

PEOPLE'S POWER AND THE COURTS

Bram Fischer Memorial Lecture, 2011

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The topic of my lecture is Peoples Power and the Courts. In the mode of all good preachers, I start with a text. In fact I have three:

- The Freedom Charter proclaims: *“The People Shall Govern!”*
- President Zuma, in his recent address in the National Assembly bidding farewell to Chief Justice Ngcobo and welcoming Chief Justice Mogoeng, said: *“The powers conferred on the courts cannot be regarded as superior to the powers resulting from a mandate given by the people in a popular vote.”*¹
- The Constitution says that one of the founding values of the Republic of South Africa is *“a multi-party system of democratic government, to ensure accountability, responsiveness and openness”*.²

The question which I want to ask this evening is whether those three statements have the same meaning . and what are their implications for the role of the courts? The underlying question is this: what is the nature of our democratic dispensation?

¹ *“Judiciary must respect separation of powers – Jacob Zuma”* Issued by the Presidency, 1 November 2011.

² Section 1(d).

Parliament and democracy

One of the possible meanings of our democracy is that it is a system in which everyone has the right to vote in regular, free and fair elections for the National Assembly, for provincial legislatures, and for municipal councils, in order to choose their representatives to constitute the government.

Representation through elective processes is obviously a necessary element of democracy, but it is not sufficient. I doubt that anyone believes that when the Freedom Charter proclaims "*The People Shall Govern!*", what it really means is that the people shall vote every five years.

That would be a weak and impoverished system of democracy. Professor Tony Judt pointed out³ that the danger of a democratic deficit is always present in systems in which we choose people to speak for us. Representative democracy is even more attenuated where, as in our country, we do not even vote for particular public representatives: we vote for a slate of candidates chosen by the internal machinery of the party concerned. Those are not conditions which promote the achievement of the constitutional value of accountability.

In the Doctors for Life case,⁴ Justice Ngcobo explained the nature of our constitutional democracy as follows:

The very first provision of our Constitution, which establishes the founding values of our constitutional democracy, includes as part of those values a 'multi-party system of democratic government, to ensure accountability, responsiveness and

³ Ill Fares the Land (2010) 132.

⁴ Doctors for Life International v Speaker of the National Assembly and Others 2006 (6) SA 416 (CC).

*openness'. Commitment to principles of accountability, responsiveness and openness shows that our constitutional democracy is not only representative but also contains participatory elements. This is a defining feature of the democracy that is contemplated ...*⁵

*In the overall scheme of our Constitution, the representative and participatory elements of our democracy should not be seen as being in tension with each other. They must be seen as mutually supportive. General elections, the foundation of representative democracy, would be meaningless without massive participation by the voters. The participation by the public on a continuous basis provides vitality to the functioning of representative democracy. It encourages citizens of the country to be actively involved in public affairs, identify themselves with the institutions of government and become familiar with the laws as they are made. It enhances the civic dignity of those who participate by enabling their voices to be heard and taken account of. It promotes a spirit of democratic and pluralistic accommodation calculated to produce laws that are likely to be widely accepted and effective in practice. It strengthens the legitimacy of legislation in the eyes of the people. Finally, because of its open and public character, it acts as a counterweight to secret lobbying and influence-peddling. Participatory democracy is of special importance to those who are relatively disempowered in a country like ours where great disparities of wealth and influence exist.*⁶

Therefore our democracy includes, as one of its basic and fundamental principles, the principle of participatory democracy. The democratic government

⁵ Para [111].

⁶ Para [115].

*that is contemplated is partly representative and partly participatory, is accountable, responsive and transparent ...*⁷

Justice Ngcobo was addressing in particular the role of Parliament in facilitating public participation. However, the principles of participatory democracy which he enunciates are not limited to the opportunity to vote in elections and to make submissions to Parliament. In that context, it is important to recognise what Mac Darrow and Philip Alston correctly describe as the *“reality that access to government and the legislative processes ... is more open to the rich than to the oppressed and downtrodden”*.⁸

If we were simply to be governed by virtue of the *“mandate given by the people in a popular vote”* on a five-yearly basis, we would not need a Bill of Rights. We would not need our elaborate Constitution. The elected representatives would decide, and everyone else would fall into line. But that is a very thin and impoverished notion of democracy. Our Constitution contemplates a richer and ~~thicker~~ ^{thicker} form of democracy. And it does so precisely so that the people may govern.

We have a Bill of Rights precisely because those who made our Constitution, informed and guided by a vast public participation process, recognised that representative democracy is not enough. A democracy also needs rights which are guaranteed to everyone, particularly when they are in a minority, and particularly where they are marginalised or powerless. A study in the USA found that while citizen referenda and initiatives endorsed only one third of the proposals which were made, more than three-

⁷ Para [116].

⁸ Mac Darrow and Philip Alston ~~Bills of rights in comparative perspective~~ in Philip Alston (ed) Promoting Human Rights through Bills of Rights: Comparative Perspectives (1999) 501.

quarters of the anti-civil rights initiatives were approved.⁹ It is not only in South Africa that minorities or vulnerable groups require protection from majorities.

