

HUMAN RIGHTS IN SOUTH AFRICA: AN ASSESSMENT

Clive Plasket
BA LLB LLM PhD
Judge of the High Court
Honorary Visiting Professor, Rhodes University

SUMMARY

In the 20 years that have passed since the Langa Massacre on 21 March 1985, the South African legal system and the constitutional system that underpins it have changed in most fundamental ways. This paper examines the constitutional structures of 1985, and of 2005, and traces South Africa's progress from autocratic rule to democratic governance, from a system in which fundamental rights were routinely violated to one in which they are constitutionally protected. It examines a selection of issues that defined the pre-democratic legal order and looks at how those issues have been dealt with in the new dispensation. It concludes that "what we have achieved so far in creating a society that respects human rights and freedoms stands as an enduring monument – albeit one continually in the process of being built – to all those, such as the victims of the Langa Massacre, who lost their lives in the quest for a better future".

1 INTRODUCTION

20 years ago on Human Rights Day – then known in struggle parlance as Sharpeville Day¹ – yet another massacre of unarmed black people by members of the South African security forces occurred not very far from here.²

On the morning of 21 March 1985, a large group of people gathered at Maduna Square in the township of Langa in Uitenhage. They began to march from there, up Maduna Road, towards KwaNobuhle to attend the funeral of a person who had been killed by the police a week or two before. The funeral had been banned by magisterial order made under the provisions of the Internal Security Act 74 of 1982. It would appear that many people were unaware of this ban.

¹ For an account of the Sharpeville Massacre on 21 March 1960, in which 69 people were killed and 180 injured by police gunfire, see Frankel *An Ordinary Atrocity: Sharpeville and its Massacre* (2001). See too Davenport and Saunders *South Africa: A Modern History* 5ed (2000) 413-414; and Roux *Time Longer Than Rope: The Black Man's Struggle for Freedom in South Africa* (1964) 402-414.

² This article was delivered as a public lecture at Nelson Mandela Metropolitan University in Port Elizabeth on 15 March 2005 during Human Rights Week.

At the top of Maduna Road, two Casspir personnel carriers were parked across the road, blocking the path of the marchers. The policemen in the Casspirs opened fire. The first shot may well have been fired in panic, but thereafter volleys of R1 bullets and SSG shot were fired into the marchers, killing 20 of them and injuring 23, some very badly indeed.

As international and internal pressure mounted on the government, it appointed a commission of enquiry, chaired by Mr Justice Donald Kannemeyer, to ascertain the circumstances giving rise to the massacre. Evidence emerged in the commission of enquiry of a shoot-to-kill policy that emanated from the office of the Commissioner of Police, and a central finding of the enquiry was that the police were not properly equipped for crowd control duties. They had been supplied only with lethal equipment and were thus not able to apply the principles of minimum force: for them it was all or nothing, with no way of applying levels of force less than deadly force. Evidence also emerged that the police, who had claimed to have been attacked by the crowd, had in fact placed stones among the dead, dying and injured to manufacture their defence.³

This story of one of the worst of the massacres that stud our history forms the centrepiece of my lecture today for three reasons. The first is that we are approaching the twentieth anniversary of this outrage and need to remember it and those who were killed and maimed. Secondly, on a more personal level, it was the first case in which I was involved in the Port Elizabeth area when, as a lowly articulated clerk, I was part of a legal team that represented many of the victims in damages claims against the police.⁴ Thirdly, it tells us a great deal about our country 20 years ago and marks something of a starting point for an assessment of our progress as a society now committed to the achievement of fundamental rights and freedoms.

It seems to me that very often we tend to focus on what is not working in our society, rather than on what we have achieved. While it is necessary to always be critical and to always strive for better, it is as important to stop every now and again to take stock and to assess our progress. This is necessary as a way of affirming what observers have sometimes referred to as the miracle of South Africa's largely peaceful transition to democracy, but also so that we can make sure that we are travelling in the right direction in the creation of our new society.

I now want to turn the clock back 20 years – to look at South Africa and its constitutional system as it was then, before describing our present

³ For an account of the events of 21 March 1985 and an analysis of the Kannemeyer Commission's findings, see Haysom "The Langa Shootings and the Kannemeyer Commission of Enquiry" in South African Research Service (ed) *South Africa Review* 3 (1986) 278. See too Cooper, Shindler, McCall, Potter, Cullum, Narsoo and Brouard (eds) *Race Relations Survey* (1986) 489-492; and Haysom, Budlender, Rieder and Rosenthal "Human Rights Index" 1985 1 *SAJHR* 186, 197-189.

⁴ The damages claims were settled shortly before trial, the Minister of Law and Order agreeing to pay the victims a total of R1.3-million. See Levin, Benjamin and Smuts "Human Rights Index" 1987 3 *SAJHR* 398, 405. The legal team that acted for the victims was Wim Trengove, Bob Nugent (now Nugent JA), Helen Seady, Halton Cheadle and me.

constitutional dispensation. I will, after that, discuss a selection of issues that defined our legal system in the pre-democratic era and look at how the new dispensation views those same issues and has dealt with some of them. Finally, I will conclude with an assessment of our progress over the two decades under review.

2 WHAT DID SOUTH AFRICA LOOK LIKE IN THE 1980s?

2.1 The constitutional system

At centre stage in the South African constitutional system stood the doctrine of parliamentary sovereignty. This meant that Parliament was the pre-eminent, the supreme, *locus* of power in the country, and that its enactments, no matter how unjust, unreasonable, irrational or oppressive, were law. No court had the power to set aside any law duly passed by Parliament and no jurisdiction existed to test the enactments of Parliament against a higher norm.⁵

In South Africa, however, the doctrine of parliamentary sovereignty was distorted. Its main political counter-balance, universal adult franchise, was removed from the mix.⁶ In the horse-trading that led to the creation of the Union of South Africa in 1910, the all-white delegates to the National Convention agreed to voting rights that allowed some black people in the Cape to vote but, by and large, excluded from the franchise all but white men.⁷ Over the following years white women acquired the vote (in 1930) but then, first Africans and later so-called coloureds in the Cape Province, were stripped of their right to vote.⁸ This meant that while Parliament exercised

⁵ Dicey *An Introduction to the Study of the Law of the Constitution* 10ed (1959) 39-40, defined parliamentary sovereignty as follows: "The principle of Parliamentary sovereignty means neither more nor less than this, namely that Parliament ... has, under the English constitution, the right to make or unmake any law whatever; and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament."

