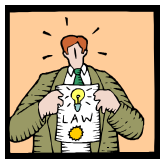
e-MANTSHI

A KZNJETCOM Newsletter

November 2011 : Issue 70

Welcome to the seventieth issue of our KwaZulu-Natal Magistrates' newsletter. It is intended to provide Magistrates with regular updates around new legislation, recent court cases and interesting and relevant articles. Back copies of e-Mantshi are available on http://www.justiceforum.co.za/JET-LTN.ASP. There is now a search facility available on the Justice Forum website which can be used to search back issues of the newsletter. At the top right hand of the webpage any word or phrase can be typed in to search all issues.
Your feedback and input is key to making this newsletter a valuable resource and we hope to receive a variety of comments, contributions and suggestions – these can be sent to Gerhard van Rooyen at gvanrooyen@justice.gov.za.



New Legislation

1. In Government Gazette no 34744 of 10 November 2011 the following notice was published by the Minister of Justice and Constitutional Development:

COMMENCEMENT OF SECTION 1 OF THE CRIMINAL PROCEDURE AMENDMENT ACT, 2008 (ACT NO. 65 OF 2008)

Under section 4 of the Criminal Procedure Amendment Act, 2008 (Act No. 65 of 2008), I hereby fix 11 November 2011 as the date on which section 1 of the said Act shall come into operation in respect of the magisterial districts of Alberton, Benoni, Boksburg, East London, Germiston, Inanda, Johannesburg, Kempton Park, Krugersdorp, Mdantsane, Moretele, Mthata, Odi, Pietermaritzburg, Randburg, Roodepoort, Uitenhage, Umlazi, Vanderbijlpark, Vereeniging and Wonderboom.

Given under my Hand and the Seal of the Republic of South Africa at Pretoria this Fourth day of November Two thousand and eleven.

13. Modderbee Remand Detention Facility	Kempton Park
14. Pietermaritzburg Medium A Remand Detention Facility	Pietermaritzburg
15. Pietermaritzburg Medium A Remand Detention Facility	Umlazi

16. Pretoria Local Remand Detention Facility	Moretele
17. Pretoria Local Remand Detention Facility	Odi
18. Pretoria Local Remand Detention Facility	Wonderboom
19. St Albans Medium A Remand Detention Facility	Uitenhage
20. Vereeniging Correctional Centre	Vanderbijlpark
21. Vereeniging Correctional Centre	Vereeniging

2. The South African Police Service is consulting on regulations under section 41(1) of the Second-Hand Goods Act, 2009 (Act No. 6 of 2009), with a view to submitting draft regulations to the Minister of Police for consideration when the Act comes into operation. A proposed Notice has been drafted for consultation purposes. The notice was published in Government Gazette no 34757 dated 16 November 2011. An invitation is hereby extended to any person, or private or public institution that may have an interest to comment on the draft notice, within 30 days from the date of publication of the *Gazette.*

Comments must be in writing and directed to:

E-mail address

vanderwaltja@saps.org.za

Recent Court Cases

1. S v NCUBE 2011(2) SACR 471 (GSJ)

Where the record of proceedings are incomplete as to the proceedings on sentence a court of appeal is entitled to hear evidence only in exceptional circumstances.

The appellants were convicted of robbery with aggravating circumstances on the strength of expert evidence identifying them as the persons photographed committing a bank robbery. In an appeal against their convictions and sentences of 12 years' imprisonment each, the court of appeal was confronted with the

complication that the trial court's record of the proceedings relating to sentence was incomplete. Only one of the three appellants could recall evidence led at the trial and therefore participate in reconstruction of the record.

Held, that the court was entitled to receive evidence in terms of the enabling statutes, ss 304(2)*(b)* read with s 309B(3) of the Criminal Procedure Act 51 of 1977, and s 22 of the Supreme Court Act 59 of 1959 and then only in exceptional circumstances. The circumstances in the present matter were exceptional: the appellants were present, legally represented, agreeable to leading fresh evidence, and it was a relatively simple matter for the mitigating circumstances to be placed before this court, those circumstances not having been disputed by the State. If this procedure were not followed, it would result in a remittal of the matter to the magistrates' court — with the need to summons the appellants (from the various prisons in I which they were resident) with the view to hearing precisely the same evidence, which would be a substantial waste of time and costs. It was accordingly ruled that the evidence of the second appellant (who could assist the appellate court with reconstruction) was to be received in the form of reconstruction of the record and in the form of fresh evidence, while the evidence of the other two appellants (who could not assist the appellate court with reconstruction) was also to be received, as fresh evidence. (At 474*b–g* and 476*f*.)

Held, further, that in dealing with expert evidence, the expert's function was not to decide the case but provide the court with the tools to assist it in deciding the case — here only insofar as the court required assistance with the skills it used in comparing the pictures with the appellants. The extent to which the opinions advanced by an expert were to be accepted would depend upon whether, in the judgment of the court, those opinions were founded on logical reasoning or were otherwise valid. It was furthermore important to bear in mind the distinction between scientific and judicial measures of proof. (At 478*b–d*.)

2. S v NKOSI 2011(2) SACR 482 (SCA)

A presiding officer has a discretion not to discharge an accused at the closure of the state’s case where there is insufficient evidence at the end of the state’s case but the possibility exists of an accomplice incriminating the accused.

In *S v Lubaxa* 2001 (2) SACR 703 (SCA) the Supreme Court of Appeal found it an unlawful breach of an accused's rights under ss 10 and 12 of the Constitution, 1996, to refuse him a discharge at the end of the State's case if there is no possibility of a conviction except if he testifies and incriminates himself. But the court held that the same considerations did not arise where the prosecution's case against one accused might be supplemented by the evidence of a co-accused. Whether, or in what circumstances, a trial court should discharge such an accused is not a question that can be answered in the abstract — what is entailed by a fair trial must necessarily be determined by the particular circumstances. In the present case there was no evidence upon which the court a quo might reasonably have convicted the first appellant at the close of the State's case, and neither was there any reasonable

basis for an expectation that his co-accused might have incriminated him. Plainly the court below failed to properly evaluate the evidence at the end of the States's case and wrongly exercised its discretion. The first appellant was entitled to a discharge. (Paragraphs [25]–[27] at 489*g*–490*f*.)

3. S v TSHABALALA 2011(2) SACR 505 (KZP)

Section 35 of Act 93 of 1996 places a duty on the court to order the suspension of a drivers licence unless the court is satisfied that circumstances justify that such an order shall not take effect.

Section 35 of the National Road Traffic Act 93 of 1996 places a duty on courts to suspend the driving licence of a person or disqualify a person from obtaining a driving licence, as the case may be, who is convicted of one of the offences listed in s 35(1)*(a)* to *(c)* thereof — in the present case, driving under the influence of intoxicating liquor in contravention of s 65(1)*(a)* of the Act — unless the court is satisfied that the circumstances justify an order that the suspension or disqualification shall not take effect. The court can invoke s 35 *mero motu*. (Paragraphs [1] at 506*a* and [10] at 508*g*).

4. S v VAN DER MERWE 2011(2) SACR 509 (FB)

If an accused pleads guilty in terms of section 112(2) of Act 51 of 1977 and his explanation in his written statement is accepted by the prosecution, the plea so explained and accepted constituted the essential factual matrix on the strength of which sentence should be considered and imposed.

The appellants had been convicted in a magistrates' court on charges of *crimen injuria* and each sentenced to a fine of R20 000 or 12 months' imprisonment, plus a further six months' imprisonment conditionally suspended for five years. The charges arose out of a video recording they had made to express their opposition to the policy, of the university they attended, of promoting racial integration of the university students' residence in which they resided. It featured an initiation ritual in which the complainants — black staff members at same university — appeared to be forced by the appellants into ingesting a concocted brew and thereafter vomiting. The appellants also appeared to have urinated into the brew and, during the episode, referred to the complainants as 'whores'.

