early apartheid measures was, by the early 1960s, a distant memory, yet the judiciary continued to trade on credit, so to speak, until a series of studies²⁴ in the late 1970s and through the 1980s brought a degree of realism to bear on this question. The legacy of this record was expressly to be seen in the court structure and jurisdiction in the interim Constitution,²⁵ and the discussion which follows must be read against that background. It should be noted that all superior court judges in office under apartheid were entitled to continue in office, subject to swearing an oath of allegiance to the new Constitution, which they all did. The most significant institutional changes were to be seen in the creation of the Constitutional Court²⁶ (CC) and of the Judicial Service Commission²⁷ (JSC), responsible for appointment and discipline of judges, and both these forums loom large in what follows. Functionally, the judiciary was challenged by its new role, which came to be described as the pursuit of “transformative constitutionalism”.

i) *The ‘Easy’ Cases*

Much of the early work of the CC which in other circumstances and at a different juncture might have thrown it into conflict with the executive and legislature was almost completely uncontroversial. So the Court struck down many of the most obviously unjust procedural and evidentiary rules, such as the presumptions that an accused’s confession was lawfully obtained,²⁸ that an accused was ‘dealing’ in a drug if found to be in

²⁴. Although there had been critical articles published before, both within and outside the country, the way was led externally by Albie Sachs, *Justice in South Africa* (1973), and internally by John Dugard *Human Rights and the South African Legal Order* (1978). As a ‘banned person’ under internal security laws, Sachs’ book could not be distributed in South Africa.

²⁵. Most particularly in that the Appellate Division, formerly the highest court in the land, was excluded from exercising constitutional jurisdiction: see s 101(5) of the *Constitution of the Republic of South Africa*, Act 200 of 1993.

²⁶. *Ibid*, s 98.

²⁷. *Ibid*, s 105.

²⁸. *S v Zuma*, 1995 (2) 642 (CC).

possession of more than a certain quantity of it,²⁹ and so on.³⁰ Potentially more controversial were the outlawing of the death penalty³¹ and corporal punishment,³² confirming the reviewability of the former prerogative powers,³³ scrapping the crime of sodomy³⁴ and confirming the constitutionality of a ban on the sale of liquor on Sundays and Christian holidays,³⁵ but none of such issues stirred the pot of public controversy unduly.

In this early period, perhaps the most clearly ‘political’ decision rendered by the Court was its refusal to upset the constitutionality of the Truth and Reconciliation Commission (TRC) set up under the Promotion of National Unity and Reconciliation Act of 1995. In all societies in transition from unjust repression to something aspirationally better, the question of what to do about those who have perpetrated evil deeds and those who have been their victims must be addressed. Such issues were very much present in the minds of those who negotiated the transition in South Africa,³⁶ and to this end the following provision appeared in what became known as the ‘postamble’ of the interim Constitution:

National Unity and Reconciliation

This Constitution provides a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex.....[T]here is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for ubuntu but not for victimisation.

In order to advance ... reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions and offences associated with political objectives and committed in the course of the conflicts of the past. To this end, Parliament under this Constitution shall adopt a law determining a firm cut-off date...., and providing for mechanisms, criteria and procedures, including tribunals, ..., through which such amnesty shall be dealt with at any time after the law has been passed.....

The critical element of the Promotion of National Unity and Reconciliation Act

²⁹. *S v Bhulwana; S v Gwadiiso* 1996 (1) SA 388 (CC).

³⁰. For example, *S v Coetzee*, 1997(3) SA 527 (CC), in which a ‘reverse onus’ under the Criminal Procedure Act was held to be unconstitutional.

³¹. In *S v Makwanyane*, 1995(3) SA 391 (CC).

³². In schools, see *Christian Education South Africa v Minister of Education*, 2000(4) SA 757 (CC).

³³. In *President of the RSA v Hugo*, 1997(4) SA 1 (CC).

³⁴. *National Coalition for Gay and Lesbian Equality v Minister of Justice*, 1999(1) SA 6 (CC).

³⁵. *S v Lawrence*, 1997(4) SA 1176 (CC).

³⁶. Among many studies of this matter, see Kader Asmal, Louise Asmal and Ronald Suresh Roberts *Reconciliation through Truth*, 1996) and Charles Villa-Vicencio and Wilhelm Verwoerd (eds) *Looking Back, Reaching Forward* (2000), particularly the chapters in Section 1.

challenged by the political party whose ideology most closely matched that of the late Steve Biko, and by Biko's family and others,³⁷ was the complete relief available to those granted amnesty, being absolution from both criminal prosecution and civil suit. The applicants challenged the constitutionality of such a provision on the grounds of unjustifiable infringement of their constitutional rights to life and dignity, relying also on the principles of customary and treaty-based international law. The matter reached the CC, and presented the judges with a real test of their political astuteness, for a decision which upheld the challenge would probably have jeopardised the whole contract of compromise which the Constitution represented.

Significantly, the leading judgment for the Court was written by its most senior black member, Justice Ismail Mohamed, who went on to become Chief Justice a few years afterwards.³⁸ His anxiety about the stance taken by the Court is clear in many passages in his judgment, for he and the rest of the members of the Court realised that there was great force in law in the arguments raised by the applicants, but equally that such arguments were trumped in the greater scheme of things, by the reality that the alternative to such complete amnesty (for full disclosure by the perpetrators of gross human rights violations) was a period of violent attrition enduring over many years, at the end of which the survivors would inherit a pitiful national legacy, a charred wasteland of destruction. In the words of Mohamed DP:³⁹

If the Constitution kept alive the prospect of continuous retaliation and revenge, the agreement of those threatened... might never have been forthcoming, and... the bridge itself [between the past and the present] would have remained wobbly and insecure... . It was for this reason that those who negotiated the Constitution made a deliberate choice, preferring understanding over vengeance, reparation over retaliation, ubuntu over victimization.

This outcome shows less about the Court's relationship with the other branches of government (except indirectly in that, as the direct representatives of the population after a free and fair election, Parliament and its Cabinet could be taken to express the views of the vast majority of the population) than about the Court's recognition of the greater political forces which had conspired to produce a political settlement, and what was needed for its survival.⁴⁰ The judgments manifest complete judicial understanding of and support for the need for political compromise as innate to the design of the constitutional transition in South Africa.

³⁷. *Azanian Peoples Organisation (AZAPO) v President of the RSA*, 1996 (4) SA 671 (CC). Section 20(7) of the Act (34 of 1995) provided for such amnesty.

³⁸. A further judgment was handed down by Didcott J, a judge who had served under the apartheid regime but who was well known for his pursuit of justice rather than the strict interpretation of the letter of the law where possible.

³⁹. See *AZAPO*, n 37, at para 19.

⁴⁰. The judgment was criticised by John Dugard, 'Memory and the Spectre of International Justice: A Comment on *AZAPO*' (1997) 13 *SAJHR* 269; and D Moellendorf, 'Amnesty, Truth and Justice: *AZAPO*' (1997) 13 *SAJHR* 283.