The enforcement of those rights is part of the process of democracy, and essential for democracy. Rodrigo Uprimny Yepes, writing from Colombia, refers to

“the importance of fundamental rights in a democratic society. The idea is that many of these rights are, first and foremost, procedural presumptions for a functioning democracy, since a true democratic debate could hardly take place if the freedoms of expression and mobilisation, the right of association and political rights, etc were not guaranteed. The existence of these rights, then, is essential for a democracy to be truly considered a regime in which citizens are free and deliberate to govern themselves. However, for these people to be genuinely free, it is also necessary to assure them the minimum conditions of dignity, which enables them to develop as autonomous individuals. And these conditions are our fundamental rights, considered indispensable for all people to enjoy the dignity necessary to be truly free, equal and autonomous individuals. As such, these rights are also a type of material presumption for a democratic regime, since without free and equal citizens, a government could hardly be considered democratic. Therefore, if fundamental rights are both procedural and material guarantees of democracy, it goes without saying that these rights need to be guaranteed, regardless of majorities ... if fundamental rights are – and forgive the

⁹ Barbara S Gamble *Putting Civil Rights to a Popular Vote* American Journal of Political Science Vol 41 No 1 (January 1997) 245 at 261.

redundancy – fundamental for democracy, then it is obvious that by ensuring that they are upheld, judges are performing an essential democratic function.”¹⁰

The question is how the courts can best do this in a manner which strengthens and deepens democracy. I will return to that in due course.

The executive and democracy

Before I do so, I must say something about the other arm of government, the executive.

As Judge Michael Kirby has pointed out,¹¹ *“In reality, in parliaments created after the Westminster model, the legislators are often, in fact, subordinate to the power of the Executive once they elect it. In our complex society the Executive, in turn, is often heavily dependant upon unelected officials”.*

Very little public attention has been given to what I think is the most striking aspect of the recent speech by the President, welcoming the new Chief Justice. Although the President’s speech referred to the democratic mandate, it was not in fact an assertion of the power of the elected legislature. To the contrary, it was an assertion of the power of the executive as opposed to the legislature and the courts. This is what he said:

“We respect the powers and role conferred by our Constitution on the legislature and the judiciary. At the same time, we expect the same from these very important institutions of our democratic dispensation.

¹⁰ Rodrigo Uprimny Yepes *Judicialization of Politics in Colombia: Cases, Merits and Risks*+Vol 4 Sur International Journal on Human Rights (2007) 49 at 61.

¹¹ Michael Kirby Judicial Activism: Authority, Principle and Policy in the Judicial Method (2004) p 65.

The Executive must be allowed to conduct its administration and policy making work as freely as it possibly can. The powers conferred on the courts cannot be regarded as superior to the powers resulting from a mandate given by the people in a popular vote.”

In other words, it is not only the courts which must not interfere with the powers of the executive: it is also the legislature.

What are we to make of the claim of the executive to have a mandate given by the people in a popular vote? The members of the Cabinet are not elected by popular vote. They are appointed by the President. The claim of the Cabinet to a democratic mandate can hardly be stronger than the claim of the legislature, which elects the President.¹² And although the President is formally elected by the National Assembly, he is in truth the person who was chosen by the majority party, through its internal processes, as its leader. There is nothing unusual or offensive about this: we simply need to recognise the reality. And we should not be naïve about the fact that in reality, the President is accountable to his party, not to the National Assembly. As our recent history tells us, it is when the President loses the confidence of his party, rather than the National Assembly, that he has to resign.

Any shift of power away from the institutions of government and towards the ruling party should be a matter for concern. Vaclav Havel reflects as follows in his memoir of his time as President of Czechoslovakia and then of the new Czech Republic:

“When civil society languishes ... then sooner or later political parties will begin to languish as well, until, ultimately, they become degenerate ghettos whose only

¹² Section 86(1) of the Constitution.

*purpose is to elevate their members into positions of power ... Partyocracy – that is, government by party secretariats and politburos – has had a great tradition in this country since the nineteenth century, and unfortunately it threatens us today as well. After all, we are close to a situation now in which people are beginning to feel ashamed that they voted for a certain party, or even that they belong to it. That can only lead to the decline of democracy”.*¹³

Under our Constitution, the President and Cabinet have the function of developing and implementing national policy.¹⁴ However, that does not mean that every policy which the executive develops and implements can claim a genuine democratic mandate. When I worked in government, I discovered the policy-making power of unelected officials. I discovered that it was unelected officials like me who made many of the most significant decisions about who gets what, when and how, to use Laswell's classic definition of politics.¹⁵

The most famous incident in our country of the courts declaring a policy inconsistent with the Constitution is, of course, the Treatment Action Campaign case.¹⁶ The story is well known. The government had a policy of not providing antiretroviral medicines to prevent the transmission of HIV from infected mothers to their infants at birth, except at a limited number of pilot sites. When challenged, the government was able to put up no rational justification for this policy. The medicine was available for free; the uncontradicted expert evidence was that the medicine was effective and safe; and the

¹³ Vaclav Havel To the Castle and Back (2006) 120.

¹⁴ Section 85(2)(b) of the Constitution.

¹⁵ Harold Laswell Politics: Who Gets What, When, How (1935).

¹⁶ Minister of Health and Others v Treatment Action Campaign and Others (No 2) 2002 (5) SA 721 (CC).

uncontradicted expert evidence was that literally tens of thousands of infants would die unnecessarily if they were denied access to this medicine. The Court made its order, and these lives were saved. The rights of the most vulnerable in our society, established in the Bill of Rights which is part of our Constitution, were vindicated, with dramatic consequences.

