

**WITHOUT FEAR, FAVOUR OR PREJUDICE: THE COURTS, THE
CONSTITUTION AND TRANSFORMATION**

In December last year George Bizos was honoured by the University of Pretoria for his extraordinary contribution to law and justice during his long and illustrious career. In responding to the honour, he made important comments about the role of the courts in a democracy. The title which he gave to his comments, *Blame Neither the Constitution nor the Courts*,¹ was prompted by what he described as unfair and unjust criticisms of the Constitution and the courts by some political leaders.

It is probably inevitable that there should be some tension between judges and politicians in a country like ours where the Constitution entrenches the rule of law, and makes provision for an independent judiciary, and judicial review of legislative and executive action. This is inherent in the separation of powers and is not solely a South African phenomenon. A former Chief Justice of Australia, Chief Justice Gleeson, explained it in these terms:

¹ Delivered at the Spring Graduation Ceremony on 8 December 2011

"It is self-evident that the exercise of [judicial review] will, from time to time, frustrate ambition, curtail power, invalidate legislation, and fetter administrative action. As the guardian of the Constitution, the High Court from time to time disappoints the ambitions of legislators and governments. This is part of our system of checks and balances. People who exercise political power, and claim to represent the will of the people, do not like being checked or balanced." ²

Lord Bingham, one of the great common law judges of our generation, refers to "an inevitable" and "entirely proper tension between the government and the judiciary".³ Whilst not necessarily desirable, such tension should not come as a surprise to anyone. It is evidence that we have an independent and not a compliant judiciary. The executive has no doubt been frustrated by a number of high profile cases that it has lost before the courts, and this may be the reason for complaints by

² Gleeson CJ, "Legal Oil and Political Vinegar", (1999) 10 Public Law Review 108 at 111, cited by McHugh J in *Tensions Between the Executive and the Judiciary*, paper delivered at the conference of the Australian Bar Association in Paris on 10 July 2002

³ *The Rule of Law*, The Sixth Sir David Williams lecture.

political leaders about the judiciary. Unsuccessful litigants are inclined to blame the court rather than themselves, and politicians are no exception to this.

There may be particular cases where judges have done or refrained from doing something that legitimately attracts the displeasure of the executive. Usually such matters can be corrected or put right on appeal, but even if that is not possible, this does not warrant an attack on the judiciary as an institution. Such attacks coming from senior politicians undermine the constitutional order and pose a threat to our democracy.

The canard challenged by George Bizos is that the constitution is a bar to transformation, and that essential change is being hampered by an untransformed judiciary. These are serious allegations which if asserted, deserve to be debated, not made into slogans, and not taken as true because of the political affiliations of their authors, or the frequency of their repetition. A conference to consider "*Challenges facing Administrative Justice*," and to launch the Administrative Justice Association of South Africa is an appropriate occasion to engage in that debate. In doing so I look particularly at the role of judges for they are

the only judicial officers with the power to enquire into the validity of an Act of Parliament or the conduct of the President.⁴ It is their decisions that shape the law, and are relevant to the charge that transformation is being obstructed by the judiciary.

The preamble to the Constitution records that the Constitution was adopted to:

- Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;**
- Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law;**
- Improve the quality of life of all citizens and free the potential of each person; and**
- Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.**

⁴ Section 170 of the Constitution

Given our history, and what life in South Africa was like under apartheid, this is a clear commitment to transform our society. It calls for positive action to confront the apartheid legacy of poverty and disempowerment, and for building a truly non-racial society committed to social justice. Transformation contemplates an improvement in the lives of people, households and communities, achieved over time by institutionalising policies, programmes and projects⁵ to that end. The arms of government primarily responsible for this are the legislature and the executive.

