Appraising the constitutional commitments to accountable, responsive and open governance and to freeing the potential of all: A tribute to Dr Beyers Naude*

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I am deeply humbled by being asked to deliver this lecture in memory of Dr Beyers Naude.

1 Introduction

I will begin this lecture by reflecting on one of the most challenging days in the life of Dr Beyers Naude, a day upon which he was subjected to the exercise of public power in its most abusive and unrestrained form. I will then plot the remarkable journey that the law has travelled since 1994 and will describe the manner in which public power is now regulated. I will then blight the picture somewhat by discussing the dichotomy between the requirements of the law and the actual manner in which public power is exercised. Suggestions will be made as to how to bridge the gap and I will end, given Dr Naude's commitment to a fairer society, with an assessment of the challenges that confront judges seeking to review governmental policy on the implementation of socio-economic rights.

2 'Black Wednesday'

On the 19th of October 1977, the Christian Institute (CI), Beyers Naude and a number of its employees were banned by the then Minister of Justice, Jimmy Kruger. The Minister of Justice was acting in terms of draconian and virtually unfettered powers bestowed upon him by a Parliament that passed these laws to silence the voices raised against its apartheid policies. It would be simplistic to attach too much opprobrium to the individual who exercised the power. He was simply acting out the

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wishes of his people. Detention without trial, bannings and restrictions had become the behavioural norm of the community in power which had convinced itself that it was fighting a just war. These laws wrenched individuals from their normal routines, often denied them the companionship of those with whom they interacted and imposed the harshest of burdens. Insidiously, bannings sought to reduce intellectual contact and in Dr Naude's case, he could not write anything for publication, had to cease all his work, could not be quoted in the press, could not meet socially with more than one person at a time and could not enter any school, university or other educational institution or any place where materials were being prepared for publication.[1] An authoritarian regime was seeking, by these actions, to preserve its order and crush a principled dissenter, a dissenter who had left its fold and stood against the tide.

The banning orders sought to silence him into irrelevance. The fact that, almost thirty-five years later, I am delivering a lecture in his honour at the University of Johannesburg, a leading South African university, is testimony to the failure of that task. But more importantly, it sends an unequivocal message to all those exercising public power that similar crass constraints and unjustifiable intrusions into the rights of people to silence voices that make us feel uncomfortable will also be doomed, in the long-term, to failure even though it may bring temporary pacification.

Years ago I read a judgment of the UN Committee on Civil and Political rights. Robert Faurisson, a French academic, argued that the Gayssot Acts which rendered the denial of the Holocaust in Nazi Germany an offence, unjustifiably infringed his freedom of expression. He denied the existence of homicidal gas chambers at Auschwitz. The Human Rights Committee[2] of the UN dismissed the application on the basis that the denial of the holocaust was the principle vehicle of anti-Semitism and the limitations on freedom of expression were justified. Much more powerful and evocative was the comment from one of the presiding officers[3] when justifying his decision to recuse himself. In a few lines he wrote that he was a child prisoner at the Auschwitz concentration camp, had lost his father and other relatives and it was proper that he recused himself. I wonder what dictators, violators of human rights and those carrying out their dictates would do if they truly understood the circle of life. The imprisoned child would rise to become a presiding officer in the Human Rights Committee and the vulnerable, banned and ostracised dissident would become a national hero in whose name lectures would be held at leading institutions for years to come.

Power and vulnerability are in equal measure transient concepts. The longevity of an institution is only guaranteed if it is legitimate and if governance

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[1]Collen Ryan *Beyers Naude Pilgrimage of faith* (1990) 2.
[2]*Robert Faurisson v France* No 550/1993 UN Doc CCPR/C/58/D/550/1993 (1996).
[3]See the statement by Mr Thomas Buergenthal.

is transparent, open, accountable and just. This does not make for easy governance, but contributes to better, more effective and enduring governance. It is staggering with what regularity these trite propositions seem to elude authoritarian rulers. By contrast, this is probably what gave people like Dr Naude the strength to continue in the toughest of hours.

But more than that, a man who chooses ostracism and hardship over a life of compliance and probably that of power obviously had an abundance of inner strength and an abiding commitment to principle. In the mid-Eighties, my wife and I were requested by Pravin Gordan, our present Minister of Finance, to teach members of the liberation organisations to disguise themselves quickly and effectively so that they could continue with their work and avoid being detected by the security police. Almost without exception, these persons possessed an inner strength, a vision and a commitment that was often reflected in their eyes. There was a quiet and steely determination in their demeanour and this more than anything else convinced me that the defeat of apartheid was inevitable.

