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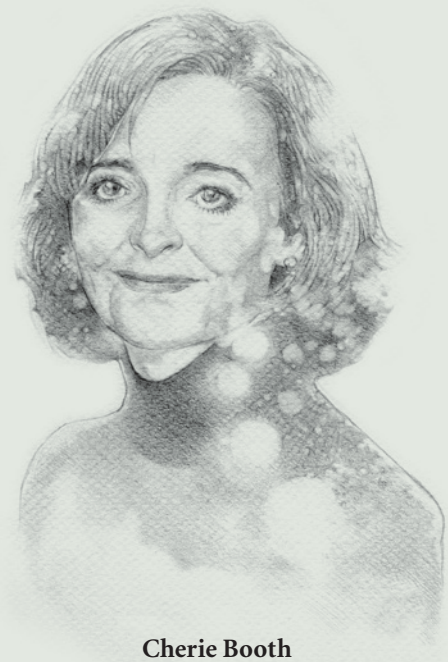
Cherie Booth QC
The Role of the Judge in a Human Rights World
19th Sultan Azlan Shah Law Lecture, 2005

The Honourable Cherie Booth QC

The Role of the Judge in a Human Rights World



Cherie Booth
(b. 23 September 1954*)*

Ms Cherie Booth has the distinction of being the first woman as well as the first practising member of the British Bar to deliver the Sultan Azlan Shah Law Lecture.

Born in Bury in 1954, Ms Booth read law at the London School of Economics and Political Science (LSE) and created history when she became the first and only person to obtain an LSE degree with a first class in all her subjects. She then excelled in her Bar examinations and was called to the Bar by Lincoln's Inn in 1976. She became Queen's Counsel in 1995, and was appointed as a Recorder in the County Court and Crown Court in 1999. She is a Bencher of Lincoln's Inn and an Honorary Bencher of King's Inn, Dublin.

Ms Booth is an accomplished barrister. As a founding member of Matrix Chambers, London, her areas of specialisation include public law, human rights, media and information law, employment law and European Community law. Ms Booth has appeared in a number of landmark cases dealing with human rights and employment issues, such as *Ali v Head Teacher and Governors of Lord Grey School* [2006] 2 AC 363, where the House of Lords considered whether the exclusion of a child from a State school violated the child's right to education under the European Convention of Human Rights; *R (on the application of Purja and others) v Ministry of Defence* [2004] QB 36, a case dealing with the differential treatment afforded to Ghurkha soldiers in the British Army; and *R (Shabina Begum) v Head Teacher and Governors of Denbigh High School* [2007] 1 AC 100, where Ms Booth represented a girl who was expelled from school for wearing a *hijab*, a case which raised the important issue of the right to manifest religious beliefs.

Ms Cherie Booth is actively involved in a number of professional organisations, and has held several important positions including former Chair of Bar Information Technology Committee; Chair of the 1997 Bar Conference; former Vice-Chair of the Equal Opportunities Committee to Bar Council; and a member of the Local Government and Planning Bar Association, IBA, FRSA, the European Women Lawyers Association and the European Employment Lawyers Association.

Ms Booth is Chancellor and Honorary Fellow of Liverpool John Moores University, Governor and Honorary Fellow of the LSE and the Open University. She is also a Fellow of the Royal Society of Arts, an Honorary Fellow of the Institute of Advanced Legal Studies, and a Fellow of the International Society of Lawyers for Public Service.

In January 2011, Ms Booth was appointed as the first Chancellor of the Asian University for Women, Bangladesh, and more recently as Visiting Professor in Law at The Open University.

Ms Booth has written and lectured widely on issues such as children's rights, the rights of women, the international judiciary, the influence of international law on domestic courts and the 1998 British Human Rights Act. She authored a chapter on the prospects for the International Court in *From Nuremberg to the Hague: The Future of International Criminal Justice* (2003, Cambridge University Press), and co-authored a chapter on the liability of public authorities in *Professional Negligence and Liability* (2004, LLP).

Ms Booth is actively involved in a number of charities, including President of Bernado's; Trustee of Refuge; Trustee of Citizenship Foundation; and Vice President of Family Mediators Association. She is also the Patron of several foundations and associations, including Sargent Cancer Care for Children, Greater London Fund for the Blind, The Lord Slynn European Law Foundation, Asian Women of Achievement Awards and the European Federation of Black Women Business Owners.

In 2008, the Cherie Blair Foundation for Women was set up to provide women entrepreneurs with access to business development support, networks, finance and technology, especially in Asia, Africa and the Middle East.

In recognition of her work, she has been conferred many honorary degrees, including LLD (Hons), University of Liverpool (2003), Hon D Litt UMIST and Doctor of Laws (Westminster University).

Ms Cherie Booth is married to The Honourable Mr Tony Blair, who, at the time Ms Booth delivered the Nineteenth Sultan Azlan Shah Law Lecture, was the Prime Minister of Britain. They have four children—Euan, Nicholas, Kathryn and Leo.

A constitutional court's democratic potential lies not only in its guardian role of ensuring that a government "show equal concern for the fate of all those citizens over whom it claims dominion and from whom it claims allegiance"; it lies also in the vital and complementary role that judges can play in engaging with national issues so as to create a public dialogue about the core human rights values that lie at the heart of all inclusive, open democracies.

In our troubled times, where terrorism, division, and suspicion of others are the order of the day, this role for judges is perhaps more vital than ever before.

19 The Role of the Judge in a Human Rights World

Cherie Booth QC

Text of the Nineteenth Sultan Azlan Shah Law Lecture delivered on 26 July 2005 in the presence of His Royal Highness Sultan Azlan Shah

Chancellor of the University of Malaya, Your Royal Highnesses, Distinguished Guests, Ladies and Gentlemen.

I, first of all, thank Your Royal Highnesses Sultan Azlan Shah, and Tuanku Bainun, for being so kind and hospitable to me on this, my first visit, to Malaysia. I had read about how welcoming and kind Malaysians were, but I did not realise just how true that was till I experienced your very generous hospitality. I am sad that I am here for just a short time, but I am sure this, my first visit, to Malaysia will not be my last.

I also of course thank you, Your Royal Highness, for the great and rare privilege that you have granted to me to deliver this Nineteenth Law Lecture named in your honour. When Professor Dr Visu Sinnadurai came to visit me in London at the suggestion of our Lord Chief Justice Lord Woolf, little did I realise just what a task I was taking on. And he certainly did not tell me that there would be so many people here at this lecture. But those of you who know will know that Professor Visu is very, very persuasive.

> Plainly, the powers of the executive in any modern democratic nation state are significant. Ordinarily, in such systems of government the courts will "respect all acts of the executive within its lawful province, and the executive will respect all decisions of the court as to what its lawful province is".

[1] "Administrative Law Trends in the Commonwealth", in Visu Sinnadurai (ed), *The Sultan Azlan Shah Law Lectures: Judges on the Common Law*, 2004, Professional Law Books and Sweet & Maxwell Asia, pages 105-130.

[2] *Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprises Sdn Bhd* [1979] 1 MLJ 135.

[3] "Deference: A Tangled Story", [2005] PL Summer 348.

[4] Ibid, at page 348.