In this way, much as in its declaration of the unconstitutionality of the death penalty, the Court acted to resolve an impasse which the politicians were unwilling to confront on their own, and in the process the judiciary grew in stature as a governmental mechanism which enjoyed both the confidence of the rest of government and a growing measure of popular legitimacy. Having considered the broader field of the judiciary establishing its acceptability in exercising the power of judicial review generally, we must now pay closer attention to the narrower enquiry of the judicial approach to the law-making and law-implementing powers of the other two branches of government.

ii) Interacting with Parliament

The courts' decisions naturally have an effect on their relationship with Parliament each time that a legislative provision is found to be unconstitutional. In this respect, the CC has from the outset displayed a keen sensitivity to the limitations inherent in a political leadership almost totally new to governing, and a state bureaucracy in transition, beset by a legacy of administrative secrecy, inefficiency and lack of accountability, with a fair dose of corruption thrown in. The relationship with Parliament *can be usefully analysed in three areas.*

Firstly, judicial concern has been most clearly manifest in the crafting of remedies consequent on findings of unconstitutionality of Acts of Parliament and subordinate legislation, the typical order being an injunction to the lawmaker to remedy the defects, within a realistic period of time, pending which the offending legal rule would remain formally in place. So we see Parliament being given twelve months to legislate for same-sex marriages⁴¹ and to remedy the defects in the State Liability Act,⁴² while the Court has also been prepared to 'read words into' an Act, in order for example to give relief to the surviving partner of a Muslim 'marriage',⁴³ and to revise the African customary law of succession so as to remove its male-centredness.⁴⁴

The Court has usually laid down guidelines for Parliament to assist with the drafting of the legislative amendments deemed necessary to render the law constitutional.⁴⁵

Parliament has generally complied, within the period stipulated, although on a few occasions it has come back to court to seek an extension of time.⁴⁶ On such

⁴¹. *Minister of Home Affairs v Fourie* 2006 (1) SA 524 (CC).

⁴². *Nyathi v MEC for Department of Health, Gauteng*, 2008 (5) SA 94 (CC).

⁴³. *Daniels v Campbell NO*, 2004 (5) SA 331 (CC).

⁴⁴. *Bhe v Magistrate, Khayelitsha*, 2005(1) SA 580 (CC).

⁴⁵. See the cases referred to in n 41 to 44, above, in which the Court has given full expression to its expectations about the type of amendments needed to remedy the defects identified, thus alerting parliament to what is required of it.

⁴⁶. See, for example, *Zondi v MEC for Traditional and Local Government Affairs*, 2006(3) SA 1 (CC).

occasions, the CC has mostly agreed grudgingly to the request. Recently, however, in relation to the reforms needed in the area of enforcement of liability of civil damages against the State, the Court has been more assertive in its attitude.⁴⁷ Faced with Parliament's failure sufficiently expeditiously and satisfactorily to comply with its earlier order, the CC agreed to an extension of time for legislative changes, but in the interim it has ordered that the relevant section of the Act be read in a manner which gives litigants against the State some effective means of executing the judgments which they have obtained in their favour.

Secondly, the Court has been willing, from the outset, to limit the legislative authority of Parliament to its constitutional bounds. This is most clearly to be seen in the Western Cape Legislature case,⁴⁸ which was the first in a line of decisions which explored the status of delegated legislative power in the post-apartheid era. Significantly, the decision was made in the context of a challenge to the national executive in the person of President Mandela by a provincial government still dominated by the party which had governed under apartheid, and the consequence of the decision was the postponement of local government elections in that province. Despite these circumstances, the CC held that Parliament had exceeded the limits of its powers to delegate its law-making function to the executive, and it has continued to hold it to such limits in subsequent cases.⁴⁹

Thirdly, and perhaps most controversially, the CC has begun to explore the meaning of the concept of a democracy characterised by responsive, accountable and open government, as that goal is described in the 'values statement' of the Constitution, and as is prescribed on several occasions throughout the rest of that document. More specifically as far as Parliament is concerned, the Constitution requires⁵⁰ the two Houses of Parliament to '... facilitate public involvement in the legislative and other processes of the [houses] and [their] committees; and...conduct [their] business in an open manner and hold [their] sittings... in public'. In the *Doctors for Life International* case,⁵¹ a non-governmental organisation which opposes choice on the termination of pregnancy challenged an Act amending South Africa's relatively permissive legislation in that area. It appeared that, although there had been some opportunities for the public to register their comments on the proposed amendments, such consultations had been insufficient in the view of the Court when the relevant committee of the National Council on Provinces had dealt with the Bill. The CC thus set aside the 'Act' concerned, and Parliament had to go through the legislative process again. Although the Court was not unanimous in its

⁴⁷. See *Minister for Justice and Constitutional Development v Nyathi* (case no. CCT 53/09), delivered on 9th October, 2009, as yet unreported; see also the Order of the Court in *Fourie*, above n 41, and in *Bhe*, above n 44.

⁴⁸. Above, n 19.

⁴⁹. Such as *Ynuico*, above n 20, and *Executive Council of the Western Cape v Minister for Provincial Affairs and Constitutional Development*, 2000 (1) SA 661 (CC).

⁵⁰. The Constitution, ss 59(1) (National Assembly), and 72(1) (National Council of Provinces).

⁵¹. *Doctors for Life International v Speaker of the National Assembly*, 2006 (6) SA 416 (CC).

judgment,⁵² a sufficiently weighty majority was willing to hold Parliament to its constitutional mandate in this respect; once more this was not necessarily a popular stance to have taken.

Thus it can be seen that the judiciary has proved itself willing to engage with the legislature on those occasions when it deems Parliament to have failed to meet its constitutionally proper mandate. However, in an era of increasing social complexity and popular expectation of the delivery of goods and services by the State, and when as a consequence the balance of power has been shifting inexorably towards the executive, the true test of the judicial determination to preserve its independence and hold the rest of government to account is to be found in the courts' approach to regulation of executive authority, to which I now turn.

iii) *Checking the Executive*

In reviewing the jurisprudence since 1994, the judicial record in the immediately preceding decade should not be ignored.⁵³ While almost all commentators acknowledged that the approach of the majority of the superior court judiciary in South Africa was characterised by 'executive-mindedness' from at least the mid-1960s,⁵⁴ the near-capitulation to executive will that happened during the successive states of emergency from mid-1985 scarred the judicial image deeply in the eyes of the general public. Although there were exceptions from time to time, when judges interpreted even the harshest emergency regulations in favour of liberty and common-law rights, the tone was set by that component of the Appellate Division (the apex court at that stage) which most frequently heard the final appeals against state action under the emergency, and which almost always decided in favour of the executive. Although the Constitutional Court was a new judicial body, and although one of the main reasons for its creation was precisely to emphasise its pivotal role as the ultimate arbiter of state power in the new constitutional dispensation and to allow its members to be selected according to the newly-established mechanism through the JSC, nevertheless interested observers, naturally including those politicians whose actions were being scrutinised, were watching its judgments closely, in order to assess its fidelity to its constitutional purpose as regards executive accountability. It is appropriate again to survey the judgments in three groups.

Firstly, and early in the life of the Constitution, the Court had the opportunity⁵⁵ to establish the principle that the Constitution was supreme, no matter how high the office-bearer and how weighty and controversial the decision made or action taken. The icon of South Africa's process of transition, President Nelson Mandela, announced at his

⁵². Ngcobo J spoke for the majority, while Van der Westhuizen and Yacoob JJ wrote separate dissenting opinions.

⁵³. For a discussion of the record, see Ellmann (above, n 9) and David Dyzenhaus *Hard Cases in Wicked Legal Systems* (Oxford, Clarendon Press, 1991).

⁵⁴. Thus Dugard (above, n 22) and Christopher Forsyth *In Danger for their Talents* (1985).

⁵⁵. See *Hugo's case*, above, n 33.

inauguration as President an amnesty for prisoners who fell within a certain class both of person and criminal act. He confined his pardon to women with young children, exercising the power given to him as Head of State, and that formerly would have been seen as part of the prerogative, and thus essentially unreviewable at common law. A male prisoner, Hugo, who in all other respects would have qualified for such amnesty, challenged this presidential action, alleging unfair discrimination on the ground of sex, an attribute expressly outlawed as the basis of unfair discrimination in the interim Constitution. A majority of the CC upheld this discrimination as fair in the circumstances,⁵⁶ but the important point for present purposes is that the Court unanimously and with no hesitation ruled that it had the authority to review this exercise of power, even though it was a decision infused with political and discretionary considerations.