Did this decision amount to the overturning of the outcome of a democratic mandate? There was no law passed by the democratic Parliament saying that these medicines should not be provided. And I can't remember that we were ever asked to vote for or against a policy that a free medicine should not be provided to prevent infants dying unnecessarily. For that matter, I can't remember that we were ever asked to vote on the policy declared unlawful in the Grootboom case,¹⁷ that people in a desperate housing situation should not be provided with any emergency solution, but should remain in that situation for up to twenty years while they wait for their names to reach the top of the waiting list for housing. I don't remember, either, that those of us who live in the Western Cape were invited to vote on the policy of the Western Cape Government that children with severe intellectual disabilities should receive education only if they were fortunate enough to find an under-funded non-governmental organisation which was able to assist them.¹⁸ Neither do I remember that we were ever asked to vote for or against the policy of the President that in deciding whether to grant pardons to alleged political offenders who had not made application to the Truth and

¹⁷ Government of the Republic of South Africa and Others v Grootboom and Others 2001 (1) SA 46 (CC).

¹⁸ Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa and Another 2011 (5) SA 87 (WCC)

Reconciliation Commission, he should not have any regard to the views of the victims of those offences.¹⁹

These are all cases in which the courts were asked to decide whether a policy of the executive, not a law passed by the elected legislature, was consistent with the Constitution. As it happens, the Legal Resources Centre was involved in each of them. In each instance, the courts recognised the rights of those who were vulnerable and marginalised. None of these policies was ever the subject of an election, and nor could they have been. They were the result of decisions made by the executive, seeking to exercise their best judgment, but doing so quite wrongly. In most if not all instances, the government subsequently accepted that it had been wrong.

Our courts repeatedly, and rightly, draw attention to the need for judges to approach policy questions with some respect. They repeatedly, and rightly, point out that in such cases the question for the court is not whether the policy is ~~right~~, or whether it is the best policy, but whether it is a policy which is permissible under the Constitution. They repeatedly, and rightly, point out that the executive has advantages that the courts do not have in dealing with questions of policy choice: the executive have specialist knowledge and experience, they can have access to a wide range of advice, and they are not limited to the materials and arguments which disputing parties put before them. All of that is undoubtedly true, and is of very great importance.

However, one has to be careful not to fetishise these propositions. Let me illustrate that by a story from my personal experience.

¹⁹ Albutt v Centre for the Study of Violence and Reconciliation and Others 2010 (3) SA 293 (CC).

Shortly after I joined the Department of Land Affairs, I bumped into an official of the Department whom I knew from times gone by. He had worked for then Department of Co-operation and Development. Now he was in the new Department of Land Affairs. He asked me how I found it being in government. I said that I was struck by how arbitrary the process of government was: you could have an idea over breakfast in the morning, you could discuss it with the Minister, and before you knew where you were, it could be a policy, a Cabinet memorandum, and even a law. I paused and said "*I suppose that's the result of a new government with new people and new policies*". He looked at me, shook his head and said "*It's always been like that*". Not long after that, I attended a seminar led by a senior member of the UK civil service for heads of Departments. I told him the story, and said that I supposed it was different in the UK with its experienced and well-resourced public service. He shook his head.

I was a public servant for nearly four years. They were the hardest years of my life. I know how difficult the task is, and I know how annoying it can be when outsiders interfere in your work. But the theory that the executive has a monopoly of wisdom on policy questions, based on a democratic mandate, strikes me as somewhat remote from reality.

The story so far

The legislature and the executive of course have central roles to play in ensuring that the people shall govern. But I hope that I have shown that this is not enough. If we want a genuinely participatory democracy . in other words, if we want more than a formally representative democracy . our courts also need to play their role in bringing this about.

So how can the courts deepen democracy and make it more responsive?

The Constitutional Court pointed out, in the Metrorail case,²⁰ that accountability is a founding value of our Constitution. It is a core value of a genuine democracy. One of the most important mechanisms through which accountability is exercised is the courts. It is important to recognise that while the courts are a critical mechanism of accountability, that accountability is not to the courts . it is to the people.

It is in that context that one has to ask a simple question of those who assert that the courts may not subject policies to scrutiny, in order to establish whether they are consistent with the requirements of the Constitution: was the TAC case decided wrongly? Put differently: was this an unwarranted intrusion by the courts onto the terrain of the executive? Was the government under no obligation to account to the people, through this mechanism, for its policies on this issue? Would our constitutional democracy have been stronger or weaker if the court had folded its hands and said that this was not a matter with which it could engage? I do not think any serious-minded person can be in any doubt as to the proper answers to those questions. Certainly, I do not think anyone would suggest that the death of many thousands of infants and children, because of the failure of the state to provide them with an effective preventive medicine which is available for free, is what the Freedom Charter contemplates when it proclaims "*A preventive health scheme shall be run by the state; Free medical care and hospitalisation shall be provided for all, with special care for mothers and young children*".

²⁰ Rail Commuters Action Group and others v Transnet Ltd t/a Metrorail and others 2005 (2) SA 359 (CC) para [74] to [76].

The courts have to be instruments of deepening and broadening our democracy and our democratic practice, so that the people do govern. The question is how they can most effectively do this.

Here there is something of a paradox. On the one hand, courts deepen democracy by holding power accountable. The courts enable the people to insist that those who exercise power, whether public power or private power, account for their conduct and justify it. It is important to stress that this ought to apply to both public power and private power. The new Consumer Protection Act²¹ opens up new possibilities for the accountability of private power which we have not yet begun to explore.

At the heart of our constitutional order is what Etienne Mureinik famously referred to as "*the culture of justification*".²² That is an inherently democratising culture, because those who exercise power have to justify it to those who are affected, in part through the mechanism of the courts.