⁶ See Mohamed "The Impact of a Bill of Rights on Law and Practice in South Africa" June 1993 *De Rebus* 460; and Boule "Constitutional Law in South Africa 1976-1986" 1987 *Acta Juridica* 55 92. O'Regan has observed that the Diceyan model of parliamentary sovereignty was particularly inappropriate in South Africa because Parliament was not representative of the populace but was "racist in origin and composition" and that the "lack of a democratic base rendered both the doctrine of parliamentary sovereignty, and its companion doctrine, *ultra vires*, particularly devious in our legal system" ("A Fresh Start for Administrative Law" paper delivered at a conference on controlling public power, University of Cape Town, March 1996, 8).

⁷ Dugard *Human Rights and the South African Legal Order* (1978) 26.

⁸ African voters in the Cape were removed from the common voters roll in 1936 in terms of the Representation of Natives Act 12 of 1936. See *Ndlawana v Hofmeyr* NO 1937 AD 229. See too Boule "Race and the Franchise" in Rycroft et al (eds) *Race and the Law* (1987) 11. The removal of coloured voters in the Cape from the common voters roll was effected with great difficulty. It triggered a profound constitutional crisis that lasted from 1951, when the Separate Representation of Voters Act 46 of 1951 was passed by means of a procedure other than that provided for and entrenched in the South Africa Act (as had the 1936 Act) until 1956, by which time the Appellate Division Quorum Act 25 of 1955, the Senate Act 53

untrammelled legislative power, it did so in an unrepresentative and unaccountable manner because 80 percent of the population were denied the right to vote for those who made the laws.

In order to hoodwink critics that the South African constitutional system was a democratic system, those in power devised an elaborate make-believe world. First, they created ethnic homelands within which Africans were supposed to exercise political rights – thereby devising a crude divide-and-rule policy – and secondly, in 1983, they dreamed up the tricameral parliamentary system: the Republic of South Africa Constitution Act 110 of 1983 – which gave effect to this system and created a House of Parliament for whites, one for coloureds and one for Indians.⁹ The ratio of white to coloured to Indian members of Parliament was 4:2:1, so that whites retained power and coloureds and Indians were drafted in as junior partners. Africans remained excluded entirely and were required in terms of the logic of this system to exercise their political choices in the homelands to which they had been assigned as unwilling and enforced citizens.¹⁰ In order to break deadlocks in the tricameral system, the President's Council was created. It too was made up of representatives on the race-based 4:2:1 ratio, so that deadlocks were invariably broken in favour of the position adopted by the white house of parliament.¹¹

2 2 Discrimination and repression

The homelands were situated in former reserve areas and, as well as being the places where Africans were required to exercise their political choices, were also the only places in which Africans could own land. In terms of the Black Land Act 27 of 1913 and the Development Trust and Land Act 18 of 1936, some 13 percent of the surface area of the country was reserved for black ownership while the remaining 87 percent was reserved for white ownership. Through this skewed allocation of the right to own and occupy property, black South Africans were, in the words of Sol Plaatje, transformed with the passing of these Acts into "pariahs in the land of their birth".¹² These

of 1955 and the South Africa Act Amendment Act 9 of 1956 had been passed. See *Harris v Minister of the Interior* 1952 2 SA 428 (A); *Minister of the Interior v Harris* 1952 4 SA 769 (A); and *Collins v Minister of the Interior* 1957 1 SA 552 (A). See further, Forsyth *In Danger for Their Talents: A Study of the Appellate Division of the Supreme Court of South Africa, 1950-1980* (1985) 13-29.

⁹ See generally, Boule, Harris and Hoexter *Constitutional and Administrative Law* (1989) 150-171. See too Baxter *Administrative Law* (1984) 102-112.

¹⁰ Boule, Harris and Hoexter 227-237; and Baxter 130-137.

¹¹ This is in fact what happened when the Internal Security Act 74 of 1982 and the Public Safety Act 3 of 1953 were amended in 1986. The coloured and Indian houses were opposed to the amendments and voted against them, while the white house voted in favour of them. The President's Council broke the deadlock by voting in favour of the amendments and the Internal Security Amendment Act 66 of 1986 and the Public Safety Amendment Act 67 of 1986 duly came into force.

¹² Plaatje *Native Life in South Africa* (1916) 21, he wrote of the coming into operation of the 1913 Act: "Awakening on Friday morning, June 20, 1913, the South African native found himself, not actually a slave, but a pariah in the land of his birth." The devastating effect of the 1913 Act has been recognised by the new democratic order: s 25(7) of the Constitution

statutes remained, until their repeal in 1990, the hub around which all other discriminatory measures revolved in apartheid South Africa,¹³ especially after 1948 when the National Party came to power on the strength of their policy of apartheid. While this policy was, initially, a rather vague notion of a more thorough application of the policy of segregation that had been at the core of every previous administration's policy, "after 1948 racism became a political creed or ideology transcending all other creeds and providing the motive for a sustained programme of legislation for the party in power".¹⁴ That legislative programme can be divided into laws that were designed to impose apartheid and laws deemed necessary to bolster them by providing the State with the means to deal with opposition.¹⁵ Initially, the government was more concerned with the former. Increasingly draconian security laws were passed over the years.¹⁶

In the 1960s, in the wake of the Sharpeville massacre and the brutal repression that followed it, internal opposition to the policy of apartheid was suppressed for many years.¹⁷ In the 1970s, with the emergence of a vibrant (and courageous) non-racial trade union movement and with a revival of organisations, particularly civic organisations, in the wake of the Soweto uprising of June 1976, resistance to apartheid began to stiffen.¹⁸ As that occurred, into the 1980s, the government responded with increased levels of repression. Perhaps one of the more sinister aspects of the security apparatus that was set up was the National Security Management System (NSMS), put in place in the early 1980s to counter what the government termed the revolutionary onslaught (and what others termed the struggle for

provides: "A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress." The Act referred to was, in fact, passed before the 1996 Constitution. See the Restitution of Land Rights Act 22 of 1994.