The facts as pleaded in appellants' plea explanation in terms of s 112(2) were accepted by the State and supported the contention that the urination, ingestion and vomiting were all simulated. No formal admissions were made in the appellants' plea explanations admitting to the averments in the charge-sheet that the *iniuria* was racially motivated. The State alleged that what appeared in the video recording was real — that the complainants were depicted as inferior and unintelligent human beings, thereby impairing not only their human dignity but also 'extensively and tacitly' that of blacks in general and/or the black students and personnel of the university in particular.

The grounds of appeal were that — *(a)* the sentence was disproportionate to the offence in the context and relevant circumstances; *(b)* the fine exceeded the court's jurisdiction; *(c)* the use of a newspaper article to reflect the convictions of the community was not competent ; *(d)* the plea and the facts upon which it rested were not based on racial insult — the behaviour to which was pleaded guilty impugned the dignity of the complainants as human beings; and *(e)* a sentence of suspended imprisonment was not appropriate and, in particular, linking the condition of suspension thereof to s 21 of Act 4 of 2000 was not appropriate or permissible.

Held, that, where an accused person pleaded guilty and handed in a written statement in terms of s 112(2) of the Criminal Procedure Act 51 of 1977, detailing the facts on which his plea was premised, and the prosecution accepted the plea, the plea so explained and accepted constituted the essential factual matrix on the strength of which sentence should be considered and imposed. Such an essential factual matrix could not be extended or varied in a manner that adversely impacted on the measure of punishment as regards the offender. The facts, as pleaded and accepted, supported the contention that the urination, ingestion and vomiting were all simulated. Simulated offensive conduct towards the complainants was, without their consent, made to look real. In that secret depiction lay the *iniuria* — indeed the video was not evidence of the *iniuria*, it was *iniuria*. It has to be accepted that the two groups were performing, in other words, play-acting. To the extent that the court a quo found otherwise, it materially erred. (Paragraphs [30] and [42] at 518*e*–*f* and 521*c*–*e*.)

Held, further, that, in the circumstances, the court a quo could not have approached the matter of sentence anyhow save on those facts plus the undisputed facts whereby those facts were amplified by the prosecution and defence during the course of closing arguments. It was however clear from the original as well as supplementary reasons for judgment that the court a quo did not approach the sentencing on such factual premise; instead reckoning that, because the appellants had not expressly taken issue with the racial averments embodied in the charge-sheet, such averments were tacitly admitted and thus constituted facts on which sentence could be validly premised. This reasoning was materially flawed and the finding relative to racism, which the court a quo regarded as a strongly aggravating factor, was a monumental misdirection. (Paragraphs [22]–[23] at 516*f*–517*a*.)

Held, further, that the reliance placed by the sentencing court upon the contents of the press article — handed in by the defence in order to demonstrate how the accused were portrayed in the press and public media as extremely loathsome persons who deserved very severe punishment — as being true and conveying a true reflection of the legal convictions of the community, had adversely influenced the determination of a balanced sentence. It was unfair to the accused for those views to have been taken into account in such a manner, given the specific purpose for which the article was handed in. It was also unfair to have accentuated the punitive aspects of the public opinion so expressed without affording the defence an opportunity of dealing therewith. (Paragraphs [46]–[48] at 521*i*–522*h*.)

Held, further, that the linking of future rulings by the Equality Court [as suspensive conditions to sentences of imprisonment imposed against the appellants] appeared undesirable. The Equality Court proceedings — the quantum of proof and the ultimate rulings and remedies — were essentially civil in nature. Allowing a suspended criminal sentence to be triggered and put into operation on the strength of a civil wrong or transgression could lead to absurd repercussions. Our domestic jurisdiction had not yet developed that far. (Paragraph [73] at 528*a* – *c*.)

The appeal was allowed and the sentences of the first and third appellants altered to one of a fine of R10 000 each and the sentences of the second and fourth appellants altered to a fine of R15 000 each. It was further ordered that the appellants had to appear before the court on a stated date should they fail to pay the fines, so that the court could impose a sentence of imprisonment.

From The Legal Journals

Anonymous

"Corruption at the courts is eating into our justice system"

De Rebus November 2011

Curlewis, L

"Section 49 of the Criminal Procedure Act: What is all the fuss about?"

De Rebus November 2011

Kupiso, O B

"Can debt enforcement procedures be circumvented by insolvency proceedings?"

De Rebus November 2011

Van Heerden, C

"The impact of the National Credit Act 34 of 2005 on standard acknowledgements of debt"

THRHR November 2011

Neethling, J

"The Supreme Court of appeal pronounces upon arrest without a warrant and the bill of rights "

THRHR November 2011

(Electronic copies of any of the above articles can be requested from gvanrooyen@justice.gov.za)

Contributions from the Law School

***S v Hendricks* (cc46/2010) [2011] ZAWCHC 345 (9 September 2011) and the Dräger Alcotest 7110 MK 111 breathalyser**

The use of breathalysers in South Africa is the most convenient way to present evidence to the court about offenders prosecuted for drinking and driving as blood testing is practically problematic due to the delay in obtaining results from state laboratories.

Although the court in *Vorster* (2002 (1) SACR 379 (N) at 387e) argued that the use of breathalysers would make it easier for the state to curb the amount of drunk drivers found on the roads, this is not borne out by the recent decision of *Hendricks.*

Notwithstanding some critique about the use of breathalysers in general (Fiandach 'Critical examination of breath testing assumptions and techniques' 2006 *Champion* 47; Hlastala 'Author's response' January 2011 *Journal of Forensic Science* 269; Hlastala 'Paradigm shift in the alcohol breath test' March 2010 *Journal of Forensic Science* 455 and Morris 'New look at breath alcohol testing' 2009 *Champion* 44), our courts have accepted the use of breathalysers in principle.

From a scientific perspective, the evidence worldwide leans towards the reliability of the Dräger Alcotest 7110–system used in South Africa (Germany: Jachau and Musshoff '"Probative" breath-alcohol analysis in Germany' 208

Rechtsmedizin 445; Israel: Peleg 'Comparison of blood alcohol levels with breath alcohol levels measured using a Dräger Alcotest 7110 MK III breathalyzer' 2010 *Injury Prevention* A1 at A147-8; Lozano Bleza 'Time evolution of the relation between blood-alcohol and breath-alcohol concentrations in traffic controls' 2008 *Toxological letters* S 32 at S 159; Alabama: Gullberg 'Breath alcohol measurement variability associated with different instrumentation and protocols' 2003 *Forensic Science International* 30-35).

However, any scientific instrument, including the breathalyser, must be operated according to the manufacturer's specifications and protocols by a trained operator to ensure that the instrument functions accurately and gives a precise reading (*Van der Sandt* 1997 (2) SACR 116 (W) at 120a-b; *Vorster* at 387e; *Bester* 2004 (2) SACR 59 (C) at 61c; 63b-c; *Price v Mutual & Federal Insurance Co Ltd* 2007 (1) SACR 501 (SE) at 512h-i; *Molahlane* (20080208) [2008] ZAECHC 146 at para [8]). This can only be proven in court if there is proper data management, software maintenance, calibration and all the other guidelines and protocols have been followed (Andrascik 'Understanding field sobriety and breath testing procedures' 2009 *Aspatore* 1 at 3-4).