Two further decisions of this type reached the Court at the turn of the century. In *SARFU*,⁵⁷ the issue at stake was the appointment of a Commission of Inquiry into the affairs of the rugby football union, formerly also a manifestation of the prerogative. While this dispute also raises interesting questions about the public/private divide in administrative law and the circumstances in which judges should recuse themselves from sitting in a case, the main point for present purposes was the fact that the Court was quite prepared to review President Mandela's action as Head of State for alleged bias, under the rubric of the principle of legality (the rule of law). In the event, it held his action to be lawful. In similar vein, in *Pharmaceutical Manufacturers Association*,⁵⁸ the Court reviewed the President's exercise of his formal authority as Head of State in giving his assent to the entering into force of an Act of Parliament, again against the standard required by the principle of legality. In this case, the Court found that President Mandela had erred in doing so, because the regulations necessary to make the Act effective had not been drafted and published, so that his decision was tainted by error, and could not withstand constitutional scrutiny. In this manner, the Court clearly demonstrated its resolve to ensure that no governmental action could claim exemption from judicial review under the Constitution, even though the intensity of the scrutiny would be determined by the extent to which policy and discretion lawfully influenced such action.

A counterweight to this decision is to be seen in the recent case of *Glenister v President of the RSA*,⁵⁹ in which a businessman, given standing as acting in the public interest, sought to stop the President from signing into law draft Bills approved by Parliament which had the effect of transferring the 'Scorpions', the elite corruption- and

⁵⁶. A minority view was expressed by Kriegler J, holding that confining the amnesty to women strengthened the stereotypical view of women as primary care givers, and thus fell foul of the right to equality on the ground of gender in the Constitution. He did not, therefore, differ from the majority on the reviewability of the exercise of power by the President.

⁵⁷. *President of the RSA v South African Rugby Football Union*, 2000 (1) SA 1 (CC).

⁵⁸. *Pharmaceutical Manufacturers Association of SA: In re Ex parte President of the RSA*, 2002 (2) SA 674 (CC).

⁵⁹. *Hugh Glenister v President of the RSA*, Case CCT 41/08, decided on 22 October 2008.

crime-fighting body, from the independent National Prosecuting Authority (NPA),⁶⁰ and incorporating it into the police service. The politics of the matter were that it was claimed that the Scorpions were too much in the camp of President Mbeki, who had effectively lost the support of the ANC, the party of government, at a congress in late 2007, and that the NPA was pursuing corruption charges too vigorously against Jacob Zuma, who had supplanted Mbeki as leader of the ANC. In this highly charged political atmosphere, Glenister's application, based on non-compliance with various forms of the principle of legality, confronted the Court squarely with the limits of its authority under the separation of powers. Accepting, without deciding, that it was possible in law for a court to intervene in principle at this stage of the legislative process, Chief Justice Langa⁶¹ went on to hold (for a unanimous court) that it would only be appropriate to do so when the 'resultant harm [of the signing into law of the Bills] will be material and irreversible'. He held further⁶² that this approach "... takes account of the proper role of the courts in our constitutional order: while duty-bound to safeguard the Constitution, they are also required not to encroach on the powers of the executive and legislature.' On the facts as presented to the Court, the applicant failed to discharge this 'formidable burden', and his application was dismissed.

There are, however, further examples of the Court's willingness to express views critical of executive action. So the CC has been very critical⁶³ of the conduct of a member of a provincial executive council who, in relation to a challenge to provincial legislation, failed on several occasions to comply with judicial requests for information about and justification for a particular use of words in a statute. This resulted in a punitive order as to costs. The Court has also been prepared to find⁶⁴ that the Presidential power to dismiss civil servants at the highest level (the rank of Director General, the equivalent of a Permanent Secretary of a government department in a British-style public service department) was reviewable, because it was the exercise of a 'public power', and the dispute before the Court was 'about whether public authority has been exercised in a constitutionally valid manner.' Review of such executive action proceeded on the basis of the principle of legality, as follows:⁶⁵

Firstly, the President must act within the law and in a manner consistent with the Constitution. He or she therefore must not misconstrue the power conferred. Secondly, the decision must be rationally related to the purpose for which the power was conferred. If not, the exercise of the

⁶⁰. Set up and given a degree of independence through s 179 of the Constitution, amplified in the *National Prosecuting Authority Act*, 32 of 1998.

⁶¹. Above, n 59, at para 44.

⁶². *Ibid.*

⁶³. *South African Liquor Traders Association v Chairperson, Gauteng Liquor Board*, 2006 (8) BCLR 901 (CC)

⁶⁴. *Masethla v President of the RSA*, 2008 (1) SA 566 (CC).

⁶⁵. *Ibid.*, at para 81.

power would, in effect, be arbitrary and at odds with the rule of law.

The second area in which the Court has held the executive to account is both similar and related to the approach to Parliament outlined above, within the sphere of the remedies ordered by the Court to make good conduct found to be unconstitutional. Three examples serve amply to demonstrate the Court's approach. In its very first decision,⁶⁶ chosen deliberately by the Court to lay down any number of benchmarks for the nascent constitutional democracy after 1994, the Court declared the death penalty to be unconstitutional. It did so in ringing terms, through eleven separate but concurring decisions, one by the President for the Court, and the remaining ten by each of the other Justices in turn. This decision is important for all sorts of reasons, both narrowly legal and more broadly symbolic. First, the Court took the drafting history (in which several of the judges had been directly involved) into account in deciding that it was appropriate and necessary that it should decide the question before it,⁶⁷ probably much to the relief of the political parties in Parliament. Secondly, the Court was very careful to select the grounds on which to decide that the death penalty was unconstitutional, placing greater emphasis on the rights to dignity, equality and to be free from degrading, cruel and inhuman punishment or treatment, and less on the right to life, granted in an unlimited fashion by the interim Constitution.⁶⁸ Most importantly for present purposes, however, it required the executive to initiate a process to re-sentence the hundreds of prisoners languishing on death row in Pretoria Central Prison, not with one rule to govern all cases, but with a degree of individual attention. The State moved very tardily in this matter, and it has been raised again before the CC, which has not hesitated to speak critically about the failure to bring certainty to the life circumstances of all such prisoners.⁶⁹

The second example of the Court's creative approach to constitutional remedies is to be found in *Modderklip Boerdery*,⁷⁰ which resulted from tens of thousands of people erecting informal dwellings on a private farm adjacent to a large town east of Johannesburg. For a complex set of reasons, the local authority was unable and unwilling to provide formal housing to such people, nor was it willing to expropriate the land and pay compensation, as the land was unsuitable (through undermining) for permanent human settlement on such a scale. Having found that the State had failed in its constitutional duties to the land-owner, but recognising that the eviction of more than 40 000 people was inappropriate, to say the least, the Court ordered the payment of

⁶⁶. *S v Makwanyane*, above n 31.

⁶⁷. *Ibid*, at paras 17 to 25.

⁶⁸. The rights are relied on to varying degrees in the eleven judgments reported. It may well be that some of the judges steered away from reliance on the right to life, anticipating a challenge on that basis to legislation on choice on the termination of pregnancy which was likely to arise.