And despite what the Vice Chancellor has kindly said about me, I am really not such a great phenomenon. I am very honoured indeed to join a very distinguished company of speakers, which includes British and Commonwealth judges and eminent academics. I am delighted to be both the first practising barrister and possibly even more delighted to be the first woman to be asked to deliver this lecture.

In the Fifth Sultan Azlan Shah Lecture,[1] Lord Cooke (or Sir Robin Cooke, as he then was, President of the New Zealand Court of Appeal) began his lecture by quoting the following dictum of Your Royal Highness:

> Unfettered discretion is a contradiction in terms … Every legal power must have legal limits, otherwise there is dictatorship.[2]

While Your Highness was actually expressing an essential premise of administrative law, this is an apt introduction to the theme of this lecture, namely the role of the judiciary in reviewing and keeping check upon the power of the executive. Plainly, the powers of the executive in any modern democratic nation state are significant. Ordinarily, in such systems of government the courts will, in the words of Lord Steyn, "respect all acts of the executive within its lawful province, and the executive will respect all decisions of the court as to what its lawful province is".[3]

However, as Lord Steyn continued, "[w]hen the executive strays beyond its lawful province the courts must on behalf of the people call it to account".[4]

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> as many countries
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> or Malaysia)
> lost their kings and queens,
> states continued to
> maintain an affinity
> between their
> secular systems of
> government and
> the sacred figure
> of justice.

[5] See "Reconstructing Equality: Of Justice, Justicia, and the Gender of Jurisdiction", *Yale Journal of Law & Feminism* 2002, vol 15, 393–418.

[6] See *Shield of Achilles: War, Peace and the Course of History*, Penguin.

The idea of justice is an ancient and feminine one, whether in the form of the Egyptian goddess Maat, or the Norse goddess Skadi; and of course the eponymous Roman goddess, Justitia,[5] the long robed woman holding the scales and the sword with her eyes often blindfolded has represented justice down the centuries. Gradually the idea of justice has become associated with the judge. As kings and queens lost their divine right and as many countries (but not the United Kingdom or Malaysia) lost their kings and queens, states continued to maintain an affinity between their secular systems of government and the sacred figure of justice. Indeed in Europe and the United States, men and women who sit on the courts, particularly the higher courts have been called "justices". More recently, in a new South Africa the judges who sit on the bench of that country's Constitutional Court are referred to as "justices".

In the modern age, science and philosophy have moved from the idea that status or fate prescribes what we are to the idea that it is contract or choice that determines our destiny. But as we move from what Professor Philip Bobbit[6] has describe as the "nation state" to the "market state", the role of those who interpret our choices and contracts moves to centre stage. So we move from the ancient High Priest to the human rights judge.

What then is the role of a judge in a human rights world? That is the topic of this lecture, and one that I hope to answer through a discussion of various themes.

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[7] "The Courts and the Constitution", Lecture delivered at King's College on 14 February 1996.

[8] Ibid, at page 18.

An expanded sense of justice under an inclusive and open democracy

Let me start by saying that in an age of human rights, officers of the bench are provided an expanded potential to do justice. Lord Bingham, while still Master of the Rolls,[7] suggested that the road map for judges wishing to achieve justice starts with the judicial oath, whereby a newly-appointed judge swears to:

> do right to all manner of people after the laws and usages of this realm, without fear or favour, affection or ill-will.

Lord Bingham explained the elements of this oath succinctly as follows:

> First, the judge must do what he (or, of course, she) holds to be right … But secondly, and vitally, he must do right according to the laws and usages of the realm. He is not a free agent, who can properly give vent to his own whims and predilections, or even (save within very narrow limits) give effect to his own schemes of law reform …
>
> Thirdly, the judicial oath makes clear … that in administering the law the judge must act with complete independence, seeking neither to curry favour nor to avoid any form of vindication. And fourthly, so far as humanly possible, judges must decide cases with total objectivity, having no personal interest beyond that of reaching a just and legally correct solution.[8]

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[9] Lord Woolf, "The International Role of the Judiciary", 13th Commonwealth Law Conference, 16 April 2003, at pages 1–2.

[10] Ibid, at page 2.

[11] 28 February 1986 at the Official Launch by YAB Tun Hussein Onn of *The Judgments of HRH Sultan Azlan Shah with Commentary,* 1986, edited by Professor Dato' Visu Sinnadurai, Professional Law Books Publishers, Kuala Lumpur.

Lord Woolf, the former Lord Chief Justice of England and Wales, has remarked that

> [j]ust as the common law has been evolving with increasing rapidity, so has the role of the common law judge. The judge's responsibility for delivering justice is no longer largely confined to presiding over a trial and acting as arbiter between the conflicting positions of the claimant and the defendant or the prosecution and defence.[9]

Rather, says Lord Woolf,

> [t]he role of the judiciary, individually and collectively, is to be proactive in the delivery of justice. To take on new responsibilities, so as to contribute to the quality of justice.[10]

Or as Your Highness put it in a speech in 1986,

> In countries which practice a democratic form of government, the judiciary has been looked upon as the defender of any encroachment to the Rule of Law.[11]

Of course, these statements take on a particular meaning when one considers the modern advance in human rights. For those states that have their own binding human rights bills or that allow regard to be had in judicial decision-making to international or regional human rights standards, there is a potential for judges to look beyond the remit of the common law to universal notions of justice

“It is important for us to stress that
we do live in an age
of human rights,
in a human rights world.
This age brings with it
huge potential for justices
of the world’s highest courts
to speak a common language.
As judges embark
on constitutional
interpretation
they are afforded
the chance to
narrate the values
that underpin
the very essence
of our humanity.”

embodied in the idea of fundamental rights. This potential is of undoubted importance for the citizens who are the direct beneficiaries of these rights.

I can speak from my own experience here. As you may know the United Kingdom has recently taken steps to "bring human rights home" through its Human Rights Act. These fundamental rights extend from the right to life to the right to marry; from the right not to be subjected to inhuman or degrading treatment to the right to a fair trial; from the right to free speech to the right of privacy: to name but a few.

While Britain was very much involved in the drafting of the European Convention on Human Rights and was one of the first countries to sign it, up until five years ago, a British citizen simply could not stand before a British court and assert that his or her fundamental rights under the Convention had been violated. That was not an available option, for although Britain had signed the Convention, it had no direct force in our law. The only use that could be made of the Convention in Britain was to refer to it as an aid in deciding the meaning of ambiguous British legislation.

Quite incredibly, we had to leave our shores and travel to Strasbourg to the European Court to seek protection of our Convention rights. And even if then, after that long and expensive road, the European Court agreed that British laws were incompatible with fundamental rights and freedoms, there was no *legal* obligation on our government to change

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[12] I Leigh "The UK Human Rights Act 1998: An Early Assessment" in G Huscroft and P Rishworth (eds), *Litigating Rights: Perspectives from Domestic and International Law,* 2002, pages 323, 330.