The crux of the *Hendricks* decision is that the results from a Dräger Alcotest 7110 breathalyser test can only be used in court if the regulatory framework had been strictly adhered to. The regulatory framework includes the National Road Traffic Act 93 of 1996 (ss 65(5)-(7)); the National Road Traffic Regulations (regs 332-332A); SANS:1793 as read with R126:1998 of OIML (International Organisation of Legal Metrology) *International Recommendation for evidential breath analysers*; Prosecution Guidelines, manufacturer's protocols and judicial precedent, particularly *Van der Sandt op cit*; *Vorster op cit*; *Bester*; *op cit Price v Mutual & Federal Insurance Co Ltd op cit*; *Molahlane op cit* and *Snyman* 2001 (1) SACR 354 (N). All these documents are relevant when operating a breathalyser.

These documents are of particular importance as it would ensure that the evidence show that the instrument gave a correct measurement and that the accused is not prejudiced. Specifically, evidence must be lead explaining the operation of the instrument, proof must be adduced that the instrument is reliable for the purpose used and that the result was reliable and correct. In addition there must also be proof of calibration and proper set-up (SV Hoctor *Cooper's Motor Law: Criminal Liability; Administrative Adjudication & Medico-legal aspects* 2 ed (2008) (Loose leaf – Original Service 2007) at B11– 68).

The facts in *Hendricks* were that he was charged with contravening s 65(5). He pleaded not guilty and placed the result of the breathalyser in dispute (at para [9]).

He furthermore argued that ss 65(5); (6) and (7) of the National Road Traffic Act were unconstitutional as they did not conform to the requirements of the rule of law and the Constitution of the Republic of South Africa, 1996, namely that the legislation did not rationally serve a legitimate purpose of government and was

vague, arbitrary and capricious (paras [9]-[10]). The court accepted that alcohol limits can differ from person to person, but found that it is possible to overcome any potential prejudice by having regard to the particular characteristics of a particular person to compensate for the differences. The court held that the constitutional challenge had no merit (para [123]). Referring to *Merafong Demarcation Forum v President of the Republic of South Africa* 2008 (5) SA 171 (CC) at paras [62]-[64], the court found that there is a rational objective basis justifying the conduct of the legislature (para [122]).

Dealing with the challenge of the breathalyser results, the state bore the onus to prove (para [10]). The court maintained that the following was what needed to be determined in terms of the South African law:

> 'Ultimately, the question posed is whether an instrument, if sufficiently specified as well as correctly programmed and operated, can deliver a result based on which a person may properly be prosecuted given the South African legislative framework and constitutional imperatives. The premise on which a breath testing instrument is based may not be unassailable in scientific terms, but the question I have to consider is whether the Alcotest can deliver a result based on which a person may properly be prosecuted – irrespective of whether it was built on the basis of the old paradigm and not the new one.' (para [109])

After discussion of the regulatory framework (paras [23]–[70]; 2.3 *supra*) and the science behind breathalysers (paras [74]-[88]; [99]-[108]), the court, on the facts, made two findings: firstly, that the existing science was reliable and that Hlastala's new paradigm, if accepted, would not make a significant difference to the outcome (para [119]). Secondly, the court found that numerous errors were made *in casu*: there was no evidence that the test was done on ethanol only (para [205]); the accredited test laboratory used were not equipped to use the recommended testing method for calibration and allowed the unaccredited institution, the manufacturer itself, to complete certain procedures (paras [71]-[72]; [132]-[133]; [206]); no complete calibration certificate was available from an accredited laboratory (para [133]); no evidence was presented about the transport or servicing of the machine or independent verification of the machine (para [133]); the instrument software-test report was not up to date and incomplete (paras [210]-[212]; [215]); no proper records of the machine had been kept at the testing centre indicating calibration, maintenance, malfunctions and faults as required (para [220]); the instruction manuals of this instrument were not comprehensive as required by OIML R126:1998 (para [128]); the training provided was insufficient and the training manual itself confusing (paras [181]; [129]-[130]); the training certificate of the operator was incomplete as it did not indicate the make and model of the machine trained on (para [222]); and the 'operator statement' of the incident as required was not available (para [180]). As a result, insufficient personal details of the accused, including

possible mouth alcohol if dentures are present, results in the absence of prescribed safeguards and raises reasonable doubt (paras [208]-[209]).

The accused was acquitted (para [225]).

Importantly though, the judge concluded that the Dräger Alcotest 7110 MK 111 breathalyser was in principle capable of producing the desired result (para [217]). To ensure reliability of breathalyser testing in future, the court recommended that an additional breath temperature module be inserted as used in the German Evidential model (paras [197]-[200]) as it would guard against irregular breathing by a test subject (para [201]) and aid the operator to monitor the breathing pattern carefully (para [201]); that the OIML requirement of a two breath system be adopted and not just the single breath that is currently required (paras [201]-[202]).

Although the judgment in *Hendricks* is comprehensive and would assist future litigants, it had placed a damper on the use of breathalysers in the immediate future with predictable negative consequences. The court did not require something new, but confirmed existing law namely that adequate proof of all aspects are mandatory. This is not an unattainable goal. There is thus no reason why the state should not be able to make the necessary adjustments to meet the regulatory requirements. It is successfully used in foreign jurisdictions such as New Jersey and South Australia.

To overcome the deficiencies in *Hendricks,* the following should be borne in mind in future for a successful prosecution (or a successful defence):

Only ‘prescribed equipment’ may be used for BrAC testing (s 65(7); reg 332-332A). This includes two main aspects: the first aspect relates to the accreditation of the general make and model of the instrument and this accreditation would be applicable to all instruments of the same make and models. The type of instrument (make and model) must have been approved by SANAS for the purpose for which it is used (reg 332(2)). In this regard the type of instrument (make and model) must comply with SANS:1793/OIML R 126:1998 (reg 332(2) as read with s 25 of Act 16 of 2006). This can be proven by a certified copy of the test report by an accredited laboratory (specifying the type (make and model) of instrument). A certified copy is prima facie evidence (reg 332(3)) that the make and model complies with reg 332(2), provided it is mentioned in charge sheet.

The second aspect of the prescribed equipment is that the specific instrument that was used to test the accused must be proved to be trustworthy and accurate (*Price* at para [38]). This evidence should preferably be lead by an expert. In this regard the state would have to show that the instrument used on the day is of the particular make and model that was mentioned in the abovementioned certificate, and that the instrument adhered to the calibration protocols. A certificate by the manufacturer or supplier that the instrument used is of that particular make and model is prima facie evidence (reg 332(4)).

To show that the particular instrument was accurate on the day when testing the accused and that the particular result is correct (Hoctor op cit; *Price* supra), evidence of testing before and after its use could be lead.

Furthermore, evidence of proper maintenance and six monthly calibration of the machine by an accredited and independent institution is essential. In this regard there must be adequate record-keeping indicating calibration, maintenance, mal-functions and faults (*Chun* supra at 142-144 and *Hendricks* at para [16]). A certificate by an accredited laboratory would be prima facie evidence of the contents thereof (reg 332A).

Note that with all the above documentary evidence, the rules relating to the authentication of non-public documents should still be adhered to.

The court should also hear evidence that the instrument used tests for ethanol only and that there were no other substances that interfered in the result.

In addition hereto *viva voce* evidence will have to be lead by the operator, a registered traffic official: specifically that he was properly trained to set up and use the specific type of instrument and had an operator's certificate to the effect that he passed the required course. The competency certificate must be available at request by the person being tested. In addition, evidence must be lead that the operator had setup and operated the instrument according to the specifications; that he explained the operation of the instrument to the accused before testing the accused (*Vorster* at 387e); that he, the operator, drafted a statement about the event (*Hendricks* at para [181]). This statement must include personal information about the offender such as the presence of dentures (to exclude the risk of mouth alcohol that may influence the result) (*Hendricks* at para [208]), the lack of alcohol intake and smoking before testing (s 65(8)) and the details of the testing itself, namely that the various time limits were adhered to, that the breath sample requirements with regard to type of air, volume, time blowing, minimum flow rate and equilibrium were observed (*Hendricks* at para [158]). In addition, the statement must mention that the environment met the required standards. Lastly, the evidence should note that the use of the instrument resulted in the BrAC result printed by the instrument and a print-out should be submitted to the court with reference to s 15(2) of Act 25 of 2002 as evidence of the BrAC. It is submitted that a pro forma set of questions should be made available to operators to assist the operators.