Judges hold office under the Constitution. They are required “to uphold and protect the Constitution and the human rights entrenched in it, [and to] administer justice to all persons alike without fear, favour or prejudice, in accordance with the Constitution and the law”. On assuming office they commit themselves to doing so.⁶ The role of judges in relation to transformation is therefore governed by the provisions of the

⁵ I take this definition of transformation from the United Nations Development Programme’s publication, *Supporting Transformational Change*, (October 2011), (available at [undp.beta.undp.org/undp/supporting transformational change](http://undp.beta.undp.org/undp/supporting%20transformational%20change)) at page 9

⁶ Section 6 of Schedule 2 to the constitution

Constitution and the law. Whether the Constitution is an obstacle to transformation is a different issue, about which I will make brief comments later.

The complaint about lack of transformation is sometimes directed at the retention of power by those who held it under apartheid. That charge cannot be made against the leadership of the judiciary. The Chief Justice, the Deputy Chief Justice, the President of the Supreme Court of Appeal, the Deputy President of the Supreme Court of Appeal and all the Judges President of the High Court are Black; none held office under apartheid; all were appointed under the present Constitution.

That charge can also not be made against the judges of the Constitutional Court which is the highest court in the land and the guardian of the Constitution. Chief Justice Mogoeng was a judge of the Constitutional Court when he was appointed as Chief Justice following the retirement of Chief Justice Ngcobo. The vacancy caused by the retirement of Chief Justice Ngcobo has not yet been filled; prior to his resignation 8 of the 11 judges of the

Constitutional Court were black; and all eleven had been appointed to the Constitutional Court by the President in accordance with the provisions of the Constitution.

In 1994 when the interim Constitution came into force, sitting judges in apartheid South Africa and the homelands remained in office, subject to their affirming or taking an oath of office to uphold the new Constitution. There were then only three black men who were judges, and two women, both white, one of whom was about to retire. All the rest were white men. Since then, as required by the Constitution, judges have been appointed by the President on the advice of the Judicial Service Commission. Of the 23 permanent members of the Judicial Service Commission, only three are judges – the Chief Justice, the President of the Supreme Court of Appeal and one Judge President. 15 (the majority) are nominees of Parliament and the Executive, 4 are nominees of the profession, and one of the Deans of Law Schools. I was a member of the Judicial Service Commission for almost eleven years. From its very beginning its policy has been to promote transformation, both in regard to race and gender, and in regard to the values of the

Constitution. As a result there has been a radical change in the profile of the judiciary.

The overwhelming majority of the judges now holding office have been appointed under our post-apartheid Constitution by the President on the advice of the Judicial Service Commission; comparatively few from the apartheid era still hold office. 134 judges, accounting for approximately 60% of the judiciary are now black.⁷ There is a legitimate issue concerning the under representation of female judges – only about 25% of all judges,⁸ and only two of the eleven judges of the Constitutional Court, are women. That needs to be addressed; but it is not the focus of the attack levelled by those who call the judiciary untransformed. Implicit in the attack is that the judges are a holdover from apartheid and out of tune with the values of the Constitution. The judiciary as an institution is quite clearly not a holdover from apartheid. Is it out of tune with the values of the Constitution?

⁷ I use “black” to include Africans, Indians and Coloureds all of whom were victims of apartheid and for all practical purposes excluded from the judiciary. The 2011 Department of Justice Annual Report records that there were 134 out of 225 judges who were black (91 were Africans, 22 were Indians and 21 were coloureds). These statistics do not include appointments to the judiciary made since then.

⁸ The annual report referred to in n. 67 records that there were 58 women judges in March 2011.

The apex court in our court system is the Constitutional Court. All other courts and all organs of state are bound by its decisions. I presided over that Court for the first ten years of its life. It is sometimes said that beauty is in the eye of the beholder; so, rather than express any opinion on the commitment of the judges of that court to the transformation contemplated by the Constitution, I will refer to what is said in some of the judgments.