⁶⁹. *Sibiya and Others v DPP: Johannesburg High Court and Others*, 2005 (8) BCLR 812 (CC)

⁷⁰. *President of the RSA v Modderklip Boerdery (Pty) Ltd*, 2005 (5) SA 3 (CC).

‘constitutional damages’ to the farmer for the loss of the use of his land,⁷¹ pending a more lasting resolution of the impasse, in effect ordering the local authority to ‘rent’ such land until that happened. In doing so, the Court relied on the constitutional provision⁷² which authorises it to make any order which is ‘just and equitable’.

The final example sees the Court coming close to fashioning what is generally known as a ‘structural interdict’ to remedy a particular constitutional shortcoming. This is to be seen in the very recent decision⁷³ involving the language policy of a high school which argued that it was entitled to refuse to introduce parallel classes in English, where the vast majority of the scholars were Afrikaans-speaking, but which almost inevitably had the effect of preserving it informally as a ‘whites only’ institution. The Court held both the school governing body and the provincial department of education (in a province heavily dominated by the ANC) to be in default of their constitutional obligations, and set out a series of steps and time periods within which the parties had to report back to the Court to demonstrate that they were remedying the defects identified in the judgment. It is too early to assess the efficacy and significance of this development, but it shows to some extent that the Court is sensitive to the criticism levelled at it that its orders, especially in socio-economic matters, are sometimes not carried out,⁷⁴ not through government intent, but rather through inefficiency and careless omission.

I would argue that these three instances show that the Court is both aware of the constraints under which the executive operates and of the many, conflicting and urgent demands on it, but also that its patience is beginning to wear a little thin, in the face of such intransigent inefficiency. It seems to me that the vexed area of the enforcement of socio-economic rights exemplifies these contradictions and limits in a stark manner, as I hope to demonstrate in what follows.

Thirdly, then, the main judgments concerning socio-economic rights need to be surveyed, through the lens of the respective constitutional roles attributed to the judiciary and the executive. It must be noted at the outset that the inclusion of such rights in the Constitution, while politically necessary, had been preceded by quite some public and scholarly debate in the late 1980s and early 1990s,⁷⁵ and that they had not been included in the interim Constitution. In the final Constitution, the grant of such rights differs from that in respect of the first generation, or civil/political, rights, in that the latter are

⁷¹. Ibid, see paras 53 to 61.

⁷². The Constitution, section 172(1)(b).

⁷³. *Head of Department: Mpumalanga Department of Education v Hoerskool Ermelo*, Case CCT40/09, handed down 14 October 2009; as yet unreported.

⁷⁴. The aftermath of the *Grootboom* decision (below, n 81) has become notorious. The named litigant, Mrs Irene Grootboom, died in the course of 2008, still without a house of her own, a full seven years after her victory in court.

⁷⁵. See, for example, Nicholas Haysom ‘Constitutionalism, Majoritarianism, Democracy and Socio-Economic Rights’; Etienne Mureinik ‘Beyond a Charter of Luxuries: Economic Rights in the Constitution’; and Dennis Davis ‘The Case against the Inclusion of Socio-Economic Demands in a Bill of Rights except as Directive Principles’, all of which appeared in (1992) 8 *SAJHR*, at 451, 464, and 475, respectively.

typically given in unrestricted (though of course limitable) language, while socio-economic rights are hedged about with qualifications. So the right to housing⁷⁶ reads as follows: “Everyone has the right to *have access to adequate* housing.... The State must take *reasonable* legislative and other measures *within its available resources*, to achieve the *progressive* realisation of this right.’ So too the rights to health care, food, water and social security.⁷⁷ Significantly, however, the grant of similar rights to children⁷⁸ uses the unrestricted language more generally to be found in the Bill of Rights.

The first significant occasion on which such rights came before the CC⁷⁹ did not permit of detailed and measured consideration and disposal. The appellant, Soobramoney, was in very poor health, with a range of illnesses, most seriously renal failure. At stake was his right to regular access to a dialysis machine provided by the public health system. Such treatment was a scarce resource, and the relevant provincial department of health had devised a detailed set of criteria according to which access to dialysis was to be granted. Soobramoney’s generally parlous state of health meant that, while his need was extremely urgent, his chances of recovery, given his multiple ailments, placed him insufficiently high on the priority list to justify granting him treatment. Faced with this dilemma, the Court reviewed the reasonableness of the policy and criteria developed by the Department of Health, and its manner of implementation, and decided (with some regret for Soobramoney) that it passed constitutional muster.⁸⁰

Within two years, the most detailed consideration of a socio-economic right issued from the Court.⁸¹ At stake was the right to housing of 900 adults and children living in dire informal accommodation near Cape Town, and suffering the effects of a typically cold, wet and windy winter. At first instance, the Cape High Court⁸² had used the fact that the majority of those affected were children to invoke the direct claim to shelter accorded to them by the Bill of Rights, and on this basis it awarded the whole group appropriate relief, for the children could clearly not manage without their parents. The CC was not so constrained.⁸³ It interrogated the government’s policy and plans for the provision of basic housing to the vast numbers of mainly urban poor who needed it, and concluded that it was constitutionally reasonable, save that it failed to deal adequately with those who, while waiting for such housing, needed emergency shelter of

⁷⁶. The Constitution, s 26.

⁷⁷. Ibid, s 27.

⁷⁸. Ibid, s 28.

⁷⁹. *Soobramoney v Minister of Health, Kwa-Zulu Natal*, 1998(1) SA 721 (CC).

⁸⁰. See the separate judgments of Chaskalson P, and Madala and Sachs JJ, especially at para 59. Indeed, the outcome for Soobramoney was fatal as, without dialysis, he died within weeks of the judgment.

⁸¹. *Government of the RSA v Grootboom*, 2001 (1) SA 46 (CC).

⁸². Reported as *Grootboom v Oostenberg Municipality*, 2000 (3) BCLR 277, judgment of Davis J.

⁸³. See the judgment of Yacoob J, speaking for a unanimous Court.

some kind in order to survive the elements. Thus the Court relied directly on the right to housing, and unanimously found the State liable for the immediate amelioration of the applicants' circumstances, in a judgment which was greeted with approval even from sceptics about the inclusion of socio-economic rights in a constitution.⁸⁴

Just two years later, the right to health care was again before the Court,⁸⁵ but this time in circumstances very different from the lone and urgent application from Soobramoney. At stake was the government's extraordinary policy response to the HIV/AIDS pandemic which threatens the lives of millions in southern Africa, and in particular its slow and patchy delivery of anti-retroviral treatment to combat mother-to-child transmission of the virus. Effectively, the executive seemed to be in denial about an appropriate and scientific response to the public health crisis, in the face of massive mobilisation by the most effective non-governmental organisation since the end of apartheid, the Treatment Action Campaign (TAC). In some desperation, the TAC turned to the courts, and their application for the immediate extension of anti-retroviral treatment to new-born children (relying on the right to have access to basic health care, and the rights of all children to such care) met with success in the High Court.

On appeal by the Minister of Health, who argued⁸⁶ that there was no constitutional obligation on the State to provide an 'effective, comprehensive and progressive programme' such as the TAC had advocated, the CC delivered judgment in the name of 'the Court', signalling its unanimity in politically contested terrain and in circumstances in which its decision was likely to attract criticism on the ground of its polycentric consequences. The Court dismissed the appeal, affirming the justiciability of socio-economic rights and characterising the government's policy as unreasonably inflexible. While acknowledging that⁸⁷

...[c]ourts are ill-suited to adjudicate upon issues where court orders could have multiple social and economic consequences [and that the] Constitution contemplates rather a restrained and focused role for the Courts, namely, to require the State to take measures to meet its constitutional obligations and to subject the reasonableness of these measures to evaluation.....

the Court refused to confine itself to a declaration of rights, and ordered the Minister to extend treatment beyond the few 'pilot-sites' which had been identified before. Such an order had clear and immediate financial implications for government, which makes this an extremely significant case within the judicial-executive relationship. It is worth noting that this judgment was greeted with overwhelming public acclaim, which would have added measurably to the courts' legitimacy, making it easier to cross the executive so directly and firmly. Some have argued that the state had effectively

⁸⁴. See, for example, Cass Sunstein 'Social and Economic Rights -- Lessons from South Africa' (2000/01) 11 *Forum Constitutionnel* 123.