In summary, it is advisable that the recommendations by the court in *Hendricks* also be considered and hopefully implemented: that a breath temperature module should be added to the breathalyser and that two breath samples of each offender should be taken (within a prescribed period of time). This is however not a requirement as yet.

M Carnelley, H Schultz & T Winchester

University of KwaZulu-Natal

Matters of Interest to Magistrates

A Forum for reason: Reflections on the role and work of the Constitutional Court

Kate O'Regan, Judge of the Constitutional Court (1994 – 2009), Helen Suzman Memorial Lecture, Johannesburg, November 22 2011

It is a signal honour to be asked to deliver this lecture in memory of Helen Suzman. There are many reasons why we should remember and honour Helen: her great courage, her principled and unwavering opposition to the policy of apartheid, her undoubted and consistent integrity, and her quick wit and dry sense of humour.

But the quality I should like to remind you of this evening is one less often mentioned: the extraordinary diligence and meticulous attention to detail with which she approached every task in her life, but particularly her responsibility as Member of Parliament. This personal quality had, according to Helen, a rather surprising source.

In her memoir, *In No Uncertain Terms,* she comments that whenever she felt like shirking something she knew she ought to do, she could hear Sr Columba, the head nun at Parktown Convent, where she went to school, whispering in her ear (with an Irish accent and no doubt firmly) "Do it child!" and, according to Helen, she always did. I imagine that Sr Columba was perhaps the first and last person that Helen ever obeyed automatically.

In her years as an MP, she was a regular and informed speaker in the House — she notes in her autobiography that she generally "tackled" (her word) fifteen ministers per session and that each speech took hours to prepare. In addition, she put an average of 200 questions a year. The answers to these questions provided information that would not have otherwise been available.

Reading through the volumes of the SA Institute of Race Relations Annual Survey of her years in Parliament, it is striking how often information provided, was sourced in answers to questions put by Helen. Famously, when chided by a Nationalist Cabinet Minister in the House for asking questions, as he put it, simply to embarrass South Africa overseas, she retorted "it is not my questions that embarrass South Africa, it is your answers".

The seriousness of purpose that underlay Helen's approach to her work as a parliamentarian was exemplary. It recognised that the work of governance and politics is a serious business which needs to be undertaken with vigour, dedication and integrity. Helen was not a practitioner of what might be called the broad brush approach to factual or policy questions.

Instead, she recognised that good governance requires a mastery of detail as well as attention to principle. Accordingly, she took seriously the work of gathering and synthesising information and considering arguments from a range of angles, before taking a view on any problem. It is this serious-minded and painstaking approach to the exercise of public power, despite all the challenges she faced, especially as a lone member of the Progressive Party in Parliament for thirteen years, from 1961 to 1974 during the darkest days of apartheid, that I would particularly like to memorialise today,

Recent months have seen an increasing number of comments by ruling party politicians, critical of the role of the courts in our constitutional democracy. Two of the most important have been by the President, Mr Zuma. In July, at the Access to Justice conference, hosted by the Chief Justice Ngcobo, the President stated in his speech that:

"Political disputes resulting from the exercise of powers that have been constitutionally conferred on the ruling party through a popular vote must not be subverted, simply because those who disagree with the ruling party politically, and who cannot win the popular vote during elections, feel other arms of the State are avenues to help them co-govern the country. This interferes with the independence of the judiciary. Political battles must be fought on political platforms."

Some concern was raised in the media about these remarks on the basis that they misconstrued the role of the courts in our constitutional democracy. But again, on 1 November 2011, in a speech given by President Zuma at the parliamentary hearing to say farewell to Chief Justice Ngcobo and welcome Chief Justice Mogoeng the President repeated the same concern:

"… we also wish to reiterate our view that 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. I know that the last time we raised this point, we generated a heated debate within the legal fraternity, some of whom did not see that it is actually an affirmation of the separation of powers. This challenge is perhaps articulated clearly by Justice VR Krishma Lyer of India who observed that: Legality is within the court's province to pronounce upon, but canons of political propriety and democratic dharma are polemic issues on which judicial silence is the golden rule."

There are two themes underlying the President's remarks. The first is that the power of the Executive and the Legislature is being curtailed by the courts, and in particular, that the courts are interfering with the power of the executive and

legislature to make what is referred to as “policy”. The second is that “those who do not agree with the ruling party” are using the courts to help them “co-govern” the country. I am going to address both these concerns in my remarks today.

But first, I am briefly going to describe the role conferred upon courts, and particularly the Constitutional Court, by the Constitution; and provide a description of the way in which the Court has gone about its work in the first seventeen years of our democracy. Then I will consider what is meant by “policy” and what the role of the courts, and particularly, the Constitutional Court, is in relation to reviewing “policy”. Finally, I shall briefly consider the question of the right of citizens to use the courts to protect the Constitution.

Before going further though, I should observe that the relationship between the judiciary and the executive and legislative arms of government in a democracy is often tense. This is, in part, because in a constitutional democracy the relationship between these arms of government is structured in a way to ensure that the power of each is checked or restrained by the other. This is what we mean by the separation of powers. There is no sovereign, unlimited power in a constitutional democracy. Instead, all power is constrained – for obvious reasons, for, as Lord Acton famously said: “All power tends to corrupt, and absolute power tends to corrupt absolutely” or as I have also heard it formulated, “all power is delicious, and absolute power is absolutely delicious”.

The fact that many different democracies use the phrase “separation of powers” to describe the regulation of the relationship between the three arms of government can mask the fact that each constitutional framework has its own understanding of the relationship between the arms of government. The particular conception of the “separation of powers” in any particular constitutional democracy requires a careful analysis of its constitutional text as well as its constitutional practice.

Moreover, the precise contours of the doctrine of the separation of powers are, arguably everywhere, somewhat uncertain. As a result, the question, in effect, raised by the President – “what is the proper domain of the Courts?” – is a question which gives rise to sharply divided answers, not only in our democracy, but in many others as well.

Take the United Kingdom, for example, where parliament has historically been considered to be sovereign in that it is free to make any law it likes. Even there, the debate over the role of courts in the British democracy is vigorous. Just two weeks ago, Jonathan Sumption QC, the newest appointment to the British Supreme Court (as the Appellate Committee of the House of Lords was recently renamed), argued that the European Convention has required judges to deal with “matters (namely the merits of policy decisions) which in a democracy are the proper function of parliament and of ministers answerable to parliament and the electorate”.

He continued “parliamentary scrutiny is generally perfectly adequate for the purpose of protecting the public interest in the area of policy making. It is also the only way of

doing so that carries any democratic legitimacy." You can see the startling similarity between these remarks and those made by President Zuma.

Accordingly, we should not immediately be alarmed when debates about the proper ambit of judicial power arises. It is a debate that is endemic in democracies. But the question of the proper role of the courts, and the Constitutional Court in relation to policy is a recurring question in our democracy. It is a serious question and, Mrs Suzman would have agreed, it warrants considered analysis and a serious response.

The role of the Constitutional Court

The Constitutional Court is the final court of appeal in constitutional matters. Although somewhat resistant to precise definition, a constitutional matter is a matter that involves the interpretation or enforcement of a provision of the Constitution. One of the key chapters of the Constitution is chapter 2 which contains the Bill of Rights and the ambit of the Bill of Rights in our Constitution is particularly broad. First, it includes not only the civil and political rights traditionally protected in a bill of rights, but also a wide range of additional rights such as environmental rights, the right to just administrative action, the right of access to information and, of course, social and economic rights.