[13] Lord Bingham, "The European Convention of Human Rights: Time to Incorporate" 109 LQR (1993) 390 at 400.

them. That this was wrong is well evidenced by the fact that as a result of the many journeys our citizens made to Strasbourg, the European Court had held the United Kingdom to be in violation of its Convention obligations on over 50 occasions.[12]

Under the United Kingdom's Human Rights Act this historical justice deficit has been corrected by an invigorated potential for judges to do right by reference, domestically, to standards respected globally. Now, because of the Human Rights Act, British citizens, like citizens in almost every other European country, can rely on their Convention rights in their own courts, before their own judges, and with the knowledge that their country has committed itself to the fulfilment of the highest ideals of human rights. As one of our senior Law Lords noted with respect to the merits of direct incorporation of the European Convention:

> … the change would over time stifle the insidious and damaging belief that it is necessary to go abroad to obtain justice. It would restore this country to its former place as an international standard bearer of liberty and justice. It would help to reinvigorate the faith, which our eighteenth and nineteenth century forbears would not for an instance have doubted, that these were fields in which Britain was the world's teacher, and not its pupil. And it would enable the judges more effectively to honour their ancient and sacred undertaking to do right to all manner of people after the laws and usages of this realm, without fear or favour, affection or ill will.[13]

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[14] *The Riddle of All Constitutions: International Law, Democracy, and the Critique of Ideology,* 2000 (Oxford: Oxford University Press), at page 110.

[15] Hope Chigudu and Ezra Mobogori, "Harnessing the Creative Energy of Citizens" in *Civil Society in the New Millennium Africa Regional Report*, 2000.

I am therefore heartened that Britain has joined the ranks of other constitutional democracies in Europe, the Commonwealth, and beyond. This is an important trend. For some time now international lawyers have been talking about an emerging norm of democratic governance. This norm of democratic governance has as its focus periodic multiparty elections, within the framework of institutions which guarantee respect for the Rule of Law and safeguard civil rights. Of importance is that increasingly the trend is towards democracies which guarantee respect for the Rule of Law and rights through domestic, constitutional charters. Through these constitutional instruments states are able to drive for a form of democratic politics that Susan Marks has called "inclusive democracy",[14] a value-driven form of democracy that has strong similarities with the recent thinking in political studies about what has become known as "good governance". According to one definition of the term,

> good governance is about pursuing and promoting the greatest good for the greatest number of citizens at all times, while equally respecting and according due protection to those who may hold a different view.[15]

If democracy is seen simply as an arithmetical, procedural one determining how a government is put into or is removed from power, then we risk acceptance of crass majoritarianism. In this guise, the right to democratic governance will have obscured the substantive moral content of a truly democratic political regime, one which

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[16] See in this regard Aidan O'Neill, "Scotland's Constitution and Human Rights", paragraph 2.12.

[17] Pope John Paul II, *Centesimus Annus,* 1991, at page 46.

[18] *S v Makwanyane* 1995 (3) SA 391 (CC).

[19] Ibid, at paragraph 88.

is required to protect and proclaim the value of human life, and to provide the conditions for each individual's flourishing, even in the case where a majority of the electorate may favour the deprivation or attenuation of rights for unpopular minorities—whether that be present day asylum seekers in the more developed countries of the Commonwealth, or Jews in the Germany of the early 1930s.[16]

It is the duty of the State authorities, especially in democratic systems, to stand up for and protect fundamental rights, often against majority opinion. As Pope John Paul noted in his 1991 encyclical *Centesimus Annus*, "a democracy without values easily turns into open or thinly-disguised totalitarianism".[17] I think Arthur Chaskalson, recently retired Chief Justice of South Africa, put it well in the *Makwanyane* case,[18] the landmark decision of the Constitutional Court which struck down the death penalty in South Africa in 1995. He said:

> Those who are entitled to claim [human rights protection] include the social outcasts and marginalised people of our society. It is only if there is a willingness to protect the worst and the weakest amongst us, that all of us can be secure that our own rights will be protected.[19]

On the Pope's or Judge Chaskalson's analysis, a political regime—even one supported or elected by a majority of the population—which sought to deny basic rights to those falling within its care, would be in danger of forfeiting the right to call itself "democratic".

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The institutional importance of the judiciary as guardian of human rights – the interpretative twist and the trouble of counter-majoritarianism

What about the judiciary within this vision of an inclusive democracy? In a human rights world, what role should the "justices" play in the pursuit of true democracy? I think it is clear that the responsibility for a value-based, substantive commitment to democracy rests in large part on judges. The importance of the judiciary in this context is that judges in constitutional democracies are set aside as the guardians of individual rights. Their supervisory role becomes intimately tied up with ensuring and enhancing a democracy that is participatory, inclusive and open.

This ability to do justice for all individuals—including the worst and weakest in a society—is then an inherent aspect of the judiciary's institutional role in a constitutional democracy. In an age of human rights, the difference of course is that judges are afforded the opportunity and duty to do justice for all citizens by reliance on universal standards of decency and humaneness.

However, for all its emancipatory potential, this institutional role for judges comes with its own problems which must be confronted. I will touch briefly on two such problems: *first*, the problem of interpreting a text that contains commitments to universal human rights ideals expressed in broad and open-ended terms; and *second*, the counter-majoritarian problem—the problem of unelected

> A political regime—even one supported or elected by a majority of the population—which sought to deny basic rights to those falling within its care, would be in danger of forfeiting the right to call itself "democratic".

[20] *Dato Menteri Othman bin Baginda & Anor v Datuk Ombi Syed Alwi bin Shed Idrus* [1981] 1 MLJ 29 at 31.

judges overturning laws drafted by elected officials, through reliance on constitutional rights.

The twist of interpretation

The special institutional role of judges in a constitutional democracy demands of them that they interpret their constitutional document in a way that eschews formalism and literalism. Your Royal Highness put it this way in a judgment in 1981:[20]

> In interpreting a constitution two points must be borne in mind. First, judicial precedent plays a lesser part than is normal in matters of ordinary statutory interpretation. Secondly, a constitution, being a living piece of legislation, its provisions must be construed broadly and not in a pedantic way—"with less rigidity and more generosity than other Acts". A constitution is sui generis, calling for its own principles of interpretation, suitable to its character, but without necessarily accepting the ordinary rules and presumptions of statutory interpretation.

For judges schooled in the tradition of narrow linguistic interpretation of laws (and there are many of them), this often poses a problem. That is not least of all because constitutional disputes can seldom be resolved with reference to the literal meaning of the constitution's provisions alone. Constitutional documents do not fall from the sky in neat and digestible form. Nor are they holy

> The responsibility for a value-based, substantive commitment to democracy rests in large part on judges. The importance of the judiciary in this context is that **judges in constitutional democracies are set aside as the guardians of individual rights.** Their supervisory role becomes intimately tied up with ensuring and enhancing a democracy that is participatory, inclusive and open.

[21] See Jeffrey Rosen, "So What's the 'Right' Pick?", *New York Times*, 3 July 2005.

writ. Rather, many of a constitution's provisions are the result of political compromises made during the drafting process. And where the document entrenches human rights the text will invariably speak to the attainment of universal and eternal standards, rather than laying down technical and easily discernible rules.

Whether one reads the American Bill of Rights, the Canadian Charter of Rights and Freedoms, the Malaysian Constitution, the Constitution of India or the South African Bill of Rights, or regional instruments such as the European Convention on Human Rights, one is struck by the general and abstract terms in which the rights are formulated. Their application to particular situations and particular circumstances will necessarily be a matter for argument and controversy.

For some judges the controversy can be resolved or avoided by seeking to uncover the "original intent" of the Founding Fathers. (There were few Founding Mothers involved in drafting early bills of rights like that of the United States Constitution!) In the United States the staunchest defender of this originalist interpretation is Supreme Court Justice Antonin Scalia. Already in the United States there is much debate about who will be appointed to replace Justice Sandra Day O'Connor following the announcement of her forthcoming retirement from the United States Supreme Court. One view—apparently endorsed by President Bush[21]—is that preference should be given to a judge who is committed to constitutional interpretation by faithful reference to the text's original meaning.