⁸⁵. *Minister of Health v TAC (No 2)*, 2002(5) SA 721 (CC).

⁸⁶. *Ibid*, set out in summary at para 51 of the judgment.

⁸⁷. *Ibid*, at para 38.

thrown in the towel before both the *Grootboom* and *TAC* cases reached the CC, yet these are nevertheless landmark decisions.

Another important case⁸⁸ in the socio-economic arena shows the CC's willingness to come to the assistance of those more at the margins of South African society. There are many migrants, mainly from other African countries, living and in many cases working in South Africa. Some are there illegally, while others have the status of 'permanent resident'. This latter group took the Constitution at its word, in seeking the payment to its members of social assistance grants as if they had been citizens of the country. It may be recalled that the Bill of Rights grants its benefits to 'everyone' in all but a few circumstances, and that there is a right to 'have access to ... appropriate social assistance'.⁸⁹ After repeated failure by the State to participate in the proceedings and to justify its exclusion of permanent residents from the benefits of social grants, despite requests to do so by the Court, the CC ruled in favour of the particular applicants, a group of destitute Mozambicans. In doing so, Mokgoro J expressed her reasoning for the majority as follows:⁹⁰

When the rights to life, dignity and equality are implicated in cases dealing with socio-economic rights, they have to be taken into account along with the availability of human and financial resources in determining whether the state has complied with the constitutional standard of reasonableness... In my view the importance of providing access to social assistance to all who live permanently in South Africa and the impact upon life and dignity that a denial of such access has, far outweighs the financial and immigration considerations on which the state relies.

This extract encapsulates two important arguments used by the court in holding the State accountable to its socio-economic obligations under the Constitution: the innate link between the fundamental civil rights to life, equality and human dignity on the one hand, and socio-economic rights on the other; and the Court's reliance on 'reasonableness' as the benchmark against which it will measure state policies and efforts, rather than using arguments about the 'minimum core' approach to the latter rights.⁹¹ In the result, the CC ordered the reading in of the words 'permanent resident' into the legislation to cure the defect identified.

In the last two years, the Court has been faced with several challenges within the context of the provision of housing and municipal services within the Johannesburg metropolitan municipality. Their judgments in such matters display a nuanced balancing of civic rights with constraints on local government capacity, and an emphasis on

⁸⁸. *Khosa v Minister of Social Development*, 2004 (6) SA 505 (CC).

⁸⁹. The Constitution, section 27(1) (c).

⁹⁰. *Khosa v Minister of Social Development*, 2004 (6) SA 505 (CC), at para 44.

⁹¹. This is a long-running dispute both in academic writing and in litigants' arguments before the courts. Amici curiae in the *TAC* case (above, n 85), for example, raised these arguments but they were rejected by the Court at paras 26ff. See also, for example: D. Bilchitz, 'Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-Economic Rights Jurisprudence' (2003) 19 *SAJHR* 1; and D. M. Davis 'Socio-Economic Rights in South Africa: The Record after Ten Years' (2004) 2 *New Zealand Journal of Public and International Law* 47.

procedural fairness. So, in *Occupiers of 51 Olivia Road, Berea Township v City of Johannesburg*,⁹² the municipality had sought to evict roughly 400 poor people living in the inner city, in order to pursue its ‘inner city regeneration strategy’, mostly without the provision of alternative accommodation. After their eviction was ordered by the Supreme Court of Appeal, the appellants sought and obtained an interim interdict from the CC, ordering the parties to engage in ‘meaningful discussions’ about how to resolve the dispute between them, and to report back to the Court on such engagement by a specific date. In doing so, Yacoob J (who had written the judgment in *Grootboom*) was careful to emphasise⁹³ the balance between the municipality’s obligations to recognise the rights to life and dignity in the socio-economic context and the availability of its resources, with the watchword in respect of the intended eviction of the occupiers being the reasonableness of such a step and the meaningfulness of the engagement between the parties.

This approach has been strongly emphasised very recently, in cases concerned with the provision of electricity and water. At the heart of the first case was the termination by the municipality of the provision of electricity without notice to those using it but having informed their landlord, who was substantially in default of payment for it, the main issue which confronted the CC⁹⁴ was the relationship between private-law rights and obligations arising from the contract of lease, and public-law rights and obligations arising out of the fact that the tenants were residents who could expect the provision of basic municipal services. The Court held⁹⁵ that the ‘broader constitutional relationship that exists between a public service provider and the members of the local community gives rise to rights’ which attracted the procedural fairness obligations specified in the Promotion of Administrative Justice Act⁹⁶ (PAJA). As a consequence the municipality was not able lawfully to terminate such services which were being received as a ‘matter of right’ without a measure of procedural fairness, which in the circumstances was at minimum pre-termination notice, giving the tenants ‘sufficient time to make any necessary enquiries and investigations, to seek legal advice and to organise themselves collectively if they so wish’. The Court declared as unconstitutional part of a provision in the Electricity By-laws which stipulated that notification of intended termination was not necessary, and ordered the reconnection of power to the block of flats concerned.⁹⁷

The outcome in the water services case is less positive for the residents concerned, and perhaps amounts to the Court balancing its expectations of local

⁹². 2008 (3) SA 208 (CC).

⁹³. Ibid, at paras 16 to 18.

⁹⁴. In *Leon Joseph v City of Johannesburg*, Case CCT 43/09, judgment handed down 9 October 2009; as yet unreported.

⁹⁵. Ibid, at para 33.

⁹⁶. Ibid, at para 43.

⁹⁷. Ibid, at para 71.

government seen more broadly. In *Mazibuko v City of Johannesburg*,⁹⁸ the right of ‘access to sufficient water’ was in dispute. The applicants were once again extremely poor, and they challenged two aspects of the municipal policy on water provision: the adequacy of the amount of water supplied free on a monthly basis to each ‘accountholder’ in the city, and the policy of installing pre-paid water meters. Both challenges failed. Again, in relation to the adequacy of the amount of water provided, the CC took ‘reasonableness’ to be its guiding standard, stating that⁹⁹

.... it is clear that the right does not require the state upon demand to provide every person with sufficient water without more; rather it requires the state to take reasonable legislative and other measures progressively to realise the achievement of the right of access to sufficient water, within available resources.

This implied a judicial rejection of the concept of a ‘minimum core’ approach to socio-economic rights, even though the applicants, in arguing for an amount of 50 litres per person per day, had linked this entitlement to the necessity for a dignified life, and had expressly rejected any reliance on the ‘minimum core’ notion. In any event, the CC¹⁰⁰ held that it would be inappropriate for a court to make such an order, as

(t)his is a matter for the legislature and executive, the institutions best placed to investigate social conditions in the light of available budgets... . Indeed, it is desirable as a matter of democratic accountability that they should do so for it is their programmes and promises that are subjected to democratic popular choice.