But there is also a downside to the role of the courts. When we first debated the inclusion of social and economic rights in the Constitution, some expressed concern that this would divert political energy and activism into the depoliticised context of the courts. Dennis Davis, amongst others, warned of the possible impact that justiciable social and economic rights could have on democratic culture and practice.²³ The concern was that the courts would become the site of struggle, and democratic energy would be demobilised. There is indeed a real danger in what has been described as the

²¹ Act 68 of 2008.

²² Etienne Mureinik %A Bridge to Where? Introducing the Interim Bill of Rights+(1994) 10 SAJHR 31 at 32.

²³ Dennis Davis %The case against the Inclusion of socio-economic demands in a Bill of Rights except as directive principles+(1992) 8 SAJHR 475.

judicialisation of politics.²⁴ One of the best-known dicta of Gary Bellow, a great radical lawyer, was that the worst thing a lawyer can do is to take an issue that could be won by political organization, and win it in the courts.²⁵ Litigation and the courts become a new form of substitutionism.

We have certainly seen an increasing judicialisation of our politics. This has not been limited to or even focused on the area of social and economic rights. Fifteen years after the 1996 constitution, the amount of litigation on social and economic rights remains limited. This is probably the result of a lack of mobilisation around these issues as a matter of legal right, and of the uncertainty as to whether it is possible to obtain effective remedies from the courts for the breach of social and economic rights. However, other political issues are increasingly finding their way to the courts. That seems to be the result of a number of factors. First, it is a result of the perceived inaccessibility and lack of responsiveness of the political system and of the institutions of formal democracy. When those processes and institutions do not work, people look elsewhere. Second, it is encouraged and facilitated by the fact that the government sometimes seems to take poor advice on these matters, and to litigate the cases ineffectively, with the result that some rather doubtful challenges acquire a real prospect of success in the courts. Third, the rate of success is surprisingly high for another reason. Judges live in the real world. They read newspapers, watch television, engage with the chattering classes, and notice what is happening around them. When the other institutions of democracy fail to respond to matters such as corruption, the courts have a tendency to move in to fill the

²⁴ John L Comaroff and Jean Comaroff %Law and Disorder in the Postcolony: An introduction+in Jean Comaroff and John L Comaroff (eds) Law and Disorder in the Postcolony (2006)

²⁵ Quoted in Luke W. Cole %Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty Law+19 Ecology L.Q. 619, 651 (1992)

vacuum. I think this is part of the animating spirit behind the judgments in cases such as Glenister²⁶ and the Mail & Guardian case against the (erstwhile) Public Protector.²⁷

An experienced Indian judge recently explained how it is that the Indian courts, schooled like ours in the English legal tradition of judicial deference or abstinence on questions of policy, sometimes take on an interventionist role.²⁸ He said that there is a large democratic deficit in India, and the courts sometimes move to fill the gap. The courts then become rallying-points in the democratic process, he said. A similar phenomenon has taken place in parts of Latin America, perhaps most visibly in Colombia.²⁹ I think something like that is happening in South Africa. This is not the first time we have seen that. Under apartheid, black South Africans were excluded from access to the other arms of government. Professor Rick Abel has written with great insight of how they turned to litigation, as a method of Politics by Other Means.³⁰ I hasten to add that the two situations are of course not even remotely comparable.

The challenge to all of us, both inside and outside the legal arena, is how the courts can be a means of enhancing democratic practice rather than a mechanism for the depoliticisation of what are fundamentally political questions. That is not an easy question. It has troubled progressive people in many places. I suspect that it is one in which we South Africans may be able to take a lead, as we have on other politico-legal

²⁶ Glenister v President of the Republic of South Africa and others 2011 (3) SA 347 (CC)

²⁷ Public Protector v Mail & Guardian Ltd and others 2011 (4) SA 420 (SCA)

²⁸ Remarks by Justice Dhananjaya Chandrachud at the launch of section 27, Johannesburg, 6 May 2010.

²⁹ Yepes op cit footnote 10.

³⁰ Rick Abel Politics By Other Means: Law in the struggle against apartheid, 1980-1994 (1995).

and constitutional questions. We need to open our eyes and minds to how courts have functioned in other societies . India and Columbia strike me as particularly interesting examples . and find ways of using the courts as a means of opening up and deepening our democracy.

In order to do that, we will need to rethink aspects of our legal culture and of our legal process. In an article which bears repeated re-study, Karl Klare wrote penetratingly about the role of legal culture in transformative constitutionalism in South Africa.³¹ He pointed out that the transformative approach has to permeate not only our substantive law, but also our legal culture and how we go about doing law. If the courts are to play a role in democratising our society, they need to find ways of becoming institutions of empowerment rather than disempowerment.

So how can they do that?

A very important insight was provided by the Olivia Road case.³² In that case, approximately 400 people lived in two buildings in the inner city of Johannesburg. The buildings were unsafe and unhealthy. The City of Johannesburg ordered the occupiers to vacate the buildings. The occupiers did not dispute that the buildings were unhealthy and unsafe. They said, however, that the remedy was to address the poor conditions in the buildings, or to find them another place within reasonable distance which they could safely occupy. They said that if they were evicted to the outer fringes of the city, they would no longer be able to sustain themselves. They said, in effect, that they would rather take their chances in unsafe and unhealthy buildings in the inner city than be

³¹ Karl Klare %Legal Culture and Transformative Constitutionalism+(1998) 14 SAJHR 146.

³² Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg and Others 2008 (3) SA 208 (CC).

consigned to the outer reaches of what unfortunately remains the apartheid urban structure. The City said that it could not find them a place in the inner city area.