¹³ The 1913 Act was described by Robertson "Black Land Tenure: Disabilities and Some Rights" in Rycroft et al (eds) *Race and the Law in South Africa* (1987) 119, 120, as the "foundational law of South Africa's racial order". See too Bundy "Land, Law and Power: Forced Removals in Historical Context" in Murray and O'Regan (eds) *No Place to Rest: Forced Removals and the Law in South Africa* (1990) 3 5 who says: "The 1913 Act had, of course, been preceded by a vast number of land laws in the British colonies and the Boer republics before 1910: laws controlling squatting, regulating tenancies, imposing taxes and rents, and escalating the penalties and punishments for their transgression. But the 1913 law – while it echoed details of earlier legislation – went further."

¹⁴ Roux 356-357 and 367.

¹⁵ For a comprehensive list of legislation enacted during this period, see Bunting *The Rise of the South African Reich* (1986) 158-180. See too Horrell *Laws Affecting Race Relations in South Africa: 1948-1976* (1976).

¹⁶ Dugard 328.

¹⁷ Dugard 163-167. The ANC, PAC and a number of other organisations were banned and the membership of, or the furthering of the aims of, such organisations were offences, a state of emergency was declared and large numbers of people were imprisoned for political offences.

¹⁸ See generally, Burdzik and Van Wyk "Apartheid Legislation, 1976 to 1986" 1987 *Acta Juridica* 119 123; Boule "Constitutional Law in South Africa, 1976 to 1986" 1987 *Acta Juridica* 55 57; and Davenport "Unrest, Reform and the Challenges to Law, 1976 to 1986" 1987 *Acta Juridica* 1.

liberation).¹⁹ This represents the low point of closed, unaccountable and secret government in this country. This system created a parallel system of government, from cabinet level to local level, which was controlled and run by securocrats, principally members of the South African Defence Force, the South African Police and the National Intelligence Service. At its apex was the State Security Council, a statutory body chaired by the State President.²⁰ It was within this structure that secret plans were developed and implemented to launch raids into neighbouring states, to indulge in smear campaigns against those the government regarded as enemies, and even to assassinate political opponents of the government.²¹ It was principally through these structures that the death squads of the South African government were permitted to murder, maim and terrorise citizens of this country, and the activities of surrogate para-military forces – vigilantes – were orchestrated in the State's efforts at counter revolutionary warfare.²² The full extent of the barbarity perpetrated through this system has yet to emerge, but important insight into it has been obtained through the processes of the Truth and Reconciliation Commission.

In mid-1985, following the murder of four activists (Mathew Goniwe, Fort Calata, Sparrow Mkonto and Sicelo Mhlauli at Bluewater Bay, Port Elizabeth), a limited state of emergency was proclaimed in terms of the Public Safety Act. This gave members of the security forces enhanced powers of detention, entry, search and seizure and the power to ban gatherings, as well as a number of other far-ranging powers.²³ The state of emergency was lifted for a while in March 1986 but reintroduced nation-wide in June 1986. It remained in place until 1990.²⁴

¹⁹ The government's thinking at the time was encapsulated in the 1982 Defence White Paper, which asserted that South Africa was the target of a "total onslaught" that had to be countered by a "total strategy". See Leonard *South Africa at War* (1983) 99-101.

²⁰ The State Security Council was created by the Security Intelligence and State Security Council Act 64 of 1972.

²¹ See for instance *In re Inquest into the Deaths of Mathew Goniwe, Sparrow Mkonto, Fort Calata and Sicelo Mhlauli* SECLD 28 May 1994 (Inquest No CC7/93) unreported.

²² See generally, Pauw *In the Heart of the Whore: the Story of Apartheid's Death Squads* (1991); Laurence *Death Squads: Apartheid's Secret Weapon* (1990); Haysom *Mabangalala: The Rise of Right Wing Vigilantes in South Africa* (1986); Haysom "Vigilantes and Militarisation of South Africa" in Cock and Nathan (eds) *War and Society; The Militarisation of South Africa* (1989) 188; and Plasket "Sub-Contracting the Dirty Work" 1989 *Acta Juridica* 165.

²³ See Plasket "The Eastern Cape Bench, Civil Liberties and the 1985/1986 State of Emergency" 1986 2 *SAJHR* 142. Nearly 8 000 people were detained without trial in terms of the emergency regulations during the eight months of its currency.

²⁴ See Ellman *In a Time of Trouble: Law and Liberty in South Africa's State of Emergency* (1992) 22. During this state of emergency, approximately 32 500 people were detained without trial in terms of the emergency regulations.

3 THE TRANSITION TO DEMOCRACY

3.1 The commencement of negotiations

During the 1980s there would have been very few people who would have imagined that this political order could have been transformed as it has been and that this transformation could have occurred in a relatively peaceful manner. But that is precisely what happened. On 2 February 1990, State President FW De Klerk, on opening Parliament, announced a range of measures that would make negotiations for South Africa's constitutional future possible.²⁵ These included the unbanning of a number of organisations, the intention to repeal apartheid legislation such as the Land Acts, the release of political prisoners and the lifting of the state of emergency.²⁶ On 11 February 1990, the world's most celebrated prisoner, Nelson Mandela, was released from prison after 27 years behind bars.²⁷

Then followed a process of negotiations, often rocky, but which ultimately led to agreement that the first non-racial and democratic elections in the country's history would be held on 27 April 1994 and that the 1983 Constitution would be repealed and replaced with an interim Constitution to serve as a bridge to a final, democratically endorsed Constitution for South Africa.²⁸ In due course the Constitution of Republic of South Africa Act 200 of 1993 (the interim Constitution) was passed. It provided in its postscript that it was a "historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans irrespective of colour, race, class, belief or sex".