O’Regan J summarised the approach of the Court in this context as follows:¹⁰¹

Thus the positive obligations imposed upon government by the social and economic rights in our Constitution will be enforced by courts in at least the following ways. If government takes no steps to realise the rights, the courts will require government to take steps. If government’s adopted measures are unreasonable, the courts will similarly require that they be reviewed so as to meet the constitutional standard of reasonableness... A reasonableness challenge requires government to explain the choices it has made. To do so, it must provide the information it has considered and the process it has followed to determine its policy.

As to the policy of installing pre-paid water meters, which allow automatic cut-off of water supply if no payment is made, the applicants raised many arguments against them, both in principle and in the particular manner in which they had been introduced in their community, essentially arguing non-compliance with constitutional rights (such as

⁹⁸. Case CCT 39/09, judgment handed down on 8 October 2009, as yet unreported.

⁹⁹. Per O’Regan J, for the Court, at para 50.

¹⁰⁰. Ibid, at paras 56 and 61.

¹⁰¹. Ibid, at paras 67 and 71.

the right to equality) and a procedural fairness obligation on the municipality. All these arguments were rejected by the Court.¹⁰² Significantly for this analysis, the policy itself was regarded as executive and not administrative action within the definition of the latter phrase in the PAJA, so that it did not attract the obligations laid down in that statute.¹⁰³ As to actual implementation of the policy on the ground, the Court expressed itself satisfied with the fairness of the process followed by the municipality.¹⁰⁴ It should be noted that the last two judgments discussed were delivered on consecutive days, and were among the last in which four of the original members of the CC (appointed in 1994) participated. There is thus something of a leave-taking flavour about them, and a further reason for them to be read in tandem. When compared directly, it seems that the narrowly administrative-law approach taken by the Appellants in *Joseph's* case served their cause better than the broad socio-economic-rights approach in *Mazibuko*. In any event, the latter case was probably not suitable to argue on an administrative-law basis.

At the conclusion of this cursory overview of the socio-economic rights jurisprudence of the CC, it seems fair to conclude that the Court has been more than willing to engage with the scope and enforceability of such rights, and has not shied away from requiring action from the executive, both in general and on occasion more specifically. Against the background of a rising tide of disenchantment¹⁰⁵ with the will and capacity of the government at all levels to deliver the required services to the people, increasing resort has been had to approaching the courts to seek judicial endorsement of socio-economic claims, and this trend could perhaps explain the apparently deferential note struck throughout the *Mazibuko* case. Whether such a sense of deference is caused by judicial perceptions of threats to their independence from the other branches of government is the question to which I now turn.

c) PARLIAMENT AND THE EXECUTIVE RESPOND

I have dealt at some length with the main features of the judicial record in the nexus of relations with the other branches of government, because it seems that this represents the challenge which is faced by a directly-elected legislature and an executive drawn from the ranks of Parliament to the well-established notion of majority rule, even under the kind of limits imposed by a Constitution such as South Africa's. Judicial accountability can be achieved through all sorts of avenues, among them the open nature of court process, critical attention to judgments from the media and the legal profession, the possibility of being overturned on appeal, a critical and independent corps of legal

¹⁰². Ibid, at paras 84 to 104.

¹⁰³. Ibid, at para 131.

¹⁰⁴. Ibid, at para 134. This has been criticised in media comment as a 'deferential' approach, which it no doubt is: the question is its appropriateness.

¹⁰⁵. Over the past two years or so, there have been increasing protests by poor people (some of which have become violent) at the failure of 'service-delivery' by government at all levels, and this was a major issue during the general election campaign of early 2009.

academics, and so on. Accountability is not necessarily a limitation of judicial independence, and is a necessary counter-balance to such independence in a constitutional democracy. However, under the guise of accountability, a curtailment of judicial authority can be sought, and potentially the most intrusive means through which this can be achieved is through executive influence on judicial appointments and the daily operations of the courts, and through formal amendments to the Constitution and relevant legislation governing the judicial power and the administration of the courts, whose purpose or effect is the curtailment of judicial independence.

The South African situation, almost inevitably, is infused with further unusual elements: it is an emerging democracy, trying to recover from centuries of autocratic government, which seeks to treat equitably all elements of an extraordinarily diverse population characterised by racial, gender and class divisions to an often extreme extent. The Constitution recognises this in several places and generally pursues a 'transformative' agenda, without expressing this directly. In regard to the judiciary, the relevant constitutional passages provide, for example, that 'the courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice';¹⁰⁶ that 'no person or organ of state may interfere with the functioning of the courts';¹⁰⁷ that 'organs of state... must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts';¹⁰⁸ that 'any appropriately qualified woman or man may be appointed as a judicial officer';¹⁰⁹ and that, in appointing judicial officers, 'the need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered...'.¹¹⁰

It is fair to say that the first decade after South Africa formally became a constitutional democracy in 1994 has assumed something of a golden hue, perhaps basking in the reflected light of the miraculous rainbow which became the characteristic image of the transition which no one had believed was possible. Within this context, the Constitutional Court rapidly established itself as an institution worthy of respect, aided by two factors: the composition of the first court, containing as it did a range of remarkable lawyers, many of whom had courageous records of resistance to injustice in the past,¹¹¹ and all of whom proved extraordinarily perceptive social observers and

¹⁰⁶. The Constitution, section 165(2).

¹⁰⁷. Ibid, s 165(3).

¹⁰⁸. Ibid, s 165(4).

¹⁰⁹. Ibid, s 174(1).

¹¹⁰. Ibid, s 174(2).

¹¹¹. For example, the first President of the CC was Arthur Chaskalson, who had been defence counsel to Nelson Mandela and many other opponents of apartheid, and who had founded the first public-interest law practice in the country; Pius Langa, who succeeded Chaskalson as head of the CC, who had been the President of the National Association of Democratic Lawyers; and Albie Sachs, exiled lawyer and academic, who had been the victim of an attempted assassination by car-bomb as recently as 1988, all found themselves members of the CC in October 1994.

servants of the Constitution --- as a unit, their jurisprudence has been admired by many apex courts elsewhere in the world; and the person of President Nelson Mandela, who unequivocally endorsed the notion of judicial independence and who unhesitatingly complied with judgments of the Court, sometimes expressing in public his willingness to do so, even though this was not necessary. The JSC pursued its mandate on judicial appointments, quite rapidly ensuring that many of the most senior black lawyers were appointed to judicial office, though it did less well on the appointment of women to the Bench. The first Minister of Justice, Dullah Omar, had been a practitioner and a fighter for justice through the law in South Africa throughout his career, and knew the system and the professions well.

At the same time, there was a clear void when it came to subsidiary elements of the new judicial administration, most notably on the issue of judicial ethics and a process to discipline judges short of impeachment. Under the leadership of the Chief Justice, various pieces of draft legislation were prepared for submission to Cabinet, including a Code of Conduct and a proposal for judicial misconduct tribunals. The structure of the practising legal profession also came under the spotlight, in the form of a draft Legal Practice Bill, which would have fused the branches of the profession, but which was contested by the Bar, which wanted to retain a degree of professional separation from the attorneys. Poor political leadership led to a lack of progress on all these fronts, and the election of 2004 brought a new ministerial team into office. The Minister of Justice and Constitutional Development, Ms B Mabandla, appeared to allow her Deputy, Mr J de Lange, who had been Chair of the Parliamentary Portfolio Committee on Justice since 1994, to take responsibility for seeing through the legislative reforms needed to make the administration of justice a more efficient and expeditious system.