In one of the earliest judgments given in 1995, in a much quoted passage, Justice Mahomed said:

The South African Constitution . . . retains from the past only what is defensible and represents a decisive break from, and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular, and repressive and a vigorous identification of and commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos, expressly articulated in the Constitution. The contrast between the past which it

repudiates and the future to which it seeks to commit the nation is stark and dramatic.⁹

In the same case Justice O'Regan referred to the founding values of the Constitution - human dignity, the achievement of equality, the advancement of human rights and freedoms,¹⁰ including non-sexism and non-racism,¹¹ and respect for certain of the fundamental principles of democracy -- the rule of law; universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government to ensure accountability, responsiveness and openness.¹² Having done so, she went on to say:

No-one could miss the significance of the hermeneutic standard set. The values urged upon the Court are not those that have informed our past. Our history is one of repression not freedom, oligarchy not democracy, apartheid and prejudice not equality, clandestine not open government.¹³

⁹ S v Makwanyane and Another 1995 (3) SA 391 (CC) para 262

¹⁰ Section 1(a) of the Constitution.

¹¹ Section 1(b) of the Constitution.

¹² Section 1(d) of the Constitution.

¹³ S v Makwanyane, n.9 above, para 322.

These comments at the very beginning of the life of the Constitutional Court set the tone for what was to follow. In 1998, addressing the socio-economic rights in the Constitution, the Court said:

We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security, and many do not have access to clean water or to adequate health services. These conditions already existed when the Constitution was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order. For as long as these conditions continue to exist that aspiration will have a hollow ring.¹⁴

In 2000, dealing with access to housing, the Court said, “a society must seek to ensure that the basic necessities of life are provided to all if it is

¹⁴ Soobramoney v Minister of Health (KwaZulu Natal) 1998 (1)SA 765 (CC) para 8

to be a society based on human dignity, freedom and equality”.¹⁵ **In the same year it said:**

“the process of interpreting the Constitution must recognise the context in which we find ourselves and the Constitution’s goal of a society based on democratic values, social justice and fundamental human rights. This spirit of transition and transformation characterises the constitutional enterprise as a whole.”¹⁶

In 2004, citing five of its previous decisions,¹⁷ **the Constitutional Court dealing with what it described as restitutorial equality, said:**¹⁸

The achievement of equality goes to the bedrock of our constitutional architecture. The Constitution commands us to strive for a society built on the democratic values of human dignity, the achievement of equality, the advancement of human

¹⁵ *Government of the Republic of South Africa v Grootboom* 2000 (1) SA 46 (CC) para 44.

¹⁶ *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors and Others* 2000(1)SA545(CC), para.21.

¹⁷ *Ex Parte Gauteng Provincial Legislature: In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995* 1996 (3) SA 165 (CC); 1996 (4) BCLR 537 (CC) at para 52; *Fraser v Children’s Court, Pretoria North, and Others* 1997 (2) SA 261 (CC); 1997 (2) BCLR 153 (CC) at para 20; *President of the Republic of South Africa and Another v Hugo* 1997 (4) SA 1 (CC); 1997 (6) BCLR 708 (CC) at para 74; *Bel Porto School Governing Body and Others v Premier, Western Cape, and Another* 2002 (3) SA 265 (CC); 2002 (9) BCLR 891 (CC) at para 6; *Satchwell v President of the Republic of South Africa and Another* 2002 (6) SA 1 (CC); 2002 (9) BCLR 986 (CC) at para 17.

¹⁸ *Minister of Finance v van Heerden* 2004(6) SA 121 (CC) para 22

rights and freedom. Thus the achievement of equality is not only a guaranteed and justiciable right in our Bill of Rights but also a core and foundational value; a standard which must inform all law and against which all law must be tested for constitutional consonance.