The matter came before the Constitutional Court. After hearing extensive argument, the Court made a decision which surprised many. Instead of deciding the matter in favour of either the City or the occupiers, it issued an order which required the City and the occupiers to *“engage with each other meaningfully and as soon as it is possible for them to do so, in an effort to resolve the differences and difficulties aired in this application in the light of the values of the Constitution, the constitutional and statutory duties of the municipality and the rights and duties of the citizens concerned”*. It ordered that the City and the applicants *“must also engage with each other in an effort to alleviate the plight of the applicants who live in the two buildings concerned in this application by making the buildings as safe and as conducive to health as is reasonably practicable”*. The parties were required to file affidavits by a specified date, reporting on the results of the engagement. The Court stated that account would be taken of the contents of the affidavits in the preparation of the judgment.³³

One could be forgiven for being sceptical about such an order. But the result of the order was quite remarkable. The City and the applicants engaged on these matters. The occupiers were fortunate to be very effectively represented. Both sides knew that they had to engage seriously, for two reasons. First, it had been clear at the hearing that neither side enjoyed a decisive advantage in the argument. The ultimate outcome was therefore uncertain. Second, they knew that the Court was looking over their shoulder: their conduct in the engagement would be reported to the Court, and the Court would have regard to that conduct in deciding what order it should ultimately

³³ Para [5].

make. The parties did reach agreement. The agreement made explicit and meticulous provision for measures aimed at rendering the properties safer and more habitable on an interim basis. The City undertook to provide all occupiers with alternative accommodation in identified and well-located buildings. The agreement defined the nature and standard of the occupation to be provided, and determined the way in which the rent would be calculated. It obliged all occupiers to move into alternative accommodation by a specified date. It stipulated that the alternative accommodation was provided “*pending the provision of suitable housing solutions*” being developed “*in consultation*” with the occupiers.³⁴

An apparently intractable dispute had been resolved. Each party had made concessions. The ultimate outcome was respectful of the rights of the occupiers.

How was this result arrived at? It seems to me that the answer is that the litigation, and the Court's order for meaningful engagement, fundamentally restructured the relationship between the occupiers and the City. Previously, the occupiers had been supplicants for largesse. They had little, they were recognised as being entitled to little, and all they could do was appeal to the goodwill and good intentions of the City. The relationship was fundamentally unequal, and the outcome was predictable. The Court order changed that. It destabilised³⁵ the existing power relationship, and reconfigured it in a manner which was consistent with our transformative Constitution: it recognised the occupiers as people who had rights, rather than as supplicants for largesse. It was that fundamental transformation of power relations which made it possible to resolve the dispute in a manner consistent with the Constitution.

³⁴ Paras [25] . [26].

³⁵ Charles F Sabel and William H Simon %Destabilisation rights: How public law litigation succeeds+ (2004) 117 Harvard Law Review 1015.

Was that democratic? Was it consistent with the declaration that the people shall govern? It could be argued that the City Council had been democratically elected, that (in the words of the President) they had “*a mandate given by the people in a popular vote*”, and that it was for them to decide what to do. On this reading, the Court interfered with representative democracy.

The answer to any such complaint is given by Justice Ngcobo: one of the fundamental principles of our Constitution is the principle of participatory democracy, which “*is of special importance to those who are relative disempowered in a country like ours where great disparities of wealth and influence exist*”. In other words, what the litigation did, and what the order of the Court did, was open up the process of participation in our democracy. People who were powerless became powerful, because they were the holders of rights and were treated accordingly. They became citizens, not subjects.

The use of ~~co~~constructive engagement+ is a major breakthrough in the conceptual approach to how courts can broaden and deepen the processes of democracy. That engagement can also be promoted where the court finds a breach of the Constitution, and orders a structural remedy. The most effective sort of structural remedy orders the government to say what it proposes to do to remedy the breach, thus leaving important operational and policy choices in the hands of the government; requires the government to engage on this with those affected, thus opening up the democratic processes; and authorises the parties to bring the matter back to the court if necessary, thus retaining the court's position as the arbiter, where necessary, of what the Constitution requires.

We need to think hard about other ways of using the courts to open up and facilitate democratic practice.

In an important recent article,³⁶ Professor Danie Brand has written about the need to consider alternatives, in appropriate cases, to our fundamentally adversarial approach to constitutional adjudication; the need for new approaches to access to court; and the need for the use of creative mechanisms for having additional factual material and arguments placed before the courts. Most tellingly, he has identified the need to reconsider the concept of judicial deference, to have regard to the fact that conceptualising this as a binary problem . either the court or the government must make the decision . disregards and undermines the principle of participatory democracy which animates the Constitution. The %democratic dialogue+ should not only be a dialogue between two arms of the state. The people shall govern.

There is not the time, tonight, to consider the questions which he raises. In my opinion, however, those questions illuminate the need for us to do a lot more work on how to facilitate the role of the courts in deepening our participatory democracy.

Some solutions are fairly obvious. For example the class action, which has become part of our constitutional law through section 38(c) of the Constitution, is now slowly making its way into our non-constitutional legal procedure. It cannot be long before class actions dealing with matters other than a breach of a right in the Bill of Rights will reach the Constitutional Court. As the government has not responded to the proposal of the Law Commission on this issue,³⁷ we will need the Constitutional Court to help us to fashion this new remedy in a manner which promotes accountability and democratic participation.

³⁶ Danie Brand %From judicial deference to judicial prudence in socio-economic rights cases+ forthcoming in Stellenbosch Law Review.