However, Mr De Lange had strong (and most within the legal profession would say, misguided) views on the perceived shortcomings of the judicial process, and he proceeded to depart in critical respects from the legislative package¹¹² agreed on by the judicial leadership and the former Minister. In doing so, he must have acted with the support of at least some significant sections within the governing party. In particular, he inserted clauses into the draft Bills which would have given much greater managerial control to both the office of the Chief Justice (in respect of judicial matters) and to the Minister (in respect of all administrative matters within the justice orbit, including the financing of the courts). In addition, he would have had the Minister make the Rules of Court (and not lend her final approval to the rules drafted by the Rules Board, dominated by the profession, as was the existing arrangement); the merger of several appellate courts was advocated, along with the abolition of 'full-Bench appeals' at High Court level and the requirement that the Supreme Court of Appeal become a circuit court; strict rules for the taking of leave by judges and a system whereby judges effectively would have to keep 'office hours' were proposed; a new judicial training institute, under the aegis of the Department of Justice, not the judiciary, was provided for; and detailed

¹¹². The draft legislation consisted of the Superior Courts Bill, the 14th Constitution Amendment Bill, the Judicial Tribunals Bill, the JSC Amendment Bill, and the SA National Justice Training College Bill, none of which has survived intact after the stand-off of 2005, but all of which will probably resurface in some form. Indeed, the last-mentioned bill has now been enacted as the *South African Judicial Education Institute Act*, 14 of 2008.

mechanisms for enquiring into judicial misconduct which would attract a sanction short of impeachment were stipulated, with substantial non-judicial involvement. As a consequence particularly of the envisaged Ministerial role in the administration of the court system, it would be necessary to amend the Constitution. The background to all these proposals was a section of the ANC's 'anniversary statement' in January 2005, which highlighted the perceived need to change the 'collective mindset' of the courts and make judges more sensitive, indeed accountable, to the needs and aspirations of the vast majority of the population.

It is fair to describe the reaction of the legal profession, led by a unanimous judiciary, as an angry, if not outraged, uproar of rejection of much of what was proposed. The Minister duly convened a 'colloquium' in April 2005, to which most of the leading figures in the debates were invited. Although discussion occurred behind closed doors, it is clear that judicial resistance to the measures listed above in particular was unequivocal and unanimous, and that the leadership of the rest of the legal profession, including the academy, and opposition politicians were no less critical in their views. Significantly, there was no division along racial lines among the opponents of the changes made by the Deputy Minister. The media duly raised public awareness of the controversy, and it became clear that the most recent amendments could not be sustained politically. Interventions by the judges and others at a high level within the executive led to the withdrawal by President Mbeki of the entire package of legislative reforms, which most observers welcomed but simultaneously viewed as at least unfortunate, given the large measure of support which the drafts had enjoyed before they were changed by Mr de Lange. In particular, the continuing absence of rules and mechanisms to deal with judicial misconduct, and of a code of ethics for judges, as agreed to before 2004, was lamented, and soon became a stick with which those politicians who resented the manner in which the courts were perceived to 'interfere' with government could beat the judges.

No judge has ever been impeached in South Africa, and it is only possible currently if the JSC finds 'that the judge suffers from incapacity, is grossly incompetent or is guilty of gross misconduct', and such finding is endorsed by a two-thirds majority in the National Assembly of Parliament.¹¹³ In the past, minor instances of judicial indiscretion were dealt with informally, usually by the head of the court in which the judge served, and doubtless this practice has continued post-apartheid. Since 1994, the JSC has been the proper channel for more serious complaints, has drafted rules to govern such process,¹¹⁴ and has received a number of minor complaints, which have usually been dealt with in confidence. Essentially, for more serious complaints which may potentially lead to impeachment, the process followed by the JSC is to have an initial enquiry, to determine whether there is a prima facie case to which the judge has to answer, after which it will move to the 'full enquiry' stage to find whether removal from office is to be recommended to Parliament.

In contrast with earlier times, the last five years have witnessed an inordinate degree of public attention on alleged judicial misdemeanours, almost wholly centred on the Judge President of the Cape High Court, Judge John Hlophe. This is not the place to

¹¹³. The Constitution, s 177(1).

¹¹⁴. Styled 'Rules Governing Complaints and Enquiries in Terms of Section 177(1)(a)' (undated).

go into detail on the ‘Hlophe saga’, as it has become to be known,¹¹⁵ and only the main points of controversy stirred by the judge need be listed:

--- his handling of an application for leave to appeal from a split full-Bench decision in which he had participated, in a highly sensitive political case¹¹⁶ involving the restructuring of the pharmaceutical industry in late 2004, and his arrogant response to being overruled by the SCA;

--- his ex parte publication of a report, delivered to the Minister in early 2005, alleging racism by many members of the legal profession in the Western Cape, including some of his senior judicial colleagues;

--- his initial denial but later acknowledgment of the receipt of monthly payments from an asset management company over a five-year period, which remained undisclosed until the same company sought permission from him to sue a fellow-member of the Cape High Court for damages, which was granted;

--- the JSC’s inept handling of the complaints arising from this conduct, in the course of which Judge Hlophe claimed to have had oral permission from the late Minister of Justice for such payments, which led in October 2007 to a decision by the narrowest majority of the JSC not to pursue the enquiry any further, but nevertheless to emphasise to Judge Hlophe the unacceptability of his behaviour --- the public row which greeted this decision served effectively to divide the legal community along race lines;

--- the complaint by the judges of the CC in May 2008 that Judge Hlophe had effectively sought to influence two of their number to uphold an appeal by the President of the ANC, Jacob Zuma, which unleashed a torrent of public comment; and

--- a counter-complaint by Judge Hlophe against the judges of the CC alleging that his dignity had been impaired by the publication of their complaint, leading to an extremely demeaning series of exchanges and several bouts of litigation between Judge Hlophe and the members of the CC over the ensuing sixteen months. The JSC again dragged its feet, culminating once more in a majority decision in September 2009 not to pursue its investigation further, even in the face of clear disparities in the accounts given under oath by several of the most senior judges in the country. What is perhaps most distressing about this saga is the rapid degeneration of the discussion into allegations of racism directed at those critical of both Judge Hlophe and the JSC’s handling of the matter, and the completely destructive nature of much of the discourse, which shows the tenacious and deep-seated legacy of the injustices of the past.

This dramatic chain of events played off against a long-running series of legal battles both within and outside court, where the political stakes were clear and much higher. The central feature of this contest was the laying of charges of corruption in relation to the arms deal of the late 1990’s against the Deputy President of the ANC, Jacob Zuma, which sparked a debilitating and ultimately destructive fight over the

¹¹⁵. The electronic service Legalbrief (accessible at www.legalbrief.co.za at 28 October, 2009) has compiled a convenient collection of media reports on Judge Hlophe’s various difficulties, which runs to many pages.

¹¹⁶. This was the dispute about the pricing mechanism for the sale of medicines by pharmacies, which eventually reached the CC as *Minister of Health v New Clicks South Africa (Pty) Ltd*, 2006 (2) SA 311 (CC).

succession to the presidency of the country itself. After seven years of court hearings, investigations, and sparring between lawyers, the charges against Mr Zuma were quashed by the Pietermaritzburg High Court in September 2009, leading directly to the recall by the ANC from the office of President of Thabo Mbeki and the triumph in the general elections of April 2009 of the ANC led by Jacob Zuma, who is now President of the country. The element of this essentially political battle which is relevant for present purposes is the centrality assumed by court hearings and judgments (including Mr Zuma's acquittal on an unrelated charge of rape in 2005),¹¹⁷ which led directly to intense scrutiny of the judicial process, and some quite blatant attempts by all concerned to question the competence and integrity of both the presiding judges and the judiciary in general. Indeed, the same party congress at which Mr Zuma was elected as party leader adopted a far-reaching resolution which called again for the transformation of the Bench, and more ominously for the passage into law of many of the features of the Bills introduced by Mr de Lange in early 2005 and so vehemently resisted by the judiciary. The row between the CC and Judge Hlophe provided further ammunition for those politicians seeking to be served by a more pliant judiciary, and they did not fail to enter the fray in trenchant terms. The effects of this "lawfare" on the judicial mind, both individual and collective, must not be underestimated.