Secondly, the bearers of obligations under the Bill of Rights are not limited to the state and its organs. Provisions of the Bill of Rights bind the judiciary in the exercise of its duties, and also bind private individuals and corporations to the extent that the relevant right "is applicable, taking into account the nature of the right and the nature of any duty imposed by the right." Given the breadth of the scope of the Bill of Rights in our Constitution, the range of constitutional matters is far broader than it would be were the Bill of Rights to be less expansive.

But in addition to the Bill of Rights, it is the task of the Courts, and the Constitutional Court in particular, to protect and enforce the other thirteen chapters of the Constitution as well. To give you some idea of the scope of this jurisdiction, a brief description of the contents of those chapters will be useful. The first chapter contains the founding values of the Constitution, the supremacy clause, the clauses on citizenship, the national anthem and flag as well as the language clause. Chapter 2, as I have mentioned, contains the Bill of Rights. The third chapter sets out the principles of co-operative governance which regulate the manner in which the three spheres of government must interact. The fourth provides for the composition, powers and procedures of Parliament. The fifth covers the Presidency and the National Executive. The sixth deals with provinces, the seventh, with local government, the eighth with the judiciary and the prosecuting authority. Chapter 9 provides for the state institutions supporting constitutional democracy such as the Public Protector, the SA Human Rights Commission, the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities. Chapter 10 regulates the public administration, chapter 11 the security services, including the SANDF and SAPS; chapter 12 the institution of traditional leadership and chapter 13 deals with finance. The final chapter deals with

international law, and various other matters. All of these chapters dealing with constitutional structure are protected and enforced by the judiciary, and especially the Constitutional Court.

One of the founding values of the Constitution is the principle that the Constitution is supreme. It follows from this principle, as section 2 of the Constitution makes plain, that law or conduct inconsistent with the Constitution is invalid, and that obligations imposed by the Constitution must be fulfilled. Accordingly, the Constitution sets the parameters for the exercise of public (and to a lesser extent, private) power. No organ of state or arm of government has the power to act in a manner that is inconsistent with the Constitution.

The corollary of constitutional supremacy is a strong form of judicial review which permits courts, and again particularly the Constitutional Court, to determine what conduct is consistent with the Constitution. A further logical consequence of the supremacy clause is that a court, "when deciding a constitutional matter within its power" mustdeclare law or conduct that is inconsistent with the Constitution to be invalid to the extent of its inconsistency.

The Constitution ameliorates any inequitable consequences that may flow from this prescription by providing that the court may, in addition, make any "just and equitable" order including an order suspending the order of invalidity for any period and on any conditions to allow the competent authority which may be Parliament or a provincial legislature or an administrator an opportunity to correct the defect. The court may also limit the retrospective effect of the order of invalidity.

The special role of the Constitutional Court is recognised by a rule that an order of constitutional invalidity in respect of an Act of Parliament, provincial legislation or conduct of the President, will have no force unless it is confirmed by the Constitutional Court: so it is only the Constitutional Court that can, in effect, declare legislation or conduct of the President invalid. The reservation of this power for the Court marks the Court's special place in our doctrine of the separation of powers, and no doubt, is the reason for the special rules relating to the appointment and terms of office of members of the Court.

The work of the Constitutional Court

The Constitutional Court has handed down 422 judgments in its first 17 years of existence, a rate of just under 25 per year. This is not a prodigious judicial output, compared to other senior courts around the world. But that relatively low output needs to be assessed in the light of three considerations.

The first is that the Court has eleven members and the general rule is that all eleven judges sit in every case. Although there is no doubt that the size of the Court is valuable in many respects, it probably slows down the process of decision-making and writing. Just for example, to go round the table and permit every judge to air his or her views on a case, will often take an hour.

Secondly, the Court receives far more applications for access to the Court than it actually enrols for hearing. Each of these applications, which in the last four years that I was at the Court exceeded the number of cases heard on a ratio of between 3 and 4 to one (that is, an additional 75 to 100 cases per annum to those that are actually enrolled for hearing) are considered by all the judges of the Court, unlike other senior appellate courts which often delegate this decision making responsibilty to a few judges. As our Constitution stipulates that a quorum of the Court is eight, no one can be turned away from the court without at least eight judges having considered the matter.

Finally, the issues that have come before the court in its first 17 years have been some of the most difficult considered by courts anywhere. They have ranged from issues that have attracted much public comment, such as the constitutionality of the death penalty, gay marriage and some high profile criminal matters, to grappling with issues relating to the interpretation and protection of social and economic rights, where there is no tried and tested path, to the questions of constitutional structure and relationship that involve interpretation of the provisions of the Constitution other than the Bill of Rights.

The fact that the Court has not been unduly burdened by cases, unlike the situation in other jurisdictions such as India or Germany, has meant that the Court has had the ability to spend time on each case it hears. Once a case has been heard, a post hearing conference of the judges is held at which the issues raised in the case are preliminarily debated and discussed. The practice has varied somewhat over the years: in early years the Court met immediately after the case was concluded, then more recently, one judge prepares a note identifying the issues for discussion, often suggesting a solution to them, and that note serves as the basis for the discussion. Once that discussion has been held, a draft is prepared, and then it is discussed again. At that stage dissents or concurrences may be prepared and then all the judgments are read through at a meeting by all the judges, where substance can be debated, and editing questions of style and formulation are also considered. The advantage of this full collegial engagement on each judgment has been the development of a shared collegial understanding of the jurisprudence which has been of great value to the court, in my view.

On my count, 147 of the 422 cases before the Court have required the Court to determine whether a provision in an Act of Parliament is inconsistent with the Constitution. Of those 147 cases, the Court found in 90 of them that the legislative provision under review was inconsistent with the Constitution, that is an average of just over five times a year. Interestingly, the average has not declined markedly over the period.

In the first five years, 29 legislative provisions were declared to be invalid. In the following five years, another 29 legislative provisions were declared invalid and since then (a period of not quite seven years), 32 have been declared invalid. In the seventeen years, 57 challenges to legislative provisions have been upheld.

It is important to note here that the provision may be a very small part of a legislative scheme. For example, in one case the Court held that section 28(1)(a) of the Medicines and Related Substances Control Act was inconsistent with the Constitution because it granted inspectors very wide powers to enter and search any place that the inspector reasonably believed medicines would be found. The Court held that the powers of search were too wide to be consistent with the Constitution and struck them down. The remainder of the Act, of course, remained in place.

Of the 90 declarations of legislative invalidity made by the Court, the largest number, 22 have been in the field of criminal law and procedure. Perhaps the most well-known of these decisions is the decision declaring the implementation of death sentences to be inconsistent with the Constitution. The court has also declared the corporal punishment of juveniles to be inconsistent with the Constitution as well as the provisions for declaring people habitual criminals to the extent that such declarations imposed prison sentences of an indeterminate period.

Approximately ten of the 22 cases related to rules that impose burdens of proof upon the accused which the court has held to be in conflict with the presumption of innocence. The most noteworthy of these was the very first judgment handed down by the Court which related to section 217 of the Criminal Procedure Act, a notorious provision during the apartheid years, which presumed that confessions that had been sworn to before a magistrate had been freely and voluntarily made and required the accused to prove the contrary.

The second most common ground for declarations of constitutional invalidity has been inequality. Section 9 of the Constitution prohibits unfair discrimination on a range of grounds, including race, gender, sexual orientation, age and disability. The list of grounds is not closed, so that discrimination on another ground may be held to be unfair. The Court has upheld 20 challenges to the validity of legislation in the area of equality. Four of these have concerned discrimination on the ground of gender, 9 discrimination on the ground of sexual orientation, and 3 on the ground of race.