> In an age of human rights, judges are afforded the opportunity and duty to do justice for all citizens by reliance on universal standards of decency and humaneness.

[22] At least in respect of the Founding Fathers of the United States Constitution it is not insignificant that the drafters would have been white, male, heterosexual, and some would have been slave-owners!

[23] In *Lawrence v Texas* 71 USLW 4574 (2003) at 4580.

I think it is fair to say that such an interpretative stance is suspect when considered against the very idea of a constitutional document. Such a document is intended to articulate the most basic ideals of our humanity, ideals which are not static—trapped and rarefied in some bygone era[22]—but rather ideals which are often only unearthed or polished or refined as we with time stumble and struggle towards their full realisation. For this and other reasons many of Justice Scalia's colleagues on the Supreme Court disagree with him about the proper approach to constitutional interpretation. The disagreement is well captured in the reasons expressed by Justice Kennedy for deciding in June 2003 that the Equal Protection and Due Process clauses of the Eight and Fourteenth Amendments rendered unconstitutional a Texas statute criminalising private adult, consensual homosexual conduct. In contrast to Scalia's originalist understanding of the Constitution which would have allowed the law to remain on the statute books, Justice Stevens wrote this for the majority:

> Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.[23]

> Constitutional disputes can seldom be resolved with reference to the literal meaning of the constitution's provisions alone. Constitutional documents do not fall from the sky in neat and digestible form. Nor are they holy writ.

[24] *Ex Parte Attorney-General Namibia: In Re Corporal Punishment by Organs of State* 1991 (3) SA 76 (NmSC).

[25] Ibid, at 91D-F.

[26] Ibid.

To similar effect is the finding by Chief Justice Mahomed of the Namibian Supreme Court in a case which outlawed corporal punishment by organs of state as cruel and inhuman.[24] To him constitutional interpretation involves

> [a] value judgment which requires objectively to be articulated and identified, regard being had to the contemporary norms, aspirations, expectations and sensitivities of the Namibian people as expressed in its national institutions and its Constitution, and further having regard to the emerging consensus of values in a civilized international community.[25]

To Chief Justice Mahomed this is not a "static exercise". Rather it is a "continually evolving dynamic". For instance,

> [w]hat may have been acceptable as a just form of punishment some decades ago, may appear to be manifestly inhuman or degrading today. Yesterday's orthodoxy might appear to be today's heresy.[26]

The approach of Justices Stevens and Mahomed – what some refer to as value-based or purposive interpretation— has increasingly come to be accepted as the most appropriate means of discerning a Constitution's true meaning. In my own country leading British Law Lords have rejected the strict legalistic approach as an inadequate means for the interpretation in particular of human rights norms.

> Many of a constitution's provisions are the result of political compromises made during the drafting process.

[27] See Johan Steyn, *Democracy Through Law: Selected Speeches and Judgments*, 2004, at pages xviii and 77.

[28] Ibid, at pages 24–26.

[29] Ibid, at page 60.

[30] Ibid, at pages 62–63.

[31] In *R v Big M Drug Mart Ltd* (1985) 18 DLR (4th) 321 at 359–360 the Canadian Supreme Court opined that:

> "The meaning of a right or freedom guaranteed by the Charter was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect. … this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and larger objects of the Charter itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concept enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter."

[32] *S v Mhlungu* 1995 (3) SA 391 (CC).

[33] Ibid, at paragraph 8.

Lord Steyn for instance has spoken against formalistic approaches to legal reasoning[27] and argues that judges must be open about all factors, including moral and ethical principles, that influence their judgments and acknowledge that different judicial answers are always possible.[28]

Importantly, to Lord Steyn interpretation is never merely a question of looking for the ordinary meaning of discrete words, nor is interpretation limited to cases where a text is ambiguous.[29] Statutes should rather be purposively interpreted as if they are speaking in the "present tense" or are "always speaking" rather than being limited to the historical context in which they first appeared.[30] This too is the view of leading constitutional courts such as the Supreme Court of Canada[31] and the South African Constitutional Court. For example, the South African Constitutional Court,[32] referring to a dictum of Lord Wilberforce, has said that:

> A constitution is an organic instrument. Although it is enacted in the form of a statute it is *sui generis*. It must broadly, liberally and purposively be interpreted so as to avoid [what Lord Wilberforce called] "the austerity of tabulated legalism" and so as to enable it to continue to play a creative and dynamic role in the expression and achievement of the ideals and aspirations of the nation, in the articulation of the values bonding its people and in disciplining its government.[33]

> A constitutional document is intended to articulate the most basic ideals of our humanity, ideals which are not static—trapped and rarefied in some bygone era—but rather ideals which are often only unearthed or polished or refined as we with time stumble and struggle towards their full realisation.

[34] The Hamlyn Lectures, *Judicial Activism,* by The Hon Justice Michael Kirby AC CMG, Justice of the High Court of Australia, (2004), 40.

A failure to interpret a Constitution in this broad and purposive manner means not only that citizens are denied the fullest enjoyment of their rights under law. In addition, a sterile, backward-looking approach to constitutional interpretation puts the entire constitutional project at risk. As Justice Kirby, a leading human rights judge from Australia so eloquently reminds us:

> Construing a constitution with a catchcry about "legalism", with nothing more than judicial case books and a dictionary to help, and with no concept of the way it is intended to operate in the nation whose people accept it has their basic law, is a contemptible idea. As one anonymous sage once put it: if you construe a constitution like a last will and testament, that is what it will become.[34]

The counter-majoritarian dilemma

Of course, the primary criticism of such a value-based or purposive approach to constitutional interpretation is the potential it holds for judges to impose their own values of what is moral, socially beneficial or politically correct. And that leads me to highlight the second problem posed by the institutional role afforded judges in a constitutional democracy. That problem—the counter-majoritarian dilemma—has been described by one academic as follows:

> As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.

[35] Dennis Davis, "Democracy – Its Influence upon the Process of Constitutional Interpretation" (1994) 10 SAJHR 104.

[36] "Supremacy of Law in Malaysia", The Eleventh Tunku Abdul Rahman Lecture, 23 November 1984. See Dato' Seri Visu Sinnadurai (ed) *Constitutional Monarchy, Rule of Law and Good Governance: Selected Essays and Speeches by HRH Sultan Azlan Shah,* 2004 Professional Law Books and Sweet & Maxwell Asia, pages 13–33.

[37] Learned Hand, one of the greatest United States judges, had surprisingly strong views against judicial activism in constitutional matters. The most formal statement of his views appeared in his 1958 Holmes Lectures, and is encapsulated in the following passage:

> "For myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not. If they were in charge, I should miss the stimulus of living in a society where I have, at least theoretically, some part in the direction of public affairs … [having] a satisfaction in the sense that we are all engage in a common venture." (Learned Hand, *The Bill of Rights,* 1958, at pages 73–74, quoted in Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution,* 1996, at pages 342–343.)