This account of the responses of the dominant political party whose policies determine the actions of both Parliament and the Cabinet (through its manner of operating and the party-list system of elections which obtains) shows that, despite many protestations to the contrary, there is at least a strong minority which is intolerant of an independent judiciary as a watchdog of the limits placed on the power of government through the Constitution. Indeed, the stated intention of the current Minister of Justice to reintroduce the Bills shelved in 2006 at the earliest possible stage, after consultation with the judges, will have to be monitored closely. While there are indications that the views of the judicial leadership may be taken more seriously than they were in 2005, the approach of the Executive to the appointment of four judges to the Constitutional Court in September 2009 has created concerns in this area.

Finally then, in this review of 'political' responses to judicial review, the manner and outcome of the judicial appointments process must be noted, as this is the most obvious point at which the other branches of government can directly influence the judicial process generally. The apartheid regime did this clearly after 1948,¹¹⁸ leading to a crumbling of judicial resistance to apartheid measures by the early 1960s. As has been mentioned above, the JSC's role is determinative for all appointments and 'promotions' of judges below the level of the CC. In pursuit of its constitutional mandate to "consider" race and gender in the composition of the Bench, the JSC has within fifteen years achieved a judiciary which is about 55% black, and about 20% female, a remarkable transformation.

The members of the JSC most obviously susceptible to political influence are those four appointed at the will of the President, although the fact that most of the ten members of both houses in Parliament who serve on the JSC are drawn from the ANC

¹¹⁷. Reported as *S v Zuma*, 2006 (2) SACR 191 (W).

¹¹⁸. See Forsyth, above n 54, at Chapter 2.

and thus subject to party discipline is not irrelevant. While the four Presidential appointees had remained unaltered since nomination by President Mandela in 1994¹¹⁹ and thus it could be anticipated that they would be changed, they were substituted only after the regular meeting of the JSC scheduled to interview applicants for judicial office in June 2009 was postponed at the last moment at the behest of the Minister of Justice. The names of the replacements were announced only the day before the JSC reconvened to consider yet another aspect of the Hlophe-CC complaints in late July. Those nominated had all been active in different ways in calls for transformation in the demographic composition of the judiciary and most were seen as closely allied to the President and perhaps supportive of Judge Hlophe. The fact that the office of Chief Justice was about to be filled, and that four members of the CC were about to be selected, added to the concern of many observers.

In the end, four relatively uncontroversial judges (but most would argue not the best candidates) were nominated to fill the vacancies on the CC, one of the most senior CC judges was appointed as Chief Justice (but significantly not the Deputy Chief Justice, whom many thought was more suited for such a leadership position), and Judge Hlophe was not elevated to the CC, which has led to a considerable lowering of the political temperature surrounding the courts.¹²⁰ Many, however, are feeling wounded by these events, and there can be no doubt that the legitimacy of the administration of justice has been shaken.

d) CONCLUSION

Granting judges the authority to review the actions of politicians brings with it a guarantee of controversy, even in the most stable of democracies in the most propitious of circumstances. South Africa's choice of limited government under law, regulated by the courts, was in reality an absolutely key element of the relatively peaceful transition from apartheid to something better, and ultimately a functioning constitutional democracy. The economic and social conditions in which this has been implemented are hardly promising, if not directly hostile in some senses. The general picture presented above indicates a measure of progress towards the goal of a stable acceptance of the role of judicial review under the Constitution, and a degree of restored legitimacy of the judicial process.

As indicated at the outset, the South African judiciary clearly has a key role to play in ensuring that the transformative goals of the constitution are achieved. As Klare has argued:¹²¹

¹¹⁹. One of them was the well-known advocate and law school class-mate of Mandela, George Bizos, who had spoken out clearly, both within the JSC and in public, on the necessity for judges to be above suspicion of unethical conduct in all aspects of their lives.

¹²⁰. The matter may yet again assume public prominence in that a non-governmental organisation, Freedom Under Law headed by retired Justice Krieger, has launched a review application of the JSC's decision in the CC/ Hlophe matter.

¹²¹. Karl Klare, "Legal Culture and Transformative Constitutionalism", (1998) 14 *SAJHR* 146 at 188.

An opening to transformation requires South African lawyers to harmonise judicial method and legal interpretation with the Constitution's substantively progressive aspirations. The burden of my argument is that law and legal practice *can* be a foundation of democratic and responsive transformation, but that this requires us to evolve an updated, politicised account of the rule of law.

Writing not long after, Klug was of the view¹²² that the Constitutional Court had, in general, succeeded in steering a "judicious" course, combining an assertion of its rightful role as the ultimate arbiter of constitutionality with a respectful deference to the legislative and executive spheres of influence.

A decade after Klare's article was published, Dyzenhaus¹²³ declared himself in broad agreement with Klug's analysis, but expressed concern about the future sustainability of the rule of law in South Africa. Based on many of the events set out in the immediately preceding section of this lecture his essential argument is that the "success of constitutionalism in a post-colonial setting must depend on the judicious politics of the courts in establishing their democratic legitimacy", but that it also depends on the executive and legislature to be partners of the courts in such an enterprise.¹²⁴ For Dyzenhaus, therefore, the approach of "government" to the Hlophe matter and to "transformation" raises doubts about its commitment to the constitutional compact entered into in 1994, and the necessity for "co-operation and collaboration, rather than confrontation" which it requires.

I agree that the events surrounding the trials and tribulations of both President Zuma and Judge Hlophe present direct and unsettling challenges to the substantial progress made through the efforts of the Constitutional Court, and threaten to derail it. A further area of concern for me is rooted precisely in the relative strength of the Court's socio-economic rights jurisprudence. The executive branch of government in particular has been found wanting in its effective achievement of much of the promise of the Constitution in this sphere, and the politicians are likely to begin to resent judicial censure of the type adverted to above. Indeed, the judicial exposure in the TAC case of the disputed and ultimately irrational policy of the Mbeki administration to HIV/AIDS drew caustic comment from the then Minister of Health. There have also been worrying signs that the wilder elements in the ANC are quite willing to vilify the courts when it seems likely that things will not go their way in a particular case or series of legal disputes. Some of this is both to be expected and is certainly not unique to South Africa, as the trenchant criticism of the English courts by government ministers in the last years of the John Major regime shows, and I am certainly not arguing that we face some imminent constitutional crisis in relations between the courts and the other branches of government.

I am rather arguing that much hard work remains to be done to meet these serious

¹²². Heinz Klug *Constituting Democracy: Law, Globalism and South Africa's Political Reconstruction* (2000).

¹²³. David Dyzenhaus, "The Past and Future of the Rule of Law in South Africa" (2007) 124 *SALJ* 734.

¹²⁴. *Ibid* at 735.

challenges. Legal and popular education have a potentially critical role to play in inculcating in its recipients both the values of the Constitution, and the need to transform the legal process and social relationships the better to reflect such ideals. Strong and sensitive leadership is required from both politicians and judges, if this goal is to be reached. Commitment to constitutional values should be required of all, and the race of the participant is not necessarily a determinant of such commitment. As we are fond of saying in the region, and as is proudly and prominently proclaimed in a neon-light work of art in the foyer of the Constitutional Court: “A Luta Continua” --- the struggle continues.

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