The third most common ground for declarations of invalidity have been the right of access to courts (section 34 of the Constitution). The Court has upheld 10 challenges in this area. As far as other provisions in the Bill of Rights are concerned, there has been 1 successful challenge on the ground of section 25, the property clause, (I should add that given current public debate about the role of the property clause in our Constitution, there have been 9 unsuccessful challenges based on this clause, a greater rate of failure than in relation to any other right), as well as 4 successful challenges relating to speech, 4 relating to the right of access to housing, 2 to freedom and security of the person, 3 to privacy, 3 to the rights of children and 4 to the right to vote.

There have been 13 successful challenges to legislative provisions regulating what might be described as constitutional structure issues: that is powers of the President, Parliament, provincial and local government.

Often the declaration of constitutional invalidity is not controversial, nor does it touch on what I think the President means when he refers to “policy”, a matter to which I shall return in a moment. Many of the legislative provisions that have been struck down have been technical provisions rather than substantive provisions. It has been rare that large portions of legislation have been found to be invalid. Accordingly, it is not infrequent that the Minister responsible for the administration of the legislative provision under challenge appears in the Constitutional Court only to indicate that the government does not wish to argue that the legislation is constitutional, but only wishes to make submissions as to the appropriate order to be made by the Court to regulate the effect of the declaration of invalidity.

Sometimes, of course, the declaration of invalidity is controversial. The source of controversy can differ. Sometimes it is the public that does not like the declaration. The leading example of this, perhaps, is the death penalty case. At other times, the source of controversy can be with government.

In nearly seventeen years, the Court has had to consider challenges to the constitutional validity of conduct of the President, on my count, seven times. Four of these challenges were against President Mandela. Two of these were successful and two were not. The earliest concerned the legislation regulating the restructuring of local government (the Local Government Transition Act, 209 of 1993). This legislation purported to confer powers on the President to amend the legislation which President Mandela purported to do in two proclamations, which were the subject of an urgent constitutional court challenge just before the first democratic local government elections were to be held. The challenge to this conduct was that the legislature may not empower the President to legislate and to the extent that the President had purported to do so, he had acted in conflict with the Constitution.

The court held unanimously though for different reasons that the empowering provision in the legislation was inconsistent with the Constitution. A majority of nine held that the Presidential proclamations were also invalid. Because of the imminent local government elections, the Court suspended the orders of invalidity for a period of a month to enable Parliament to be recalled to rectify the legislation. That evening, 22 September 1995, President Mandela went on national television to say that he accepted the decisions of the Court, that Parliament would be recalled, and that the constitutional defects in the legislation and proclamations would be rectified.

A presidential pardon made by President Mandela to single mothers who had committed less serious crimes was challenged on the grounds of sex discrimination but was not successful although the Court held that the pardons process was subject to the Bill of Rights and was constitutionally reviewable by the Courts. Similarly, President Mandela’s appointment of a commission of inquiry into rugby was challenged, again, on appeal to the Court, unsuccessfully. The final challenge related to the premature bringing into force of legislation regulating pharmaceuticals and medicines in April 1999 which was upheld.

There were two direct challenges to conduct taken by President Mbeki during his term of office. The first concerned the termination of employment of the head of the

national intelleigence agency. This application failed and the second related to the process regulating presidential pardons which succeeded. Under President Zuma, there has been one challenge, which was successful: it related to the purported extension of the term of Chief Justice Ngcobo.

Challenges to presidential conduct are therefore rare. The principles that inform the determination of such challenges are relatively straightforward: the President must act lawfully, rationally and consistently with the Bill of Rights. I shall return to examine these requirements more fully in a moment.

Having looked briefly at the role and work of the Court, I am going to turn now to consider more closely the role of the Court in relation to policy-making, an issue raised in the speeches of the President that I referred to at the outset and one that has given rise to controversy in recent years.

"Policy" and the Constitution

The Constitution does not define "policy," although it does stipulate that "the development and implementation of national policy" is a task for the executive. The Shorter OED gives a useful definition of policy as "a course of action adopted and pursued by a government." This is, I think, the sense in which the President used the word "policy" in the two speeches referred to above.

The Constitution does not define "policy" probably because policy is not a distinct legal category. Different legal tools can be used to implement "policy." So policy may be encapsulated in legislation, or through regulations made in terms of legislation, or it may take the form of executive instructions to bureaucrats or it may be pursued through the conduct of officials. These different tools have different constitutional and legal implications. Time does not permit me fully to elaborate these different consequences. At a general level, all policy, however pursued, must comply with the three constitutional constraints that I have already mentioned: the requirements of legality and rationality, and compliance with the Bill of Rights. Where policy is pursued through the tool of what is called "administrative action" in the Constitution, there are additional requirements of procedural fairness and reasonableness. The two questions — what constitutes administrative action? and what does procedural fairness and reasonableness require? — are questions beyond the scope of my address today.

The first constraint: Legality and the Rule of Law

The first constraint on the implementation of policy is that all government conduct must have a legal foundation: in the Constitution or in legislation. As the Constitutional Court formulated this principle in an early case: "it is central to the conception of our constitutional order that the Legislature and Executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law." This principle, referred to in our jurisprudence as the principle of legality, is based on the rule of law — a founding principle in our democracy. The rule of law, at its most straightforward,

means that power must be exercised in accordance with the Constitution and the law. Its implication is that legislation must be passed in accordance with the provisions of the Constitution and powers exercised by the President or government ministers must be conferred upon them by the Constitution or legislation.

The first question then is whether the tool selected to pursue a policy is authorised by law and the Constitution. An example of a recent case where the conduct of the President was held not to meet this requirement was the case of*Justice Alliance of South Africa v President, RSA* (which I have mentioned earlier). This case concerned the purported extension of Chief Justice Ngcobo's term of office. The Court held that section 8(1) of the Judges Remuneration and Conditions of Employment Act that purported to confer a power upon the President to request a Chief Justice who has become eligible for discharge from active service to continue to perform active service as Chief Justice of South Africa "for a period determined by the President". The Constitutional Court concluded that "… section 8(a) violates the principle of judicial independence. This kind of open-ended discretion may raise a reasonable apprehension or perception that the independence of the Chief Justice and by corollary the judiciary may be undermined by external interference from the executive. The truth may be different, but it matters not. What matters is that the judiciary is seen to be free from external interference." The consequence of this conclusion was that both the legislation and the President's decision to extend the term of office of the Chief Justice, were held to be invalid.

The second constraint: rationality or the "some rhyme or reason" rule

The second requirement, that of rationality is, perhaps, the most misunderstood of the three requirements I am describing this evening. It is not onerous, for it requires only that there be *some* nexus or link between the purpose sought to be achieved by the relevant action or legislation and the terms of the legislation or character of the conduct. It perhaps might be called the "some rhyme or reason" rule. As long as there is some rhyme or reason to what the legislature or executive seeks to do, it will probably pass the rationality test.

The first case dealing with this principle illustrates the point. In the *Pharmaceutical Manufacturers* case, new legislation regulating the manufacture, sale and possession of medicines for human and animal use had been enacted by Parliament and brought into force by the President. But when it was brought into force, the necessary regulations that would make the Act effective had not yet been made and the result was that the new Act, which had repealed the old Act, was almost completely ineffective. The case therefore challenged the President's decision to bring the Act into force. The Court found that "the decision to bring the Act into force before the regulatory framework was in place, viewed objectively, is explicable only on the grounds of error"

Accordingly, the court concluded that "[t]he President's decision to bring the Act into operation … cannot be found to be objectively rational on any basis whatsoever. The fact that the President mistakenly believed that it was appropriate to bring the Act

into force, and acted in good faith in doing so, does not put the matter beyond the reach of the Court's powers of review."