The constitutional commitment to transformation has been a consistent theme in the jurisprudence of the Constitutional Court, and following it as they are bound to do, of other courts as well. Most recently, in a judgment given at the end of last year, the Constitutional Court again drew attention to the centrality of the constitutional commitment to social justice, to the fact that millions of people were still compelled to live without adequate housing, and to the concern that “seventeen years into our democracy, a dignified existence for all in South Africa has not yet been achieved.”¹⁹

¹⁹ City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another (CCT 37/11) [2011] ZACC 33 (1 December 2011)

This lack of transformation of the day to day lives of marginalised communities commented on by the Court has not been due to decisions of the courts. There are other reasons for this which fall beyond the scope of my comments today. Some have been suggested in the discussions in the previous sessions of this workshop; those are issues I do not intend to deal with now, save to say that given our history, transformation was always going to be difficult. There is, however, no justification for blaming the Courts for this failure.

Voices are sometimes heard criticising the Constitution itself as being an obstacle to transformation. George Bizos refers to one such assertion by a prominent member of the ANC, that

power was systematically taken out of the legislature and the executive to curtail efforts and initiatives aimed at inducing fundamental changes. In this way, elections would be regular rituals handing empty victories to the ruling party.'

This is in stark contrast to the claim made in the recent January the 8th statement by the ANC marking its hundredth anniversary, where it is said

The ANC played a leading role in shaping the nature, form, process and content of CODESA and its outcome.

The preamble and the founding values of the Constitution assert human dignity, the achievement of equality, and the advancement of human rights and freedoms. These were not values forced on those who negotiated the Constitution on behalf of the ANC; nor was an entrenched bill of rights. They were demands made by the ANC which had been enshrined in the Harare Declaration of 1989 which provided that a new constitutional order for South Africa should be based on certain principles, which included a principle that “ all shall enjoy universally recognised human rights, freedoms and civil liberties, protected by an entrenched bill of rights”.²⁰ In the recent January the 8th statement the ANC celebrated the human rights culture enshrined in

²⁰ Section 16.5 of the Harare Declaration

the Constitution, and emphasized that “the promotion of human rights for all has always been a key feature of the ANC since its formation”.

Do those who blame the Constitution for lack of transformation want a legal order in which human rights are not entrenched, and Parliament is supreme, where as a former South African Chief Justice of those times observed in 1934:

Parliament may make any encroachment it chooses upon the life, liberty, or property of any individual subject to its sway . . . and it is the function of the courts of law to enforce its will.²¹

If this is what they want, they should say so, so that a sensible public debate can take place around such issues.

Property law has been an area of transformation that has been particularly difficult. The complexity of that problem lies beyond the

²¹ *Sachs v Minister of Justice* 1934 AD 11 at 37,

scope of today's conference; and it is not the focus of the attack on the judiciary, though it is raised by some in attacks on the Constitution. I should make clear, however, that I do not accept that the Constitution prescribes that compensation must be what a "willing buyer" would pay "a willing seller", which is sometimes heard as being one of the causes of the problem. The Constitution permits expropriation of property in the public interest which is different to expropriation for public purposes. Given our history the public interest would in my view encompass expropriation of land pursuant to a reasonable land redistribution policy. This is borne out by section 25(5) of the Constitution, a subsection of the property clause of the Bill of Rights, which requires the state to

take reasonable legislative and other measures within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.

Subsection (4) of the same clause provides specifically that

the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources.

Compensation is payable for expropriated land.²² Old legislation from the apartheid era dealing with expropriation is still in place,²³ despite the Constitutional Court having urged the government to amend it to bring it into line with the Constitution.²⁴ The constitutionality of the Act has not been challenged and courts have had to construe its provisions as far as possible in accordance with the requirements of the Constitution.

The Constitution does not entrench the willing buyer willing seller formula. Its provisions are much more nuanced than that. They require the amount of the compensation and importantly also, “the time and manner of payment” to reflect “an equitable balance between the public interest and the interest of those affected” having regard to various factors. Market value is one of the factors

²² Section 25(3)

²³ The Expropriation Act 63 of 1971, and in particular section 12.