Unlike Learned Hand, I am wholly committed to the idea of a constitutional democracy in which judges uphold rights against public morality. I see far greater value in the views of Ronald Dworkin who convincingly argues that Learned Hand's dream of living in a society in which he has "some part in the direction of public affairs", is, paradoxically, best realised through the very judicial activism that Hand deplores. See Dworkin, *Freedom's Law*, esp pages 343–347. See further the discussion below regarding the importance of judicial review as a tool for real participatory democracy.

[38] See generally Janet Kentridge and Derek Spitz, "Interpretation" in Chaskalson, et al, *Constitutional Law of South Africa,* 1996, pages 11–16.

> Constitutional review is conducted by unelected judges who are empowered to overturn the will of a democratically elected and accountable legislature in terms of a process of interpreting abstract constitutional provisions. In short, the question arises as to how to account for and justify the curtailment of the operation of a democratic political system by an unaccountable institution.[35]

Or as Your Highness pithily put it in 1984,

> … just as politicians ought not to be judges, so too judges ought not to be politicians.[36]

Those critics who are wary of the power of judges perceive the essence of the problem to be a subversion of democracy. Democracy, as it is commonly perceived, entails that political power should be disposed of by the people. When unelected judges take over the democratic role, a possible legitimacy problem emerges. The exclusive views of what Learned Hand described as a "bevy of Platonic Guardians"[37] take precedence and they alone, as an all-powerful body, may directly override the will of an elected legislature, and indirectly then, the will of the electorate.[38] What increases the tension is that in today's human rights age, judges exercise the power of judicial review by recourse to value-laden, often imprecisely worded and invariably loftily expressed constitutional rights.

An obvious riposte to critics of judicial review is to point out that the power of judicial review is accorded to

> A failure to interpret a Constitution in a broad and purposive manner means not only that citizens are denied the fullest enjoyment of their rights under law. In addition, a sterile, backward-looking approach to constitutional interpretation puts the entire constitutional project at risk.

[39] As Greenberg says in his opus on United States Constitutional Law, "[t]he scholarly historical debate over the legitimacy of judicial review curiously goes on, although it is a debate about an accomplished fact." See Jack Greenberg, *Judicial Process and Social Change: Constitutional Litigation,* 1977, page 599.

[40] McLachlin "The Charter: A New Role for the Judiciary?" (1991) vol xxxix *Alberta Law Review* 540 at 541.

[41] The Hamlyn Lectures, *Judicial Activism,* by The Hon Justice Michael Kirby AC CMG, Justice of the High Court of Australia, (2004), 72.

judges by "the people" through present day constitutional arrangements.[39] Chief Justice Beverley McLachlin's comments with regard to the Canadian Supreme Court are therefore equally apposite for other constitutional courts. She has said that:

> The fact is that the Constitution, not the judges, compels the courts to act as final arbiters of what is right and just, to stand as the guardians of the Constitution. While the courts may choose between relative degrees of judicial activism, and while the extent to which they defer to the legislative branch may vary, the fundamental fact remains that the courts cannot avoid the new responsibilities and powers which the Charter has placed upon them. The question is not whether they do it, but how they do it.[40]

Nonetheless, I would suggest that in order to keep the counter-majoritarian problem in check it behoves judges to keep in mind certain basic points if they are to avoid a legitimacy problem.

The first is that as much as human rights principles might drive a judge to conclude that a rule of the common law or a provision in a statute breaches a fundamental constitutional guarantee, judges must bear in mind, as Justice Kirby reminds them, that "one settled human rights principle is addressed to the judiciary itself".[41] That principle is encapsulated in Article 14 of the International Covenant on Civil and Political Rights, which requires not only that judges should be competent and independent, but also that

> Critics who are wary of the power of judges perceive the essence of the problem to be a subversion of democracy. An obvious riposte to critics of judicial review is to point out that the power of judicial review is accorded to judges by "the people" through present day constitutional arrangements.

[42] Ibid.

[43] Johan Steyn, *Democracy Through Law: Selected Speeches and Judgments*, 2004, page 130.

they should be impartial in the discharge of their duties. In the context of the awesome power of judges to act in a counter-majoritarian way, the principle of impartiality

> … helps to remind judges that they have no rights, as an elected legislator may, to pursue an agenda that they conceive to be in the interests of society. They are adjudicators. They must approach the resolution of the parties' dispute without partiality towards either side. Nor must they be obedient to external interest.[42]

That is so whether those outside interests are political, cultural or religious.

Aside from impartiality, judges have a duty, as Lord Steyn has put it, "of reaching through reasoned debate the best attainable judgments in accordance with justice and law".[43] This may seem an obvious point, but one that is often overlooked. In cases where judges overturn the laws of democratically elected officials their decisions often have a ripple effect through society. That is because a decision, for instance, to strike down a statute that allows the death penalty, or to overturn a law—like the Texas statute I spoke of earlier—that proscribes punishment for sexual relations between homosexuals, is to act against sometimes overwhelming public support for such laws. All the more reason then for judges to engage critically and openly with the public's opinion and to explain why they refuse to be led by it. Critical scrutiny of the public's morality might reveal that the public's opinion is swayed by information which

> Article 14 of the International Covenant on Civil and Political Rights requires not only that **judges should be competent and independent,** but also that **they should be impartial in the discharge of their duties.**

[44] John Rawls, *Political Liberalism*, 1996, page 225. Since citizens are a disparate group who hold differing views on a variety of topics, meaningful debate cannot take place between them unless they first agree on the framework and tools that make debate possible. According to Rawls, when engaging in public reason citizens may rely only on "presently accepted general beliefs and forms of reasoning found in common sense, and the methods and conclusions of science when these are not controversial" (page 224).

[45] Ibid, at page 235.

[46] Ibid.

is false, fraught with prejudice, or mired in sentiment. In response, judges in a human rights age have the opportunity and responsibility to openly explain why such views are incorrect.

The type of persuasion that courts might employ can usefully be explained by what John Rawls calls "public reason". Rawls discusses public reason as a method of argument—a discourse of persuasion—and argues that people should engage in debate by using methods of reasoning which "rest on the plain truths now widely accepted, or available, to citizens generally."[44] This public reason is peculiarly suited to the court's work in a constitutional democracy. As Rawls has said,

> … the court's role is … to give due and continuing effect to public reason by serving as its institutional exemplar.[45]

While ordinary citizens and legislators are entitled to vote and debate on the strength of reasons that are not always public, the court has only public reason to rely on. Unlike citizens and legislators who may be influenced by majoritarian pulls and pushes, judges must "justify by public reason why they [decide] as they do" and "make their grounds consistent and fit them into a coherent constitutional view over the whole range of their decisions."[46]

The same point is made, for example, by Alexander Bickel who, commenting on the United States Supreme Court's power to effect social change, says that

> Aside from impartiality, judges have a duty, as Lord Steyn has put it, "of reaching through reasoned debate the best attainable judgments in accordance with justice and law".

[47] Quoted in Jack Greenberg, *Judicial Process and Social Change: Constitutional Litigation,* 1976, at page 556.

> … the Court is the place for principled judgment, disciplined by the method of reason familiar to the discourse of moral philosophy, and in constitutional adjudication, the place only for that, or else its insulation from the political process is inexplicable.[47]

Terrorism and judicial review as an essential component of democracy

This then brings me back to democracy. Contrary to the sceptics of judicial review who believe that such a power frustrates the will of the people, it will already be clear that I am of the view that judicial review is a vital ingredient for the attainment of true, inclusive democracy.