3.2 The final Constitution

The final Constitution – the Constitution of the Republic of South Africa Act 108 of 1996 – came into force on 4 February 1997, signed, symbolically, into law by President Mandela at a ceremony in Sharpeville. It had been passed by the Constitutional Assembly created and empowered by the interim Constitution and made up of the democratically elected National Assembly and the Senate.²⁹ The main features of the 1996 Constitution are that it

²⁵ Sparks *Tomorrow is Another Country: The Inside Story of South Africa's Negotiated Revolution* (1994) 7 says that De Klerk's speech "turned three centuries of his country's history on its head".

²⁶ For a list of the organisations that were unbanned, see Levin and Benjamin "Human Rights Index" 1990 6 *SAJHR* 121 151-153. See too Haysom "Negotiating a Political Settlement in South Africa" in Moss and Obery (eds) *South African Review* 6 (1992) 26 27-28.

²⁷ Sparks 121; Haysom 28. Most of Nelson Mandela's co-accused in the Rivonia Trial had been released on 15 October 1989. Two, Dennis Goldberg and Govan Mbeki, had been released a few years earlier.

²⁸ For a synopsis of the negotiating process, see Du Plessis and Corder *Understanding South Africa's Transitional Bill of Rights* (1994) 7-10.

²⁹ S 68 of the Interim Constitution.

envisages a separation of powers between the legislature, the executive and the judiciary,³⁰ that it creates a federal state in which governmental power is distributed between the national, provincial and local spheres of government,³¹ that it proclaims itself to be the supreme law of the land, stating that “law or conduct inconsistent with it is invalid”³² and that it contains a bill of rights which lists and defines fundamental rights which can be enforced by the courts.³³ It contains, in section 1, a statement of the values upon which our new democracy is founded. This section provides as follows:

“The Republic of South Africa is one, sovereign, democratic state founded on the following values:

- (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.
- (b) Non-racialism and non-sexism.
- (c) Supremacy of the constitution and the rule of law.
- (d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.”

The presence of these particular values in the constitution is not an accident. They are explicable on the basis of South Africa’s history of the systematic denial of these values in the system of government and the laws that successive governments have passed. This point is made by Sachs:³⁴

“It is no accident that constitutions usually come into being as a result of bad rather than good experiences. Their text, or sub-text, is almost invariably: ‘never again’. In the case of South Africa, the new constitution arises out of the need to escape from the profound humiliations and oppression created by apartheid. Through the constitution, we affirm that we learn something from our dolorous history.”

4 THE STATE OF HUMAN RIGHTS IN SOUTH AFRICA: 1985 AND NOW

4 1 The right to life

The Langa massacre illustrated in vivid terms the fact that, in 1985, the State had little respect for the right to life, particularly the right to life of black South Africans. The number of people shot by the police in the 1980s – particularly after September 1984 – was alarmingly high. As I said at the commencement of this lecture, our history seems to be studded with massacres of unarmed black civilians by the security forces. (This trend

³⁰ Ss 43, 85 and 165.

³¹ S 40.

³² S 2.

³³ Ch 2 (ss 7-39).

³⁴ “The Constitution is Natural Justice Writ Large” in Corder and McLennan (eds) *Controlling Public Power* (1995) 51.

continued into the 1990s. Perhaps the two most notorious massacres of this latter period were the Bisho massacre and the Boipatong massacre, both of which had a profound influence on the constitutional negotiations.) The lack of respect for the right to life went even further: it cannot be doubted now, given the evidence that has emerged in the Truth and Reconciliation Commission hearings, that death squads, both within the South African Police and South African Defence Force, and State-sponsored vigilante groups murdered substantial numbers of the political opponents of the government. Some of the more notorious cases come from Port Elizabeth: the murder of Mathew Goniwe, Fort Calata, Sparrow Mkonto and Sicelo Mhlauli, the disappearance of Siphiwo Mthimkulu and Topsy Mdaka and their subsequent murder, the disappearance and murder of Sizwe Kondile and the disappearance and murder of Qaqawuli Godolozzi, Sipho Hashe and Champion Galela (the PEPCO Three) are but a handful of examples.³⁵ Ironically, at a time in South African history when the State had appropriated to itself the most far-reaching of drastic powers (such as long-term detention without trial), some of those involved in these murders stated before the TRC that they were committed because the laws of the land, draconian as they were, simply could not quell the resistance to apartheid. The third aspect of the right to life that was noteworthy by its flaunting was the imposition of the death penalty as a competent sentence for murder, various other common law crimes (including the political crime of treason) and for various statutory crimes such as terrorism and sabotage as defined in the Internal Security Act.

Section 11 of our Constitution provides that everyone has the right to life. Section 10 provides that everyone “has inherent dignity and the right to have their dignity respected and protected”. These rights, as well as certain other fundamental rights contained in the Constitution, were at the heart of the judgment of the Constitutional Court in *S v Makwanyane*,³⁶ in which the death penalty was struck down as unconstitutional. I do not intend here to debate the judgment. (I recommend, however, that it be read by anyone wishing to come to grips with the death penalty debate, and by anyone wishing to acquire a good understanding of the workings of our constitutional order and the place of the courts in it.) One of the most important points to emerge from this foundational building-block in the creation of our new constitutional jurisprudence is that those who exercise public power are required by the Constitution to justify their exercises of power on rational grounds. Ackermann J, in the context of the arbitrariness of the imposition of the death penalty, said the following:³⁷

“In reaction to our past, the concept and values of the constitutional State, of the ‘regstaat’, and the constitutional right to equality before the law are deeply foundational to the creation of the ‘new order’ referred to in the preamble. The detailed enumeration and description in section 33(1) of the criteria which

³⁵ For a depressingly long, but incomplete, list of assassinations and disappearances during the apartheid years, see Pauw 270-288.

³⁶ 1995 3 SA 391 (CC); and 1995 6 BCLR 665 (CC).

³⁷ Par 156.

must be met before the Legislature can limit a right entrenched in chap 3 of the Constitution emphasise the importance, in our new constitutional State, of reason and justification when rights are sought to be curtailed. We have moved from a past characterised by much which was arbitrary and unequal in the operation of the law to a present and a future in a constitutional State where State action must be such that it is capable of being analyzed and justified rationally. The idea of the constitutional State presupposes a system whose operation can be rationally tested against or in terms of the law. Arbitrariness, by its very nature, is dissonant with these core concepts of our new constitutional order. Neither arbitrary action nor laws or rules which are inherently arbitrary or must lead to arbitrary application can, in any real sense, be tested against the precepts or principles of the Constitution.”