²⁴ *duToit v Minister of Transport* 2006 (1) SA 297(CC), para 36

but there are others, including the history of the acquisition and use of the property, the extent of state investment and subsidy in it, and the purpose of the expropriation.²⁵ These provisions and the relatively unrestricted fiscal power vested in the national government under Chapter 13 of the Constitution, would in my view permit the adoption of a reasonable land redistribution policy. I do not underestimate the political or economic difficulties of formulating and implementing such a policy. Those are political questions that have to be addressed in the political forum.

Some in the academy have criticised judgments of the Constitutional Court dealing with socio economic rights. The criticism is that the Court has been too deferential to government. I do not agree with this criticism, but it is the subject of legitimate debate. It is not, however, the issue that is raised by those who claim that the judiciary is hampering government's attempt to transform our society. They talk about obstruction, not deference. But they do not spell out what the judiciary has done or failed to do to warrant such condemnation.

²⁵ Section 25(3) of the Constitution

In more measured language than those who demean the judiciary President Zuma has said:

There is a need to distinguish the areas of responsibility, between the judiciary and the elected branches of the State, especially with regards to policy formulation. Our view is that the Executive, as elected officials, has the sole discretion to decide policies for government.’²⁶

Under the Constitution the executive authority of the Republic is vested in the President,²⁷ who exercises such authority together with other members of the cabinet.²⁸ The executive authority includes implementing national legislation²⁹ and developing and implementing national policy.³⁰ It is correct therefore to say that the executive decides policy. But that is only half the story. The other half is that policy must be consistent with the Constitution,

²⁶ Cited by George Bizos in *Blame Neither the Constitution nor the Courts*, n. 1, supra.

²⁷ Section 85(1) of the Constitution

²⁸ Section 85 (2) of the Constitution

²⁹ Section 85 (2) (a) of the Constitution

³⁰ Section 85(2)(b) of the Constitution

and if it is not, it is the duty of a court to say so and to declare it to be invalid to the extent of its inconsistency.

A simple example will illustrate this. A decision by a government to allocate houses in social housing projects only to supporters of the governing party, or to employ only men as teachers, would be policy decisions, but would be inconsistent with the equality clause of the Constitution, and would have to be set aside by the courts. The same is true of more complex policy issues that have come before the courts. Thus, the Constitutional Court held that the policy of prohibiting doctors in public hospitals from prescribing antiretroviral therapy to combat mother to child transmission of the HIV virus was inconsistent with the Constitution. In doing so it said:

Where state policy is challenged as inconsistent with the Constitution, courts have to consider whether in formulating and implementing such policy the state has given effect to its constitutional obligations. If it should hold in any given case that the state has failed to do so, it is obliged by the

Constitution to say so. In so far as that constitutes an intrusion into the domain of the executive, that is an intrusion mandated by the Constitution itself.³¹

And this is the source of the tension. For as Chief Justice Gleeson said, those who exercise political power do not like being checked and balanced. But that is what is required in a constitutional democracy.

Courts should, however, be astute to distinguish between an intrusion into policy that is mandated by the Constitution, and one that is not. The Constitutional Court has made this clear, saying:

Although there are no bright lines separating the roles of the legislature, the executive and the courts from one another, there are certain matters that are pre-eminently within the domain of one or other of the arms of government and not the others. All arms of government should be sensitive to and respect this separation. This does not mean, however, that

³¹ *Minister of Health and Others v Treatment Action Campaign and Others* (No 2) 2002 (5) SA 721 (CC) para 99

courts cannot or should not make orders that have an impact on policy.³²

Policy is the basis of almost all legislative and executive action. Sometimes it is the particular steps taken by the legislature or the executive to implement policy to which objection is taken, and becomes the subject of litigation. More rarely it is the policy itself that attracts the objection – and it is when this happens that the potential for tension between the judiciary and other arms of government is likely to be most pronounced. The former can be put right without abandoning the policy; the latter cannot.