For one thing, a purposive or value-laden theory of constitutional interpretation is built on the idea of a novel institutional role for the judiciary. Its proponents acknowledge the counter-majoritarian nature of judicial review, but argue that such an institutional role is a prerequisite for the protection of individual rights. The counter-majoritarian difficulty is then not so much a problem, as it is a tool for true democracy. The courts, insulated from the populist strains of the political process are now the guardians of principle. While the collective welfare of the community is best left to the people to decide via a majoritarian legislature, rights *against* such a collective welfare are best determined by the judges who are insulated from the demands of the political majority whose interests would override minority rights.

Critical scrutiny of the public's morality might reveal that the public's opinion is swayed by information which is false, fraught with prejudice, or mired in sentiment. Judges in a human rights age have the opportunity and responsibility to openly explain why such views are incorrect.

[48] *S v Makwanyane* 1995 (3) SA 391 (CC) at paragraph 88.

[49] 319 US 624 63 Sct 1178 (1943) at 638.

[50] Ronald Dworkin, *Life's Dominion,* 1993, page 123.

Epitomising this view, former Chief Justice Chaskalson, in the judgment of the South African Constitutional Court which struck down the death penalty as unconstitutional, had the following to say about public opinion:[48]

> Public opinion may have some relevance to this inquiry, but in itself, it is no substitute for the duty vested in the courts to interpret the Constitution and to uphold its provisions without fear or favour. If public opinion were to be decisive there would be no need for constitutional adjudication. … The very reason for establishing the new legal order, and for vesting the power of judicial review of all legislation in the courts, was to protect the rights of minorities and others who cannot protect their rights adequately through the democratic process.

In a similar vein are the remarks of Justice Jackson in *West Virginia State Board of Education v Barnette and Others*:[49]

> The very purpose of a bill of rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of the majorities ... and to establish them as legal principles to be applied by the courts. One's right to life ... and other fundamental rights may not be submitted to (the) vote; they depend on the outcome of no elections.

This institutional role ensures that courts develop what Dworkin calls a "Constitution of Principle".[50] Such a

> Unlike citizens and legislators who may be influenced by majoritarian pulls and pushes, judges must "justify by public reason why they [decide] as they do" and "make their grounds consistent and fit them into a coherent constitutional view over the whole range of their decisions."

[51] Ibid.

[52] See the Islamic Human Rights Commission press release of 7 July 2005 at www.ihrc.org.uk.

constitution of principle, enforced by independent judges, is not undemocratic. On the contrary, it is a precondition of legitimate democracy that government is required to treat individual citizens as equals and to respect their fundamental liberties and dignity. As Dworkin points out,

> [u]nless those conditions are met, there can be no genuine democracy, because unless they are met, the majority has no legitimate moral title to govern.[51]

Nowhere has the importance of independent judges policing a constitution of principle become clearer than in the context of the ongoing threat and reality of terrorism. I say this in the same month that London has experienced the consequences of a series of bomb blasts killing many innocent civilians, and maiming many others. Nothing I say here could possibly be construed as making light of these horrific acts of violence, or of the responsibility imposed on the United Kingdom's and other governments to keep the public safe, or of the difficult and dangerous task performed by the police and intelligence services.

At the same time, it is all too easy for us to respond to such terror in a way which undermines commitment to our most deeply held values and convictions and which cheapens our right to call ourselves a civilised nation. Were it otherwise, it would not have been necessary for the Islamic Human Rights Commission to have reportedly warned London Muslims after the attack to stay at home for fear of reprisals.[52]

> Judicial review is a vital ingredient for the attainment of true, inclusive democracy.

[53] President Aharon Barak, "Foreword: A Judge on the Role of the Supreme Court in a Democracy", (2002) 116 *Harvard Law Review* 19, 160.

[54] [2004] UKHL 56, 16 December 2004.

[55] See the speech by Lady Justice Arden, "Human Rights in the Age of Terrorism", Third University of Essex and Clifford Chance Lecture, 27 January 2005.

[56] Lady Justice Arden points out that the speech of Lord Woolf in the Court of Appeal in *A v Secretary of State* was for instance referred to by the Supreme Court of India in December 2004: *People's Union of Civil Liberties v Union of India* 2003 SOL Case No 840.

The choice of options in response belongs to the executive or legislature. But these choices too are not unbridled. As the President of the Supreme Court of Israel has put it,

> [t]he court's role is to ensure the constitutionality and legality of the fight against terrorism. It must ensure that the war against terrorism is conducted within the framework of the law.[53]

There is an obvious conflict that arises between the need for national security and human rights. Recently the House of Lords in its decision in *A v Secretary of State for the Home Department*[54] has come to grapple with this conflict when faced with a challenge to indefinite detention of foreigners at Belmarsh prison, but not nationals, under the United Kingdom's Anti-terrorism, Crime and Security Act of 2001. The House ruled that such detention was a breach of the European Convention on Human Rights. It is a landmark decision, described by Lady Justice Arden[55] as a

> … decision that will be used as a point of reference by courts all over the world for decades to come,[56] even when the age of terrorism has passed. It is a powerful statement by the highest court in the land of what it means to live in a society where the executive is subject to the Rule of Law.

What the *A case* makes clear is that the government, even in times when there is a threat to national security, must act strictly in accordance with the law.

> While the collective welfare of the community is best left to the people to decide via a majoritarian legislature, rights against such a collective welfare are best determined by the judges who are insulated from the demands of the political majority whose interests would override minority rights.

I should add that the reaction of the general public to the decision in the *A case* has not been uniformly favourable. Lady Justice Arden has pointed out that

> [s]ome members of the public have expressed the view that the judges had taken over the government's role in deciding how to react to a terrorist threat.

Judges to educate the public and government

Of course the public has in this respect failed to appreciate that the outcome of the case was not driven by what the judges thought or felt about the appropriate reaction to a terrorist threat, but rather what the European Convention demands. I am accordingly in full agreement with Lady Justice Arden when she says that the decision in the *A case* should not be misinterpreted as a transfer of power from the executive to the judiciary. The position is that the judiciary now has the important task of reviewing executive action against the benchmark of human rights. Thus, the transfer of power is not to the judiciary but to the individual.

To my mind what the *A case* further demonstrates is the potential for judges to educate the public about the real meaning of democracy. In this age of human rights, constitutional courts the world over have found themselves cast as educators in a national forum. With each and

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[57] Eugene Rostow, "The Democratic Character of Judicial Review" (1952) 66 *Harvard Law Review* 193 at 208. See also Christopher Eisgruber, "Is the Supreme Court an Educative Institution?" (1992) 67 *New York University Law Review* 961; Ralph Lerner, "The Supreme Court as Republican Schoolmaster" (1967) *Supreme Court Review* 127; Alexander Bickel, *The Least Dangerous Branch*, 1962, page 26; Robert Bork, *The Tempting of America,* 1990, page 249.

[58] George Devenish, *A Commentary on the South African Bill of Rights,* 1999, page 4.

every contentious matter that these courts hear, judges are forced to grapple with opinions held by the public, often exemplified in parliamentary legislation subject to constitutional challenge. Judges are forced in their judgments to respond in a way that teaches citizens and government about the ethical responsibilities of being participants in a true democracy committed to universal human rights standards.