The requirement of justifiability is evident in a further case dealing with the right to life, namely *Ex parte Minister of Safety and Security: In re S v Walters*³⁸ in which the constitutionality of section 49(2) of the Criminal Procedure Act 51 of 1977 was in issue. This section purported to permit police officers to use deadly force to effect an arrest in certain circumstances. It provided that, where a person “is to be arrested for an offence referred to in Schedule 1 or is to be arrested on the ground that he is reasonably suspected of having committed such an offence, and the person authorised under this Act to arrest or to assist in arresting him cannot arrest him or prevent him from fleeing by other means than by killing him, the killing shall be deemed to be justifiable homicide”. Kriegler J held:³⁹

“If due recognition is to be given to the rights limited by the section and the extent of their limitation, the resort to Schedule 1 in ss (2) in order to draw the line between serious cases warranting the potential use of deadly force and those that do not, comprehensively fails the test of reasonableness and justifiability postulated by s 36(1) of the Constitution. The protection due to the rights of a suspect fleeing from arrest cannot be lifted merely because there is to be an arrest for having committed one or other of the wide variety of offences listed in the First Schedule. As we have seen, this Schedule not only includes relatively trivial offences, but what is more important, it includes offences involving no suggestion of violence and no hint of possible danger to anyone. The list is therefore simply too wide and inappropriately focussed to permit a constitutionally defensible line to be drawn for the permissible use of deadly force.”

Kriegler J went on to make another equally telling point about the nature of law in our democratic dispensation. After referring with approval to an observation made by the United States Supreme Court (and by Langa J in his judgment in *S v Makwanyane*⁴⁰) that the government is the “potent, the omnipresent teacher” and that for “good or for ill, it teaches the whole people by its example”⁴¹ he stated:⁴²

³⁸ 2002 4 SA 613 (CC); and 2002 7 BCLR 663 (CC).

³⁹ Par 45.

⁴⁰ *Supra* par 222. Langa J had written: “Implicit in the provisions and tone of the Constitution are values of a more mature society, which relies on moral persuasion rather than force; on example rather than coercion. In this new context, then, the role of the State becomes clear. For good or for worse, the State is a role model for our society.”

⁴¹ *Olmstead v United States* 277 US 438, 485 (1928).

“We have a history of violence – personal, political and institutional. Our country is still disfigured by violence, not only in the dramatic form of murder, rape and robbery but more mundanely in our homes and on our roads. This is inconsistent with the ideals proclaimed by the Constitution. The State is called upon to set an example of measured, rational, reasonable and proportionate responses to antisocial conduct and should never be seen to condone, let alone to promote, excessive violence against transgressors. Its role in our violent society is rather to demonstrate that we are serious about the human rights the Constitution guarantees for everyone, even suspected criminals. An enactment that authorises police officers in the performance of their public duties to use force where it may not be necessary or reasonably proportionate is therefore both socially undesirable and constitutionally impermissible.”

4 2 Detention without trial

In the 1980s, detention without trial had become, in the words of Professor Tony Mathews, “a prevalent and, among the ruling group at least, acceptable practice of government in South Africa”.⁴³ It had also, he said, been institutionalized by its incorporation into “permanent law”. Lest we forget the true nature of detention without trial, many people, including Steve Biko, died at the hands of their interrogators while being held in detention without trial. A great many others were tortured or otherwise ill-treated. This was not the aberrant response of rogue police officers to being given such awesome and uncontrolled powers over others: it was precisely what was to be expected of doing so, and was so widespread a practice that those who held the reins of State power must have been wilfully blind or alarmingly feeble-minded if they did not understand this.⁴⁴

A number of statutory provisions allowed for various forms of detention without trial, which varied in their scope and purpose. Section 50 of the Internal Security Act was the most “gentle” form of detention without trial as it allowed a police officer of or above the rank of Warrant Officer to detain a person without trial for up to 14 days. In terms of section 31 of the Act, the Attorney-General had the power to order the detention of a potential witness if he was of the opinion that the witness may be tampered with or intimidated or that the witness may abscond, or simply whenever he deemed it to be in the interest of the witness or the administration of justice. This provision was used exclusively (and extensively) in political trials, often when people had been forced into giving evidence against their comrades. Section 28 of the Act authorised the Minister of Law and Order to authorise long-term preventative detention of people, of up to 180 days. In 1986, section 50A was introduced into the Act. It authorised another form of 180-day preventative detention, to be carried out by police officers with no intervention on the part of the Minister. The harshest form of detention without trial that formed part of the ordinary law of the land was that

⁴² Par 47.

⁴³ Mathews *Freedom and the State Security and the Rule of Law: Dilemmas of the Apartheid Society* (1986) 62.

⁴⁴ For a harrowing account of detention without trial and its effects, see *First 117 Days* (1965).

envisaged by section 29 of the Act. In terms of this section a police officer of or above the rank of Lieutenant-Colonel could order the arrest and the detention, for interrogation, of any person whom he had reason to believe had committed or intended to commit certain offences or was withholding information related to the commission or intended commission of such offences. Most of the more than 60 people who died in detention were being held in terms of this section or its predecessor, the notorious section 6 of the Terrorism Act 83 of 1967.⁴⁵

Detainees held in terms of section 29 or its predecessor were not allowed access to their lawyers, their doctors or their family. The only people with whom they had contact were their interrogators. They were liable to be held until they had, in the view of their interrogators, answered all questions satisfactorily. One of those who died while in detention in terms of section 6 of the Terrorism Act was a young man by the name of Looksmart Ngudle. At the inquest into his death, a police interrogator was cross-examined by the advocate for the family of the deceased, Vernon Berrange, as follows:⁴⁶

“Question: If a detainee, this man or any other, on being interrogated after he has been detained says, ‘I am not under any circumstances prepared to give you any information whatsoever’, do you leave him alone or do you take further steps?

Answer: Well, he has got to be asked again.

Q: And again?

A: Yes.

Q: And again?

A: Yes.

Q: And again?

A: Yes.

Q: And again?

A: Yes.