³⁷ South African Law Commission The recognition of class actions and public interest actions (August 1998)

In the Mazibuko case,³⁸ Justice O'Regan explained how litigation can promote participatory democracy, increase accountability, and improve government's performance of its constitutional obligations. That was a case which the applicants lost. Nevertheless, she observed as follows:

[160] The purpose of litigation concerning the positive obligations imposed by social and economic rights should be to hold the democratic arms of government to account through litigation. In so doing, litigation of this sort fosters a form of participative democracy that holds government accountable and requires it to account between elections over specific aspects of government policy.

[161] When challenged as to its policies relating to social and economic rights, the government agency must explain why the policy is reasonable. Government must disclose what it has done to formulate the policy: its investigation and research, the alternatives considered, and the reasons why the option underlying the policy was selected. The Constitution does not require government to be held to an impossible standard of perfection. Nor does it require courts to take over the tasks that in a democracy should properly be reserved for the democratic arms of government. Simply put, through the institution of the courts, government can be called upon to account to citizens for its decisions. This understanding of social and economic rights litigation accords with the founding values of our Constitution and, in particular, the principles that government should be responsive, accountable and open....

³⁸ Mazibuko and Others v City of Johannesburg and Others 2010 (4) SA 1 (CC).

[163] This case illustrates how litigation concerning social and economic rights can exact a detailed accounting from government and, in doing so, impact beneficially on the policy-making process. The applicants, in argument, rued the fact that the City had continually amended its policies during the course of the litigation. In fact, that consequence of the litigation (if such it was) was beneficial. Having to explain why the Free Basic Water policy was reasonable shone a bright, cold light on the policy that undoubtedly revealed flaws. The continual revision of the policy in the ensuing years has improved the policy in a manner entirely consistent with an obligation of progressive realisation.

If litigation and the courts are to perform the function of democratising our society, then the manner in which the litigation is conducted becomes of critical importance. As I have pointed out, litigation can be demobilising, disempowering and depoliticising. Notwithstanding some reticence because of familial connection, it seems to me right to mention in this regard the work of the Rural Women's Action Research Project at the University of Cape Town. That project shows how to work with rural communities through first listening carefully, and then facilitating political and legal action in a manner which mobilises and empowers rather than disempowering. The work of Equal Education shows a similar intelligence at work. At the heart of this is that lawyers need to find ways of working which empower their clients, and thereby deepen democracy, rather than disempowering their clients. That is the lesson which had to be learnt under apartheid, and it is also the lesson which has to be learnt under democracy.

I am coming towards the end of this part of my remarks, but I cannot end it without saying something about the need for government to use the courts intelligently to further

the democratic and transformative agenda. Hardly a week goes by that we do not read a report in the newspapers in which the complaint is made that the Constitution obstructs economic transformation because of the %willing seller, willing buyer+principle, and that therefore the Constitution needs to be amended in that regard. It was utterly refreshing, as I was preparing this lecture, to read what the Deputy President said this week in this regard.³⁹ He said that it is nonsense (“*onsin*”) that the property clause in the Constitution, or the principle of %willing seller, willing buyer+is an obstacle to land reform. He pointed out that South African law has always authorised the expropriation of land for public purposes. And he pointed out that the determination of reasonable compensation stands under the authority of the courts. He is of course absolutely correct. As long as anyone can remember, expropriation has been permitted for public purposes. The Constitution clarifies, to the extent that there might be any doubt, that expropriation may be undertaken for a public purpose or in the public interest,⁴⁰ and 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*”.⁴¹

The fundamental compromise in the new constitutional order was that it recognised and protected existing property rights, which had been acquired during the era of dispossession and discrimination. Some would say that this was a fatal compromise. It was a telling instance of what Arundhati Roy has pointed out, quoting Howard Zinn: “*The rule of law does not do away with unequal distribution of wealth and power, but reinforces that inequality with the authority of law.*”⁴² Our Constitution-makers

³⁹ Die Burger 9 November 2011

⁴⁰ Section 25(2)(a).

⁴¹ Section 25(4)(a).

⁴² Arundhati Roy Listening to Grasshoppers: Field Notes on Democracy (2009) 119 quoting Howard Zinn The Zinn Reader: Writings on disobedience and democracy (1997) 373

attempted to meet this problem in three ways: by providing that expropriation may take place on broad public interest grounds, including access to natural resources; by providing that the compensation for expropriation must be "*just and equitable*", which will have regard to market value as one of a number of factors; and by creating social and economic rights, which are countervailing rights to existing vested rights.

Only time will tell whether that compromise was effective, or whether it was indeed fatally flawed. What seems clear, however, is that the government has made little or no attempt to use the space which is created by the provisions of the property clause. We regularly read reports that government has substantially over-paid for property which has been acquired for the purposes of land reform or social purposes. It is said that government is paying above market value. It is sometimes government spokespeople who say this. If that is so, then the responsibility must rest on the officials or Minister concerned. Not only are they not obliged to pay above market value, but in some instances they may not be required to pay as much as market value.

I am reminded of a debate I attended sometime in the late 1970s or early 1980s between Sydney Kentridge and General Van den Bergh, who was the head of the Bureau for State Security. During the course of his address, General Van den Bergh spent some time talking about what was then a fashionable theme in government circles, namely the inappropriateness and failure of the Westminster system in South Africa. In his reply, Sydney Kentridge said the following. He said that there are two key elements of the Westminster system. One of them is that everyone has the right to vote. The second is that there are two major parties, the %ns+ and the %Duts+- and they change places from time to time. The problem, said Kentridge, was not that the

Westminster system had failed in South Africa. The problem was that it had never been tried.