The Constitutional Court has been sensitive to the role it has where policy is challenged, referring to its “institutional respect for the policy-making function of the two other arms of government”,³³ and explaining that courts have “a restrained and focused role”,³⁴ in such matters, which requires them to hold organs of state, including the legislature and the executive, to the requirements of the Constitution. Where policy is an

³² id, para 98

³³ Minister of Health v Treatment Action Campaign, n.31 above paras 37-38

³⁴ id

issue, they have to decide whether or not it is in accordance with the Constitution; if it is not they must declare the legislation or conduct that gives effect to the policy to be invalid. That is their duty and they must not shirk from it. The Constitution empowers them in such circumstances to make orders that are just and equitable,³⁵ which means that they do not necessarily have to set aside what has been done under the invalid action.

Trenchant criticism has been directed by other speakers to the legislative and policy structures which regulate public procurement. If that is where the problem lies, the remedy is to change such legislation and policies; not to attack the constitutional requirement in section 33 of the Constitution that “everyone has the right to administrative action that is lawful, reasonable and procedurally fair”. I agree with Jeffrey Jowell that this provision of the Constitution is a bulwark against the abuse of power, and is essential to the promotion of a truly democratic society.

³⁵ Section 172 (1) (b)

PAJA, referred to by the previous speakers, was enacted to give effect to this right. Cora Hoexter has referred to “the complexity and obscurity of the definition” of administrative action in PAJA, “and the sheer difficulty of working out whether something is or is not administrative action” as defined in the statute.³⁶ She points out that this has led to a plethora of litigation that has been focused on this issue rather than on the merits of the dispute.³⁷ This is the fault of the legislation, not the Constitution. To avoid having to strike down parts of the legislation as being unconstitutional courts have, where possible, construed the definition consistently with the language of section 33 of the Constitution.³⁸ The test applied by the Courts is that “an administrative decision will be reviewable if . . . it is one that a reasonable decision maker could not make”.³⁹ Here too there is room for tension with the executive. What is important, and this too has been stressed by the courts, is that they do not substitute their opinion for that of the administrators. It is not the task of the courts to take over government; a court will thus not interfere with a decision simply because it disagrees with it or considers that the

³⁶ Cora Hoexter, *Administrative Law in South Africa* (Juta 2007) at 220.

³⁷ *id.*

³⁸ *id.* at 221-222.

³⁹ *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 46(CC), n.14 above

power was exercised inappropriately”⁴⁰ As long as the decision is one which falls within the range of possible decisions that could be reasonable, it must be upheld.

This is not to say that administrative law is without problems or that there is not room for reasonable people to disagree about outcomes in particular cases. The volume of administrative law cases in our law reports, and dissenting judgments and differences between different courts in the hierarchy of appeals, provide ample evidence of this. And this is why I welcome the founding of the Administrative Justice Association of South Africa. It will provide a forum for discussion of difficult issues that are and will continue to be experienced in this branch of the law, and will contribute to the development of the law in a manner consistent with the values of our Constitution.

Administrative law cannot solve all the problems of incompetent or unlawful administration, but it is an essential safeguard against corruption and for the promotion of good government.

⁴⁰ Merafong Democratic Forum & Ors v President of RSA & Ors 2008 (5) SA 171(CC) para 63

Administrative law has developed out of the rule of law which is one of the founding values of our Constitution. Its purpose is to uphold legality and promote fairness, accountability and transparency in government. These are basic values of good public administration,⁴¹ and it is the role of the courts in a democracy to ensure as far as possible that they are respected. If this does not happen the door to corruption is opened and nothing could pose a greater risk to the transformation demanded by our Constitution than that. That is why democratic governments comply with court orders even if they disagree with them, and why our Constitution demands that organs of state assist and protect the courts to ensure their independence, impartiality, dignity and accessibility.⁴² And that is why I support your Association which will enhance the study of administrative law, and contribute to the promotion of good governance that is so essential for our future.

Arthur Chaskalson

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⁴¹ Affirmed in section 1 of the Constitution and reaffirmed with regard to public administration in section 195.

⁴² Section 165 (4) of the Constitution.