Q: I see, the idea is to wear him down I suppose?

A: I make no comment.

Q: What is the idea? You give me your comment.

A: Well, he is there to give information, that is why he is detained.

Q: But if he has said to you, ‘Even if I have got it, I won’t tell you?’ Are these repeated interrogations for the purpose of wearing him down?

A: No.

Q: Well, what are they for?

A: To extract information from him.

⁴⁵ One of the most notorious deaths in detention occurred not very far from here when, in September 1977, the Black Consciousness Movement leader, Steve Biko was beaten to death by members of the Port Elizabeth Security Branch after he had been detained in terms of s 6 of the Terrorist Act. His death is evocatively and hauntingly dealt with in a song by Peter Gabriel, called *Biko*.

⁴⁶ First *117 Days* 96-97.

-
- Q: The idea is to keep on questioning him to see whether he will change his mind?
- A: Yes.
- Q: Supposing we had a case of a suspect who was detained because you, the police, genuinely believed that he could give certain information and if in fact your belief was wrong and this man couldn't give information, would you keep on questioning him over and over again?
- A: The question is whether we genuinely believed that he could give information.
- Q: Yes, I am putting it on that basis.
- A: I would question him, yes.
- Q: You would, over and over again?
- A: Yes.
- Q: That would be a dreadful thing to happen to a man, wouldn't it, if in fact you were wrong?
- A: Yes."

Another form of detention without trial was to be responsible for the warehousing of literally thousands upon thousands of people. Regulation 3 of the Emergency Regulations made under the Public Safety Act 3 of 1953 provided:

- "3(1) A member of a security force may, without warrant of arrest, arrest or cause to be arrested any person whose detention is, in the opinion of such member, necessary for the safety of the public or the maintenance of public order or for the termination of the state of emergency, and may, under a written order signed by any member of a security force, detain or cause to be detained any such person in custody in a prison.
- (2) No person shall be detained in terms of subregulation (1) for a period exceeding 30 days from the date of his arrest, unless that period is extended by the Minister under subregulation (3).
- (3) The Minister may, without notice to any person and without hearing any person, by notice signed by him and addressed to the head of a prison, order that a person arrested and detained in terms of subregulation (1), be further detained, and in that prison, for the period specified in the notice or for so long as these regulations remain in force."

As Mathews has commented, detention without trial was a common and, indeed, everyday part of South African life. The new dispensation makes it impossible in all but the most limited circumstances. Section 12 of the Constitution entrenches a fundamental right to freedom and security of the person. It reads:

- "(1) Everyone has the right to freedom and security of the person, which include the right –
- (a) not to be deprived of freedom arbitrarily or without just cause;
- (b) not to be detained without trial;

- (c) to be free from all forms of violence from either public or private sources;
- (d) not to be tortured in any way; and
- (e) not to be treated or punished in a cruel, inhuman or degrading way.”

In *De Lange v Smuts NO*⁴⁷ the Constitutional Court had occasion to comment on the prohibition against detention without trial contained in section 12(1)(b) of the Constitution. The case involved the constitutionality of section 66(3) of the Insolvency Act 24 of 1996, which provided that the officer presiding at a meeting of creditors had the power to issue a warrant for the incarceration of recalcitrant witnesses. Ackermann J emphasised that this raised a rule of law issue because, in “the sphere of personal freedom, particularly, the 1996 Constitution must be seen as a decisive rejection of and reaction against the severe erosion of the rule of law in relation to personal freedom in the apartheid era by a government which fits very closely Dicey’s description ... namely one ‘based on the exercise by persons in authority of wide, arbitrary or discretionary powers of restraint’”.⁴⁸ Didcott J was even more forthright. He held:⁴⁹

“Those words, the words ‘detained without trial’, ought not in my opinion to be construed separately. They comprise a single and composite phrase which expresses a single and composite notion and must therefore be read as a whole. Both the usage of the phrase in this country and the provenance here of the notion are unfortunately familiar to us all. Neither should be viewed apart from our ugly history of political repression. For detention without trial was a powerful instrument designed to suppress resistance to the programmes and policies of the former government. The process was an arbitrary one, set in motion by the police alone on grounds of their own, controlled throughout by them, and hidden from the scrutiny of the Courts, to which scant recourse could be had. And it was marked by sudden and secret arrests, indefinite incarceration, isolation from families, friends and lawyers, and protracted interrogations, accompanied often by violence. Detentions without trial of that nature, detentions which might be disfigured by those or comparable features, were surely the sort that the framers of the Constitution had in mind when they wrote s 12(1)(b).”

4 3 Administrative justice

From what I have quoted already of the laws that regulated detention without trial, it will be noted that a large measure of discretion was vested in members of the police to deprive citizens of their right to freedom if they so wished. The rules of administrative law played a central role in the efforts of human rights lawyers to control these exercises of power, as well as the other invasive powers enjoyed by State functionaries to ban meetings, to ban persons from having contact with others or to move freely, to ban publications and to ban organisations and to engage in the myriad of other

⁴⁷ 1998 3 SA 785 (CC); and 1998 7 BCLR 779 (CC).

⁴⁸ Par 47.

⁴⁹ Par 115.

tasks that were involved in the social engineering of apartheid.⁵⁰ What made the task of controlling these excesses of power all the more difficult was that a sovereign parliament could oust the jurisdiction of the courts if it wished to, could provide that these types of powers could be exercised without giving those affected by them a hearing and it could empower its officials with the broadest and most unrestrained types of discretions. This it routinely did in the security legislation of the 1980s.

A good example of an ouster clause was section 5B of the Public Safety Act. It provided:⁵¹

“No interdict or other process shall issue for the staying or setting aside of any proclamation issued by the State President under section 2, any regulation made under section 3, any notice issued by the Minister under section 4 or 5A(1) or (2) or any regulation made under section 5A(4), and no court shall be competent to enquire into or give judgement on the validity of any such proclamation, notice or regulation.”