The statement by Rostow that the United States Supreme Court is, "among other things, an educational body, and the Justices are inevitably teachers in a vital national seminar",[57] is now equally appropriate with regard to all constitutional courts. The judges' role then is a complex amalgam in which

> … the judiciary becomes the guardian of the constitution and the system of democratic values and government it embodies, which involves the protection of individual and minority rights, and inevitably involves the disciplining of certain manifestations of majority rule.[58]

This is so even when—one might say particularly when—a nation is confronted by the threat of terrorism. A judge's decision becomes then the vehicle by which one arm of the government reminds citizens of what it means to live in a democratic society. In the *A case* Lord Bingham powerfully addressed this issue in the following passage:

> There is an obvious conflict that arises between the need for national security and human rights. The government, even in times when there is a threat to national security, must act strictly in accordance with the law.

[59] [2004] UKHL 56, at paragraph 42.

> I do not accept the distinction which [the Attorney General] drew between democratic institutions and the courts. It is of course true that the judges in this country are not elected and are not answerable to Parliament. It is also of course true … that Parliament, the executive and the courts have different functions. But the function of independent judges charged to interpret and apply the law is universally recognised as a cardinal feature of the modern democratic state, a cornerstone of the Rule of Law itself. The Attorney General is fully entitled to insist on the proper limits of judicial authority, but he is wrong to stigmatise judicial decision-making as in some way undemocratic. It is particularly inappropriate in a case such as the present in which Parliament has expressly legislated in section 6 of the 1998 [Human Rights] Act to render unlawful any act of a public authority, including a court, incompatible with a Convention right … . The 1998 Act gives the courts a very specific, wholly democratic mandate … .[59]

Another expression of this idea is provided by Professor Archibald Cox in his Chichele Lecture, delivered in Oxford in 1976. Discussing the role of the United States Supreme Court as a constitutional body, Cox said:

> Constitutional adjudication depends, I think, upon a delicate, symbiotic relationship. The Court must know us better than we know ourselves. Its opinions may, as I have said, sometimes be the voice of the spirit, reminding us of

> The judiciary now has the important task of reviewing executive action against the benchmark of human rights. Thus, the transfer of power is not to the judiciary but to the individual.

[60] *The Role of the Supreme Court in American Government*, Chichele Lectures, Oxford, 1976, at 117, quoted in MM Corbett "Aspects of the Role of Policy in the Evolution of Our Common Law" (1987) 104 SALJ 52, 67.

[61] Ronald Dworkin, *Life's Dominion*, 1993, at page 37.

[62] See too the views of Alan Hutchinson, "Reconceiving the Rule of Law" in David Dyzenhaus (ed), *Recrafting the Rule of Law: The Limits of Legal Order,* 1999, at page 196. Hutchinson argues that the critics of constitutional review are obsessed with majoritarian process. In other words, they are wary of judicial review because it interferes with "democracy" as reflected in majority politics and legislation. However, Hutchinson points out that "democracy" involves a substantive element which both justifies the power of government and limits what can be done in the name of majoritarianism (hence the term "constitutional democracy"). According to Hutchinson then:

> "Once the principle of democracy is accepted to have a substantive as well as formal dimension, the justification for judicial action must also be viewed in substantive as well as formal terms. The work of courts need not be judged by their capacity to be objective and impartial nor by their willingness to be consistent with and not interfere with majority politics. Instead they can be evaluated in terms of the value choices that they make and the contribution that their decisions make to the promotion of democracy in the here-and-now." (page 209)

[63] See Dworkin, *Life's Dominion*, 1993, esp pages 343–347.

> our better selves … But while the opinions of the Court can help to shape our national understanding of ourselves, the roots of its decisions must be already in the nation.[60]

This process, I would suggest, is democracy *affirming*, rather than democracy *limiting*. As Ronald Dworkin has emphasised with regard to the United States Constitution, a moral reading of the constitution demands that judges make contemporary judgments of political morality, and it therefore encourages an open display of the true grounds of judgment. Only with those true grounds of judgment out in the open do judges stand a hope of constructing "franker arguments of principle that allow the public to join in the argument."[61]

Dworkin argues that a government where citizens actively debate the principled issues of the day would be better realised when final decisions involving constitutional matters are removed from ordinary politics and left to the courts.[62] That is because ordinary politics generally prevent any reasoned argument from occurring, since such politics are usually aimed at political compromise between the most powerful groups. However, when an important constitutional issue has been decided by the Supreme Court, the debate around that issue is then forced to deal with the reasoned judgment of the court, and better achieves that vision of a government in which all citizens have a chance to engage in the "common venture" of public debate.[63]

> Judges in their judgments respond in a way that teaches citizens and government about the ethical responsibilities of being participants in a true democracy committed to universal human rights standards.

[64] See Hutchinson, "Reconceiving the Rule of Law", note 62, above.

[65] Ibid.

[66] See Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality*, 2000, at page i.

In contrast therefore to the depiction of a constitutional court as a "deviant institution" [64] by those who are fearful of its counter-majoritarian tendencies, it becomes more appealing to understand the court as a "democratic institution".[65] Its democratic potential lies not only in its guardian role of ensuring that a government "show equal concern for the fate of all those citizens over whom it claims dominion and from whom it claims allegiance";[66] it lies also in the vital and complementary role that judges can play in engaging with national issues so as to create a public dialogue about the core human rights values that lie at the heart of all inclusive, open democracies. In our troubled times, where terrorism, division, and suspicion of others are the order of the day, this role for judges is perhaps more vital than ever before.

The importance of cross-constitutional dialogue

In an age of human rights, the process of judging which I have been speaking about thus far is no longer one to be undertaken by national judiciaries in isolation. Today we can see the extent to which judging is now an international business. While reference to foreign and international law in United States cases may still be somewhat rare and controversial, the fact is, as Anne-Marie Slaughter has pointed out, there is a growing trend towards cross-constitutional discussion and learning with judges in Israel inspecting Canadian precedents on minority rights cases, and judges in the South African Constitutional Court

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[67] Anne-Marie Slaughter, "Judicial Globalisation", *Virginia Journal of International Law* 40 (2000); Anne-Marie Slaughter and David Bosco, "Plaintiff's Diplomacy", *Foreign Affairs* 79 (September/October 2000): 102.

[68] Johan Steyn, *Democracy Through Law: Selected Speeches and Judgments*, 2004, page 159.

[69] Claire L'Heureux-Dube, "The Importance of Dialogue: Globalisation and the International Impact of the Rehnquist Court", (1998) *Tulsa Law Journal* volume 15 at 17.

[70] Ibid, at 21.