The Court described the requirement of rationality as "a minimum threshold requirement applicalbe to exercise of all public power by members of the executive and other functionaries" but emphasised that the standard of rationality does not permit courts to substitute their opinions as to what would be appropriate for that of the government . Given the requirement that any link between the decision or legislation and the underlying purpose, the Court noted that "[a] decision that is objectively irrational is likely to be made only rarely …".

This "no rhyme or reason" test does not significantly impair the ability of the government to perform its necessary tasks. It does not permit a court to interfere with a decision of the government simply because it disagrees with it or considers that government acted in appropriately. Instead, the Court has on several occasions emphasised that it "should be slow to impose obligations upon government which will inhibit its ability to make and implement policy effectively … As a young democracy facing immense challenges of transformation, we cannot deny the importance of the need to ensure the ability of the Executive to act efficiently and promptly."

It is important that the test of rationality remains a "no rhyme or reason test" and is not tightened to require a closer connection between the government purpose and the legislation or action in question. Setting a tighter test for rationality might well constitute an unwarranted intrusion into the legitimate constitutional space accorded to the legislature and the executive.

The third constraint: the Bill of Rights

All governmental policy, whether implemented through legislation, executive or presidential action or administrative law may not infringe the rights entrenched in the Bill of Rights. The legislature and executive as well as the courts are all bearers of obligations under the Bill of Rights, which means that they must respect, protect and fulfil the rights in the Bill of Rights. In a real sense, it is the provisions of the Bill of Rights that most sharply constrain the conduct of government, including the process of policy-making.

Yet the rights in the Bill of Rights are not absolute constraints. Under our constitutional order, rights are not "trump cards" that always take precedence over other concerns. Our constitutional order recognises that there will be times when one right in the Bill of Rights will be in tension with another, or where important public interests may require the limitation of rights and it accordingly permits the limitation of rights. In this regard our Constitution is similar to the German Constitution. The remarks of Professor Dieter Grimm, a respected former member of the German Constitutional Court in relation to the German Constitution are of equal application to ours:

“From the beginning, limitations of fundamental rights were regarded as normal, because all rights and freedoms can collide or can be misused. Harmonization of colliding rights and prevention of abuses of liberty are normal tasks of the legislature. The function of constitutional guarantees of rights is not to make limitations as difficult as possible but to require special justifications for limitations that make them compatible with the general principles of individual autonomy and dignity.”

Accordingly, a challenge to legislation based on a right in chapter 2 follows a two-stage process and a court, when considering a constitutional challenge to legislation, asks two questions: the first is does the legislation limit a right entrenched in the Bill of Rights? Should the court decide that the legislation does indeed limit a right, the next question that arises is whether the limitation is “reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom”? This affords the executive defending the constitutionality of legislation an opportunity both to lead evidence and present argument as to why the legislation is not unconstitutional.

How does the Court decide whether an infringement will nevertheless pass the test of justification? It considers whether the reason given by the government for limiting the right is sufficiently important to outweigh the impact it causes in limiting the right. This is essentially a proportionality analysis. The approach was summarised in an early decision of the Court as follows:

“In sum, therefore, the Court places the purpose, effect and importance of the infringing legislation on one side of the scales and the nature and effect of the infringement caused by the legislation on the other. The more substantial the inroad into fundamental rights, the more persuasive the grounds of justification must be.”

The process of limitations analysis therefore permits the Court to consider the reasons proffered by government for the legislation under attack. In so doing, it affords a government an opportunity to set out its reasons for the limitation to persuade the Court, and the broader society, of the legitimacy of both its purpose and method. The function of the Court when determining challenges to legislation based on the Bill of Rights is thus twofold: most obviously, it serves as the guardian of fundamental rights; less obviously, but as importantly, it serves to create a forum for public debate about the reasons for the exercise of power. This role carries with it a conception of democracy which requires the exercise of public power to be accountable.

Thus government may enact legislation to pursue a policy it has adopted even if the legislation will limit rights. But if it chooses to do so, government must consider whether the purpose and scope of the provision that limits rights is reasonable and justifiable in the light of the invasion of the right. That is a question that should be considered both by the Minister introducing the legislation, and by Parliament during the parliamentary process.

The role of the Courts is thus not to thwart or frustrate the democratic arms of government, but is rather to hold them accountable for the manner in which they

exercise public power. In Etienne Mureinik's celebrated formulation: our new constitutional order establishes a "culture of justification" and "must lead to a culture of justification – a culture in which every exercise of power is expected to be justified; in which the leadership given by government rests on the cogency of the case offered in defence of its decisions, not the fear inspired by the force at its command. The new order must be a community built on persuasion, not coercion." Nowhere in our constitutional order is the insistence on justification more visible than in the jurisprudence of rights. Our Constitution asks government to justify what limitations they wish to impose on rights, and empowers the courts to consider whether those justifications are convincing.

But it is not only relation to justification that the Court gives scope for flexibility to government. Our Constitution, unlike many others, protects not only civil and political rights, but also social and economic rights. In understanding the meaning of rights, the key question for lawyers is the parameters of the obligations imposed by the right. So, if I have a right of access to health care, against whom do I have that right, and what must that person do in relation to my right? The most difficult jurisprudential aspect of social and economic rights is determining the extent of the positive obligation they impose upon government to act to achieve the realisation of the right. A full consideration of this question is beyond the scope of my remarks today. A brief outline of the Court's approach is all that is possible.

The Constitutional Court has held that, at least in relation to the rights entrenched in section 26 and 27 of the Constitution, the scope of government's positive obligation to take steps to achieve the realisation of the rights of access to housing, health care and sufficient food and water, amongst others, is delineated by matching provisions in the Constitution which state that "the state must take reasonable legislative and other measures, within its available resources, progressively to achieve the realisation" of these rights. The question in such cases, therefore, is whether the government has acted reasonably.

This aspect of the Constitution has required the Court on several occasions to assess policy adopted by the government. In the seminal early case, *Government of the RSA and Others v Grootboom and Others*, the Court held that the government's housing policy was in breach of the obligations imposed upon government by section 26 of the Constitution in that it failed to "provide for any form of relief to those desperately in need of access to housing" and ordered the government to to amend its program "to provide relief for people who have no access to land, no roof over their heads, and who are living in intolerable conditions or crisis situations."

Similarly, in the *Treatment Action Campaign* case, the Court held that the policy of the government whereby Nevirapine would be administered to pregnant mothers living with HIV at only two clinics per province was in breach of section 27 of the Bill of Rights, and specifically the positive obligation imposed upon government by that provision to take reasonable steps within its available resources to progressively achieve the right of access to health care. The policy was not formulated in legislation, but had been adopted by the Department of Health, despite the fact that Boehringer Ingelheim, the manufacturers of Nevirapine, had offered Nevirapine to

the government free of charge for a period of two years; and despite the fact that the World Health Organisation had issued guidelines stipulating that Nevirapine was an appropriate intervention to prevent mother to child transmission of HIV, and so should be administered without limitation.

The Court held that in the circumstances the policy adopted by government was not a reasonable policy and stipulated that the policy should be expanded to include all clinics in all provinces where adequate counselling and testing facilities existed for the administration of Nevirapine. The Court concluded, however, by noting that government would be free to introduce a different policy to reduce the risk of mother to child transmission of HIV "if equally appropriate or better methods become available to it for the prevention of mother-to-child transmission of HIV".

In sum, the approach of the Court has been to require government to explain why its policies in the field of social and economic rights are reasonable. Government must disclose to the Court "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". This approach permits citizens to hold the democratic arms of government to account through litigation, but does not require government "to be held to an impossible standard of perfection".