An example of the exclusion of the right to be heard is to be found in regulation 3(3) of the Emergency Regulations. It specifically empowered the Minister of Law and Order to extend the detention of a person to the end of the state of emergency – which was the standard term of extension – “without notice to any person and without hearing any person”.⁵² The third feature – the broad discretion given to officials – was highlighted by the fact that parliament increasingly used subjective formulae when creating discretionary powers. So, members of the security forces and the Minister were empowered, in terms of the Emergency Regulations, to arrest and detain, and to extend detentions, if they formed an *opinion* that certain facts or circumstances were present. It was held by the courts that the jurisdictional facts necessary to found a valid exercise of power were not objectively justiciable: all that had to be shown was that the empowered official formed the opinion concerned. Whether he or she did so on a correct factual basis was not the test.⁵³

⁵⁰ See Abel *Politics by Other Means: Law in the Struggle Against Apartheid: 1980-1994* (1995) 13 who observed that “[p]erhaps most important, the infrastructure of apartheid – an administrative nightmare more complex and bureaucratic than the combined tax code, criminal law, regulatory apparatus, and welfare system of most countries – was constructed out of law and thus susceptible to legal challenge”. See too Chaskalson, Mahomed, Langa, Van Heerden and Corbett “The Legal System in South Africa 1960-1994: Representations to the Truth and Reconciliation Commission” 1998 115 *SALJ* 21 22-28.

⁵¹ See, on the interpretation and effect of s 5B, *Staatspresident v United Democratic Front* 1988 4 SA 830 (A). See too Haysom and Plasket “The War Against Law: Judicial Activism and the Appellate Division” 1988 4 *SAJHR* 303; and Corder and Davis “A Long March: Administrative Law in the Appellate Division” 1988 4 *SAJHR* 281.

⁵² The exclusion of the right to be heard was inserted into the regulation after it had been held in *Nkwinti v Commissioner of Police* 1986 2 SA 421 (E) that the Minister was obliged to give every detainee a hearing before deciding on whether to extend his or her detention. The amended regulation was held to be valid in *Omar and others v Minister of Law and Order; Fanie v Minister of Law and Order; State President v Bill* 1987 3 SA 859 (A).

⁵³ See, eg, *State President v Tsenoli; Kerchoff v Minister of Law and Order* 1986 4 SA 1150 (A); *Minister of Law and Order v Dempsey* 1988 3 SA 19 (A); *Ngqumba v Staatspresident; Damons NO v Staatspresident; and Jooste v Staatspresident* 1988 4 SA 224 (A).

Section 33 of the Constitution creates a fundamental right to just administrative action. It does so by providing that “[e]veryone has the right to administrative action that is lawful, reasonable and procedurally fair”⁵⁴ and that everyone “whose rights have been adversely affected by administrative action has the right to be given written reasons”.⁵⁵ Section 34 of the Constitution bolsters section 33. It provides that everyone “has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum”. These provisions, when read with section 38 of the Constitution (which provides that anyone whose fundamental rights have been infringed or threatened may approach a court for appropriate relief) and section 172(1) (which provides that when deciding a constitutional matter within its power, a court “must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency”) render ouster clauses such as section 5B of the Public Safety Act unconstitutional: it is very difficult to imagine the circumstances in which an ouster clause may be held to be a reasonable and justifiable limitation of these fundamental rights. Secondly, the right to procedurally fair administrative action would render the type of exclusion of the right to a hearing mentioned in regulation 3(3) of the Emergency Regulations invalid. Thirdly, the fundamental right to reasonable administrative action – and the requirement of the rule of law that all public power, in order to be exercised constitutionally, must be objectively rational,⁵⁶ would put paid to the minimalist approach to the review of subjectively framed discretions.

The importance of the fundamental right to just administrative action has been commented on by the courts on a number of occasions. In *Pharmaceutical Manufacturers Association of South Africa and another: In re ex parte President of the Republic of South Africa*⁵⁷ Chaskalson P stated that administrative law, which he described as the “core of public law”, occupies “a special place in our jurisprudence” and that it is an “incident of the separation of powers under which courts regulate and control the exercise of public power by other branches of government”. In the earlier case of *President of the Republic of South Africa v South African Rugby Football Union*⁵⁸ the Constitutional Court had commented on the place of the fundamental right to just administrative action in the following terms:

“Public administration, which is part of the executive arm of government, is subject to a variety of constitutional controls. The Constitution is committed to establishing and maintaining an efficient, equitable and ethical public administration which respects fundamental rights and is accountable to the broader public. The importance of ensuring that the administration observes fundamental rights and acts both ethically and accountably should not be understated. In the past, the lives of the majority of South Africans were

⁵⁴ S 33(1).

⁵⁵ S 33(2).

⁵⁶ *Pharmaceutical Manufacturers Association of South Africa: In re ex parte President of the Republic of South Africa* 2000 2 SA 674 (CC); and 2000 3 BCLR 241 (CC).

⁵⁷ *Supra* par 45.

⁵⁸ 2000 1 SA 1 (CC); and 1999 10 BCLR 1059 (CC) par 133.

almost entirely governed by labyrinthine administrative regulations which, amongst other things, prohibited freedom of movement, controlled access to housing, education and jobs and which were implemented by a bureaucracy hostile to fundamental rights or accountability. The new Constitution envisages the role and obligations of government quite differently.”

More recently, in *Sasol Oil (Pty) Ltd v Metcalfe NO*,⁵⁹ Willis J discussed the pedigree of the Promotion of Administrative Justice Act 3 of 2000 – the statute required by section 33(3) of the Constitution to give effect to the fundamental right to just administrative action. He held that the Act “cannot be regarded as ordinary legislation” because it seeks to give effect to fundamental rights contained in the Bill of Rights, describing the Act further as “triumphal legislation”.⁶⁰ He then issued a timely reminder of why it was considered necessary to entrench a fundamental right to just administrative action in the Bill of Rights, something that may often be forgotten now that more than 10 years have elapsed since the heady early days of the democratic era, when memories of past excesses were perhaps more vivid. He stated:⁶¹

“It is widely recognised that the Bill of Rights was incorporated in our Constitution with the unanimous approval of all political parties represented in Parliament because we, the citizenry, believed that there were potent lessons to be learnt not only from our apartheid past but also from the experience of other countries around the world, especially in the past century. We were resolved, almost unanimously, that never again must such injustices as had been experienced under apartheid and in other parts of the world prevail in our own country. Over the past 100 years, most of the terrible suffering which humankind has actually experienced, whether it arose from war, genocide, religious persecution, racial classification, racial segregation, forced removals, arrest under the pass laws, detention without trial, confiscation of property, denial of access to health, or the application of fatally flawed economic policies, derives from the exercise of administrative power. The limitation of administrative power, according to law reflecting internationally respected human rights, lies at the heart of a modern constitutional democracy.”