[71] See Lord Goff of Chieveley, "The Future of the Common Law" (1997) 46 ICLQ 745 at 748.

studying German cases to interpret social and economic rights claims.[67] In the United Kingdom, both during the period of semi-incorporation of the European Convention on Human Rights before the Human Rights Act was passed and now most certainly after the Human Rights Act came into force, British lawyers and judges have looked to foreign and international law for guidance in human rights cases. That is not surprising when one connects, as does Lord Steyn, constitutional reform in the United Kingdom to the constitutional "renaissance" throughout the Commonwealth.[68]

There is an increased sophistication in and acceptance of what Canadian Supreme Court Justice Madame L'Hereux-Dube has called "dialogue": the practice of citing, analysing, relying on, or distinguishing the decisions of foreign and supranational tribunals.[69] Whereas the earlier practice was one of "reception"—newly created constitutional courts applying the reasoning of older tribunals, particularly British and American courts—Justice L'Hereux-Dube highlights that today judges live and practice a new trend: one in which courts look to a "broad spectrum of sources" and "mutually read, and discuss, each others' jurisprudence" in a transcultural constitutional dialogue.[70] In equal vein, Lord Goff of Chieveley has warned that

> [c]omparative law may have been the hobby of yesterday, but it is destined to become the science of tomorrow. We must welcome, rather than fear its influence.[71]

> A moral reading of the constitution demands that judges make contemporary judgments of political morality, and it therefore encourages an open display of the true grounds of judgment.

[72] Mark Tushnet, "The Possibilities of Comparative Constitutional Law" (1999) 108 *Yale Law Journal* 1225 at 1232.

[73] Ibid at 1232. See too Justice Breyer in his extrajudicial writings where he argues that reliance on international and transnational precedents aids United States constitutional interpretation, "simply because of the enormous value in any discipline of trying to learn from the similar experience of others": Stephen Breyer, Keynote Address, (2003) 97 ASIL Proc 265 at 267. See also La Forest J in her extrajudicial writings, "The Use of American Precedents in Canadian Courts" (1994) 46 *Maine Law Review* 211 at 220:

> "The greater use of foreign material affords another source, another tool for the construction of better judgments … The greater use of foreign materials by courts and counsels in all countries can, I think, only enhance their effectiveness and sophistication."

[74] See the special issue "Constitutional Borrowing" (2004), *International Journal of Constitutional Law*, vol 2, 1, 178, cited in Jolyon Ford, "International and Comparative Influence on the Rights Jurisprudence of South Africa's Constitutional Court", in Max du Plessis and Stephen Pete (eds), *Constitutional Democracy in South Africa 1994-2004*, 2004, Butterworths Lexis Nexis, Durban, at page 44, footnote 65.

This "science of tomorrow" is an important one, no doubt. It is important for all justices who preside over superior courts. As Mark Tushnet, a leading American constitutional scholar puts it, thinking about, and drawing from, the constitutional experience of other courts "can be part of the ordinary liberal education of thoughtful lawyers."[72] After all "if one believes that constitutional interpretation is the application of reason to problems of governance within a framework set out in the Constitution's words, experience elsewhere is relevant because it provides information that an interpreter committed to reason might find helpful".[73]

To believe otherwise is to cling to the implausible notion that a judge cannot expand his or her awareness and knowledge by drawing on other sources and experiences. Surely the importance of comparative constitutional lawyering—whether one is an American, British, South African or Malaysian judge—is its potential to act as "a counter to the natural, parochial tendencies of national constitutional theory, method, law"?[74]

In this context a leading academic has explained that:

> Confronting the power of others' ideas about common problems or concerns can contribute to a better intellectual product and can also impose the discipline of explanation upon the decision-maker. … Confrontation with and reasoning about the relevance and persuasive value of significant foreign decisions on analogous problems adds

> Today judges live and practice a new trend: one in which courts look to a "broad spectrum of sources" and "mutually read, and discuss, each others' jurisprudence" in a transcultural constitutional dialogue.

[75] VC Jackson, "Narratives of Federalism: Of Continuities and Comparative Constitutional Experiences" (1999) 51 *Duke Law Journal* 223 at 254–260; see also his statement that "even if the reasoning of the foreign court ultimately is rejected, explaining why it is inapplicable or wrong could improve the quality of the court's reasoning, making its choices more clear to the audience of lawyers, lower courts, legislators, and citizens". (Ibid)

> to the mechanisms of accountability, through reason giving.[75]

The fact of the matter is that the international nature of constitutionalised human rights means that domestic judges are engaged in a common exercise. Even as they seek solutions to local problems, they do so by drawing on an increasingly interconnected global set of standards, and by considering the experience of others who have faced similar issues.

I return again to the problem of terrorism. While each of the world's nations have localised responsibilities to their citizens to act against terrorism, the experience of others who face similar threats and have considered appropriate responses is of obvious importance. For instance, the House of Lords in the *A case* appears to have drawn inspiration from the findings of the Israeli Supreme Court which has developed a unique jurisprudence on the judicial approach to counter-terrorism laws. President Barak has given many judgments on this issue. One discerns a close parallel in thinking between the House of Lords in *A* and the oft-quoted passage in the ticking bomb case, in which President Barak said:

> We conclude this judgment by revisiting the harsh reality in which Israel finds itself …
>
> We are aware that this decision does not make it easier to deal with that reality. This is the fate of democracy, as not all means are acceptable to it, and not

> The importance of comparative constitutional lawyering is its potential to act as "a counter to the natural, parochial tendencies of national constitutional theory, method, law".

[76] Justice Michael Kirby, *Through the World's Eye,* 2000, Federation Press, Sydney, *Preface.*

> all methods employed by its enemies are always open before it. Sometimes, democracy must fight with one hand tied behind its back. Nonetheless, it has the upper hand. Preserving the Rule of Law and recognition of individual liberties constitute an important component of its understanding of security. At the end of the day, they strengthen its spirit and this strength allows it to overcome its difficulties.

I venture to suggest that such comparative learning is vital to democracies around the world. Our problems are not unconnected and our democratic aspirations are not dissimilar. As Justice Kirby of the Australian High Court has pointed out in his book *Through the World's Eye*, while we once may have seen "issues and problems through the prism of a village or a nation-state, especially if we were lawyers" today, in an age of human rights, "we see the challenges of our time through the world's eye".[76]

Conclusion

It has come time now for me to conclude. Although there are many that through their actions diminish the claim, I think it is important for us to stress that we do live in an age of human rights, in a human rights world. As my Matrix colleague Rabinder Singh QC has said:

> Since World War Two, in particular, the age-old problem of whether there are human rights and where they come from—whether from pure reason, natural law, divine

> This age brings with it huge potential for justices of the world's highest courts to speak a common language. Independent judges providing purposive interpretations of their country's most fundamental rights are an important component of any true democracy.

[77] Rabinder Singh, *The Future of Human Rights in the United Kingdom: Essays on Law and Practice*, 1997, at page 38.

> origin or universal custom—has been largely avoided, if not resolved, by the social fact that the international community has come to accept a set of principles as being of global application.[77]

This age brings with it huge potential for justices of the world's highest courts to speak a common language. Independent judges providing purposive interpretations of their country's most fundamental rights are an important component of any true democracy. As judges embark on constitutional interpretation they are afforded the chance to narrate the values that underpin the very essence of our humanity. This is not only a democratic role played by courts that act as guardians of the weakest, poorest, and most marginalised members of society against the hurly-burly of majoritarian politics. It is also a chance for judges to play a vital role as teachers in a national seminar on the topic of meaningful, inclusive democracy in the twenty-first century. In this role, the rhetorical possibility exists for judgments to draw upon relevant comparative and international rights experience to paint enriched and enriching tapestries of our common human rights and international law commitments.

We live in challenging times. Our institutions are under threat; our commitments to our deepest values are under pressure; our acceptance of difference and others is at a low point. It is at this time that our understanding of the importance of judges in a human rights age should be at its clearest. And it is at this time that our support for the difficult task that judges have to perform is at its highest.