The same applies, in my view, to the complaint that the Constitution and the courts prevent transformative processes. The validity of transformative legislation was tested in the Constitutional Court in the Van Heerden case.⁴³ The Court gave a judgment which provides robust protection for measures aimed at redressing past inequality.

One of the most important pieces of economically transformative legislation is the Minerals and Petroleum Resources Development Act.⁴⁴ It seeks to give effect to the proclamation in the Freedom Charter that the mineral wealth beneath the soil shall be transferred to the ownership of the people as a whole. The Act ends private ownership of mineral rights, places those rights in the custody of the State, and creates a system through which the right to extract minerals is allocated by the State.

I have to say immediately that the Act has had two deeply troubling consequences.

First, it has effectively dispossessed rural communities who had a claim to the minerals under their land, which had not yet been transformed into a vested legal right, because they are still awaiting the restitution or legally secure tenure which the Constitution promises them.⁴⁵ The Act dispossessed them of those claims without compensation. Unlike the commercial holders of mining rights, they did not have an “*old order right*” which they could convert into a mining right under the new Act. It can be a terrible misfortune if a valuable mineral such as platinum is found under your land. You not

⁴³ Minister of Finance and another v Van Heerden 2004 (6) SA 121 (CC)

⁴⁴ Act 28 of 2002.

⁴⁵ Sections 25(6) and 25(7) of the Constitution.

only have no claim to the platinum, but you may also suffer the destruction of your community life and the loss of your land without adequate compensation.

Second, the Act created a rush for mining rights which has been characterised by widespread corruption, fronting and abuse. People in the industry know that this is so, but few are willing to say so publicly, perhaps because their rights are to some extent vulnerable to the exercise of official discretion.⁴⁶ There has been a feeding frenzy of what Bram Fischer might have called primitive accumulation. When the full story of the first decade of implementation of this Act comes to be written, it will be a shocking story.

But for all its defects, the Act has led to significant redistribution of access to South Africa's mineral wealth. Despite numerous threats of litigation by the holders of old order rights, very little has materialised . precisely because of the way in which the property clause in the Constitution was formulated. One case, a test case skilfully chosen by those who represent conservative agricultural interests, is currently making its way through the courts.⁴⁷ But whatever the outcome of that case, one can be fairly confident that when it finally reaches the Constitutional Court, as it surely will, that Court will find that the underlying transformative and redistributive impulse of the MPRDA is permissible under our Constitution, and ought not to be undermined by a requirement of compensation which would disable the transformative process.

There have also been major legislative interventions in the area of land and water, two other critical natural resources. Again, there has been no effective challenge to any of those laws; and again, this is in part because of the way in which the property clause in

⁴⁶ The best-informed writing I have seen on this subject has been a series of articles by Tim Cohen in Business Day.

⁴⁷ The case is currently pending before the Supreme Court of Appeal: Minister of Mineral Resources v Agri South Africa Case no 458/2011

the Constitution was formulated. There are many reasons for the failures of land reform. They include mistakes made in the formulation and implementation of policy, for which I share responsibility in the early period. But the Constitution is not one of the reasons for those failures, and neither is the approach of the courts.

Enabling government to govern

We often forget that the Constitution does not only place restrictions on government. One of its functions is to empower government, to enable government to govern.

In my opinion, government has a legitimate complaint that the process of enforcing rights, and particularly the right to administrative justice, sometimes obstructs its ability to deliver effectively and on time. One sees this particularly in the area of tenders. Only too often, one sees litigation in which a disappointed tenderer obtains the tender documents, and combs them furiously in an attempt to find an error in the process. when the real complaint is not an error in the process, but an unfavourable outcome. A minute examination of processes and documents leads to the ~~aha~~ moment: an error is found, a judicial tripwire is revealed. The tender is set aside, for no reason other than a procedural defect which had no consequences for the outcome. Meanwhile, necessary services cannot be delivered. The very important reason for scrutinising government procurement. the need to ensure honesty, fairness, value for money, and quality services. has somehow got lost in the process.

The problem is not limited to procurement. Other government processes also become complicated by an excessive peering at the minutiae of process, to the disadvantage of those whom government seeks to serve.

It must surely be time to look again at the question of remedies where an administrative process is found to be defective, but the defect is of a technical nature and does not impact on the underlying values of our Constitution. The Supreme Court of Appeal has already held⁴⁸ that “(not) every slip in the administration of tenders is necessarily to be visited by judicial sanction”. It is time that this principle was more widely applied. We too often forget that section 33(3)(c) of the Constitution states that the national legislation to give effect to the right to just administrative action must “*promote an efficient administration*”.

This is not a theoretical problem. How are the courts to deal with a case in which a major housing project is desperately needed, and the neighbours attempt to stop it on the basis that the proper notice was not given of a particular step in the process, when the neighbours were aware that the step was being taken, and made representations in that regard? That is not a hypothetical case. Sometimes it is a matter of balancing rights: for example, what are the courts to do where the tender process was unfair, but the result of setting aside the award will be to deprive schoolchildren of desperately needed educational materials? That too is a real case.⁴⁹ We need to develop a more sophisticated approach to remedies, which ensures that the outcome promotes the goals of the Constitution. And we need to find ways of dealing with a formalism which makes it impossible for the government to carry out its duties under the Constitution.

This is not a plea for an end to the right to administrative justice, or even a dilution of that right. If the process was not lawful, the courts must say so. Rather, it is a plea that

⁴⁸ Moseme Road Construction CC and Others v King Civil Engineering Contractors (Pty) Ltd and Another 2010 (4) SA 359 SCA para [21]. See also Minister of Social Development v Phoenix Cash & Carry 2007 (3) SA 115 (SCA).