5 CONCLUSION

One could engage in the same sort of exercise with every fundamental right contained in the Bill of Rights and the result would be the same: a picture would emerge of a legal system that is at the same time more caring and more rational, and it would be evident to any observer that the country we live in is a far better place now than it was 20 years ago, or 10 years ago for that matter.⁶²

⁵⁹ 2004 5 SA 161 (W).

⁶⁰ Par 7.

⁶¹ Par 7.

⁶² This is not to say that we should ignore the many difficulties that we face as a society. It is, I think, clear that levels of official and private corruption are unacceptably high and serve as a warning that we, as a society may be in danger of losing our moral compass. There are worrying signs of large-scale bureaucratic inefficiency and administrative “melt-down” particularly in many organs of local government and in at least some provincial

So, for instance, in the period since the advent of democracy, fair trial rights have been secured – to name but two examples – by the onus being placed squarely on the State to prove the voluntariness of confessions⁶³ and by requiring the State to provide information contained in the police docket – principally witness statements – to the accused in criminal proceedings;⁶⁴ the right to dignity has been promoted by the setting aside of the section of the Criminal Procedure Act 51 of 1977 that allowed for a sentence of corporal punishment to be imposed on juvenile offenders;⁶⁵ the right to freedom of expression has been furthered by the acknowledgement that the common law required development through the rejection of the rule that imposed strict liability for defamation on the mass media.⁶⁶ The list goes on and on. It includes the very impressive emerging jurisprudence on the protection of socio-economic rights such as the right of access to adequate housing entrenched in section 26 of the Constitution;⁶⁷ the right of access to health care services entrenched in section 27(1)(a) of the Constitution;⁶⁸ and the right of access to social assistance entrenched in section 27(1)(c) of the Constitution.⁶⁹

The list will increase year by year as legislatures pass legislation – such as the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 – intended to give effect to fundamental rights, and as courts are called upon to adjudicate on new matters involving the Bill of Rights and its application. In this way, the Constitution will be fleshed out over time and the rights it contains will be concretised in their application, as our constitutionally based jurisprudence of human rights is developed by the courts, and as our common, law, customary law and statute law is examined

governments. The words of our recently retired Chief Justice, Justice Arthur Chaskalson, are worthy of repetition. He said: "The Constitution offers a vision of the future. A society in which there will be social justice and respect for human rights, a society in which the basic needs of all our people will be met, in which we will live together in harmony, showing respect and concern for one another. We are capable of realising this vision but in danger of not doing so. We seem temporarily to have lost our way. Too many of us are concerned about what we can get from the new society, too few with what is needed for the realisation of the goals of the Constitution. What is lacking is the energy, the commitment and the sense of community that was harnessed in the struggle for freedom ... All of us have an obligation to make the Constitution work, and it is in all of our interests that this be done. It is important that we regain the energy, the commitment and the sense of community we once had, and use it to give effect to the values and aspirations of the Constitution." ("The Third Bram Fischer Lecture: Human Dignity as a Foundational Value of our Constitutional Order" 2000 16 SAJHR 193, 205.)

⁶³ *S v Zuma* 1995 2 SA 642 (CC); and 1995 4 BCLR 401 (CC).

⁶⁴ *Shabalala v Attorney-General, Transvaal* 1996 1 SA 725 (CC); and 1995 12 BCLR 1593 (CC).

⁶⁵ *S v Williams* 1995 3 SA 632 (CC); and 1995 7 BCLR 861 (CC).

⁶⁶ *National Media Ltd v Bogoshi* 1998 4 SA 1196 (SCA). See too *Khumalo v Holomisa* 2002 5 SA 401 (CC); and 2002 8 BCLR 771 (CC).

⁶⁷ *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC); and 2000 11 BCLR 1169 (CC).

⁶⁸ *Minister of Health v Treatment Action Campaign (No 2)* 2002 5 SA 721 (CC); and 2002 10 BCLR 1033 (CC).

⁶⁹ *Permanent Secretary, Department of Welfare, Eastern Cape v Ngxuzo* 2001 4 SA 1184 (SCA).

through the lens of the Constitution and are developed and interpreted in conformity with its values.⁷⁰

What we have achieved over the last 20 years – in progressing from what was nothing less than a police state, to a democratic one, is not to be sniffed at, even if it is acknowledged, as it must be, that a great deal of work still lies ahead. Very few would have said in March 1985 that in less than five years, Nelson Mandela would be a free man and, in less than ten years, that he would be our president (much less that he would, in 1995, be wearing a number 6 Springbok rugby jersey at Ellis Park and be celebrating South Africa winning the Rugby World Cup!), that the liberation movements and other anti-apartheid organisations would have been unbanned and be engaging in dialogue with the government of the day. In 1985, very few people – even those who were unshakable optimists – had the realistic expectation of one day living in a democratic South Africa that had, as the jewel in the crown of its Constitution, a comprehensive and justiciable Bill of Rights.

We may occasionally lose our way. We may bicker among ourselves about the best ways in which to transform our society to achieve the ideals of our Constitution. But what we have achieved so far in creating a society that respects human rights and freedoms stands as an enduring monument – albeit one continually in the process of being built – to all those, such as the victims of the Langa massacre, who lost their lives in the quest for a better future. We owe it to them to remain focused on and committed to achieving the aspirations spelt out in the preamble to the Constitution, namely to:

“Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;

Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law;

Improve the quality of life of all citizens and free the potential of each person;
and

Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.”

⁷⁰ For but two of a number of recent decisions in which the common law has been developed in accordance with the values of the Constitution, see *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* 2001 4 SA 938 (CC); 2001 10 BCLR 995 (CC); and *NK v Minister of Safety and Security* CC 13 June 2005 (case no CCT52/04) unreported.