The effect of this approach is that the courts do not take over the task of making policy but they do require government to account to citizens for its policy decisions in the field of social and economic rights. The process of accounting for decisions in the field should improve the quality of decision-making without improperly restricting the choices available to government.

The right of access to courts

It is fitting now to turn briefly to the second question underlying the remarks of the President, and that is the suggestion that the approach of the courts has permitted "those who do not agree with the ruling party" to use the courts to help them "co-govern" the country. Section 34 of the Constitution guarantees that citizens have the right of access to courts. It follows that citizens may approach courts to protect rights where they consider that "policy" that has been adopted by government, whether in legislation or in other ways, infringes rights. If the "policy" meets the requirements of legality and rationality, and does not unjustifiably infringe rights, then such litigation will, of course, fail.

If, on the other hand, the "policy" (whatever form it may take) does not comply with the constitutional requirements, then the consequence will be that an order of invalidity will follow. What is clear, however, is that these are the only grounds upon which citizens may challenge government's actions. The grounds for constitutional review are therefore narrow. There is a clear public interest in ensuring that government's actions comply with the principles of legality, rationality and do not unjustifiably infringe rights. If government's actions are compliant with these constitutional requirements, government will succeed. Citizens' entitlement to ensure that government complies with these constitutional requirements does not diminish

government's capacity to govern, nor does it entitle citizens to co-govern the country. It is only if courts were improperly to intrude on the legitimate domain of legislative and executive power that citizens' use of the courts would improperly diminish the powers of the legislature and executive. And it is that concern that I now consider.

The importance of judicial modesty and restraint

The scheme that I have outlined above illustrates the manner in which the actions of government are constrained by the principles of the Constitution. It would not be complete without a final comment about the need for judicial modesty and restraint. It is unarguable that South Africa remains a society deeply scarred by its history. The deep inequalities that persist are visible reminders of the effects of apartheid and colonialism. Until these scars are healed, the vision of our Constitution will not have been achieved. There is a great burden on government, in particular, to address this historic legacy.

Courts need to be modest about the judicial role in addressing the legacy of our history. They must recognise that their responsibility is primarily to ensure that government works within the threefold framework of legality, rationality and compliance with the bill of rights. Outside of this framework, it is not for courts to impede the functioning of government. There are reasons for this: the first is that the legislature, and indirectly, the executive are democratically elected arms of government, whose office is determined by popular vote. In South Africa, where democracy has only recently been achieved, the vote is precious and the principle of democracy dear. Courts must, and do, acknowledge this.

Secondly, courts are institutionally ill placed to make the complex decisions that policy requires. Why is this? First, judges have no experience in the field of policy formulation. Secondly, courts cannot dictate the issues they address, they are responsive to cases that come before them and often the picture they obtain is incomplete. Thirdly, the doctrine of precedent means that when the Constitutional Court decides cases, the principle that founds their decision binds all courts in the future. The doctrine of precedent is an important aspect of the rule of law, but it is peculiarly unsuited to application in the field of social and economic policy where governments often need to act expeditiously and even experimentally to seek to identify solutions to the pressing problems faced by the country.

In many cases, there is reasonable disagreement in our society as to what policies will best achieve the destruction of the apartheid legacy. Courts should take care not to limit unduly, government's ability to make the decisions as to which policies it chooses. Given the great challenges we face, and the lack of clear and agreed answers as to how they should best be tackled, courts should not tie government's hands more than the Constitution requires.

Courts must accordingly avoid what a respected Indian commentator has termed the jurisprudence of exasperation: the tendency to reach decisions or make statements that are an expression of judges' exasperation with the state of affairs in the country,

rather than on the basis of “carefully thought out arguments based on the law’s possibilities and limits.” Reasoned arguments. In South Africa a jurisprudence of exasperation might result in the requirements of rationality being unduly tightened or in courts being too slow to accept that government’s policies in achieving social economic rights are reasonable, or in insisting that government adopt the court’s own views as to what is an appropriate government policy.

Such a result would be damaging, as Pratap Bhanu Mehta has observed. “Often judicial interventions, unless disciplined by law and carefully crafted, produce worse outcomes [than bad government policy]. In some ways judicial policy-making magnifies rather than corrects the deficiencies of executive policy-making. … Ad hominem interventions based on nothing more than confidence in the judges’ good intentions, are no substitute for a policy-making process.”

By and large, courts in South Africa have avoided a jurisprudence of exasperation. Government action is scrutinised to ensure that it is lawful, rational and in compliance with the Bill of Rights as the Constitution requires. Beyond these parameters, government must be, and is, free to act. It is important for courts to continue to be disciplined in this regard despite criticism that may come not only from government, but also from other sources.

In this regard, it is interesting to note that in India, public opinion and non-governmental organisations have often applauded judicial incursions into the sphere of legislative and executive power. Partly, this may be due to exasperation shared by citizens as well as judges with the actions of government. But these will be short-term gains, for courts cannot run a country effectively. Instead of a jurisprudence of exasperation, we should insist on a jurisprudence of accountability that ensures that the responsibility for government remains that of the legislature and executive, but insists that those two arms of government must account for their conduct, where required to do so, through the courts.

Conclusion

The challenges that face South Africa in building the society envisaged in the Constitution’s Preamble are many and complex. Until the deep inequality that is a legacy of apartheid is eradicated, these challenges will persist.

I hope that in the course of my address, I have explained why our courts have an important role under our constitutional order to ensure that the provisions of the Constitution are honoured, and that includes the responsibility of ensuring that governmental action, including policy making, is consistent with the Constitution: it must be lawful, rational and in compliance with the Bill of Rights. As both Mrs Suzman and Sr Columba would have asserted, this is not a task that may be shirked. Courts must carry out their important constitutional role with integrity and with seriousness of purpose. Neither legislation, nor conduct of the President, nor the making of policy are immune from the three core constitutional requirements of legality, rationality and compliance with the Bill of Rights.

Where courts consider that governmental action falls short of these standards, they are obliged to make appropriate orders of invalidity and to give reasons for their decisions. Inevitably, there will be times when government, and other parties that appear before the courts, disagree with the decisions of the courts and the reasons given for them. They are entitled to air their reasonable disagreement. And in my experience they do so, quite often, vociferously. But I conclude with the firm and simple proposition that the fact of such disagreement, whatever its source, cannot and should not deter the courts from performing their constitutional mandate.

(The footnotes have been excluded from this lecture. The full text can be accessed on the website of the Helen Suzman Foundation at http://www.hsf.org.za/siteworkspace/helen-suzman-memorial-lecture-november-2011.pdf. (ed).

A Last Thought

Missing court file: Where to now?

I act for a client on whose instructions I issued a summons in the magistrate's court for the district of Pretoria as long ago as the beginning of 2007. The summons was issued against three defendants, who were all individually represented by an attorney and counsel at the hearing. The matter was enrolled for hearing on 21 July 2008 and duly commenced. Evidence was given by the plaintiff but the matter had to be postponed in the afternoon due to a witness failing to turn up on a subpoena and a warrant being issued.

Since the aforesaid date the court file has gone missing, together with the cassettes relating to the evidence led. Despite numerous attempts by my correspondents in Pretoria to trace the file and the cassettes, they just cannot be found and one can therefore only assume that they have been permanently lost.

I have no doubt that I can duplicate the pleadings and other documents filed and have them substituted as a duplicate file in the matter. I am, however, unable to place on record what evidence has been led to date, nor have I available any original documents which might have been handed in at that time.

Counsel was employed by all the parties at the first hearing and my client has incurred substantial costs for my services and those of my correspondents.

I therefore inquire: Where do I go to now and why must clients suffer because of the incompetence of the Justice Department?

GN Dracatos,

attorney, Alberton

(The above letter appeared in the *De Rebus* of November 2011.)