⁴⁹ Freedom Stationery (Pty) Ltd and another v MEC for Education. Eastern Cape and others Eastern Cape High Court, Bhisho: case no 59/2011.

we take much more seriously the remedial provisions of section 8(1) of the Promotion of Administrative Justice Act,⁵⁰ which says that where a court finds that there has been a defect in the administrative action, the court may grant “*any order that is just and equitable*”. We need to give much more serious thought to what remedy would be just and equitable in each case, and particularly where the order will have an impact on the quality of the services which will be provided to people who are not party to the litigation, and on their right to those services.

In the famous dictum of Justice Oliver Wendell Holmes the machinery of government cannot work if it is not allowed “*a little play in its joints*”.⁵¹

It is a deep irony that in the midst of widespread and quite often successful litigation around tender processes, we are told that we have tender frauds occurring on a vast scale. A member of the Cabinet recently commented to me on that irony: he said that it often seems that the regulatory process which has been introduced does not catch the crooks, but does impede government in doing its work effectively.

Conclusion

So what is the complaint about the courts? If the TAC case was rightly decided, and if the courts have not impeded economic transformation through the redistribution of mineral, land and water resources, what precisely is the complaint?

⁵⁰ Act 3 of 2000.

⁵¹ Bain Peanut Co of Texas et al v Pinson et al 282 US 499 (1931) at 501, quoted by Mokgoro and Sachs JJ in Bel Porto School Governing Body and others v Premier, Western Cape and another 2002 (3) SA 265 (CC) para [154]. See also State of Haryana and others v Kashmir Singh and another [2010] INSC 828.

I am sympathetic to the core of the President's argument that *"it would help if political disputes were resolved politically"*. That, however, cannot mean that we must leave political decisions to the politicians. To my mind, it means that we must open up our democratic processes so that they are more responsive to political disputes, and enable them to be resolved in a democratic manner. It seems that the formal institutions of representative democracy have become less effective in that regard. Certainly, the response of the executive to Parliament seems to be increasingly dismissive. Some Ministers refuse to answer questions, or do so in a contemptuous manner; some Ministers and senior public servants fail to arrive at meetings of parliamentary committees; and increasingly, one has the sense that with some very honourable exceptions, Parliament does not exercise oversight of an effective nature, and seldom challenges the view of the executive on proposed legislation.

I cannot resist an anecdotal aside. When I was the Director-General of Land Affairs, our parliamentary officer brought me a draft answer to a question in Parliament, for me to check it before it was submitted to the Minister for his approval. The proposed answer avoided the question. He explained to me that in the old order, he had been taught that the perfect answer to a Parliamentary Question reads as follows:

Question 1: The Honourable Member has referred to the incorrect section of the Act of Parliament in question.

Questions 2, 3(a) and (b), 4, 5, 6 and 7(a), (b) and (c): Fall away.

When I said that this was not the way in which we did things in the new order, because Ministers were accountable to Parliament and were under a duty to provide information

when requested, he gave me what can only be described as an old-fashioned look. He would be in his element if he were today in the Ministry of Defence.

There are many reasons to be concerned about our future. We remain grossly unequal, with deep poverty alongside great and sometimes nauseatingly ostentatious wealth. Many South Africans have little prospect of ever achieving the material benefits which facilitate a life of dignity and hope. Deep and persistent inequality tears social bonds. But for all the criticisms that are made of it, we also have an extraordinarily lively democracy. We debate, argue, shout at each other, and abuse each other with abandon. Our country is the richer for it.

The courts have an important role to play in this democracy. The criticism that they are anti-democratic rests on a number of false premises: on the conflation of the people with Parliament, the Executive or the party; on the unfounded contention that in their judgments the courts have impeded the transformation which we have promised each other in the Constitution; and on an inability to see that the courts are a means of broadening and deepening our democracy. The real source of the criticism, I think, is often that the critics simply do not like the outcome of particular cases. Justice Ruth Bader Ginsburg has observed that the complaint of illegitimate judicial activism is *“too often pressed into service by critics of court results rather than the legitimacy of court decisions”*.⁵² One has the sense that the cases which have triggered much of the criticism are Glenister⁵³ and JASA.⁵⁴ Glenister had nothing to do with the policy of the executive. It dealt with the difficult question of whether the law establishing the

⁵² Quoted by Michael Kirby op cit footnote 11, page 47.

⁵³ Glenister v President of the Republic of South Africa and others 2011 (3) SA 347 (CC)

⁵⁴ Justice Alliance of South Africa v President of the Republic of South Africa and others 2011 (5) SA 388 (CC)

Directorate for Priority Crime Investigation gives it the form of independence our constitution order requires. JASA concerned whether Parliament had prescribed a constitutionally permissible procedure for the extension of the term of office of the Chief Justice. The President used the existing procedure in good faith: but I do not think it can be seriously contended, on closer scrutiny, that the procedure was constitutionally permissible. The Constitutional Court held unanimously that it was not.

When courts do their job, some parties win, and others lose. That has nothing to do with the courts over-riding democratic mandates. It is simply the courts carrying out their constitutional mandate, which is to ensure compliance with the Constitution and the law.

The struggle for a better society is essentially a political struggle. A critical question is how we can use the courts and the law to open up the political process, and make the political process more responsive to ordinary people. In that way, the courts will play their part in ensuring that the people do govern.