Dr Naude and many other South Africans were subjected to the uncontrolled exercise of authoritarian public power. I have chosen the notion of accountable and responsive governance as the main theme primarily to plot the journey that we have travelled and what still needs to be accomplished.

In an article entitled 'Beyers Naude: Calvinist and catholic', the late Archbishop Dennis Hurley[4] stated that the title does not imply that Dr Naude had become a Catholic, but rather that the term catholic was being used in its general sense as being universal. He argued that what he sought to convey was that Dr Naude's Christian outlook and practice had acquired a universality that transcended barriers. Thus, getting people of various religious backgrounds to deliver this lecture is particularly apposite. Archbishop Hurley identified the Sharpeville tragedy on the 21st March 1960 and the Cottesloe Conference later that year as the seminal events that reshaped the life and thinking of Dr Naude.

Archbishop Hurley describes one of the central conundrums facing the church and other religious organisations in 1981. Some of the congregation believed that the church should not be involved in political and economic matters and that the spiritual life could be neatly compartmentalised from temporal matters. In addition, some felt that the Church has no mandate to govern the things of the world. The Archbishop gently refutes that stance and states:

> But the Church has been given a mandate to promote good behaviour and right relations between people which are woven of justice and love and this is extremely important in politics and economics. The Church without aspiring to political and economic power, has the responsibility of promoting ethical standards in politics and economics as in all aspects of human behaviour.

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[4]Hurley 'Beyers Naude: Calvinist and Catholic' in *Not without honour: Tribute to Beyers Naude* (1982) 70.

That remains true and powerful even today. Religious leaders must speak and speak out like religious leaders and diplomacy, legal subtleties, generalised sound bites and appeasement must be left to the politicians.

The fundamental premises or structures upon which our Constitution is built would sit very easily with the beliefs and values of people like Dr Naude and so many others who made monumental sacrifices in pursuit of a more caring and just society. The Constitution directly acknowledges these sacrifices and commits us to a vision of an open and democratic society based on human dignity, equality and freedom. The Constitution sees the attainment of such a society as the best monument to the memory of all those, like Dr Naude, who contributed to its realisation. Lectures of this nature allow us to acknowledge these visionaries of the past and to assess the extent to which the present possessors of power are remaining faithful to the testament and wishes of those visionaries as articulated in the Constitution.

3 The legal journey

The change from the apartheid system to the Interim Constitution and subsequently to the Final Constitution occurred without a break in the legal order, as the Tricameral Parliament voted in the Interim Constitution. The Interim Constitution, however, brought about revolutionary changes to the South African legal system. It entrenched the principle of equality and the notion of constitutional supremacy with a justiciable Bill of Rights.

The founding values of the Final Constitution[5] refer to human dignity, the achievement of equality and the advancement of human rights and freedoms. In addition, it commits our society to non-racialism and non-sexism. It recognises the supremacy of the Constitution and the rule of law. The constitutional order is premised on universal adult suffrage, regular elections, a multi-party system of democratic government and accountable, responsive and open governance. It is this last value which is the main theme of this paper.

The abiding message from the reports of the Truth and Reconciliation Commission is when unconstrained power is given, inevitably it will be abused and in the most egregious manner. Not only was Dr Naude banned, but the Christian Institute and several Black Consciousness organisations were declared unlawful organisations. The *World* and the *Weekend World* newspapers, which catered largely for black readers, were also closed down and the editor detained. A similar fate befell *Pro Veritate*, the Christian Institute's journal.[6] When an organisation was banned, all of its assets were forfeited to the state. This included the Cape Town and Johannesburg office buildings of the Christian

[5]Section 1 of the Constitution of the Republic of South Africa, 1996.
[6]*Pilgrimage of faith* (n 1) 3.

Institute. The ban fundamentally affected all the Christian Institute's[7] employees and smashed the organisation. It is probable that it was the unequivocal intention of the apartheid Parliament to give the Minister unconstrained power. The mass bans on 'Black Wednesday' were the direct and inevitable consequence of uncontrolled administrative power granted to political functionaries who perceived themselves as under threat.

The Interim and Final Constitutions articulate an appreciation of the human and moral cost of granting expansive and uncontrolled powers to functionaries, and repudiate this arrangement in ringing terms. Accountable, responsive and open governance was to be the bedrock upon which public power must be exercised. As the late Professor Etienne Mureinik pointed out, accountability and responsiveness prevent the notion of 'snapshot' democracy where the sum total of our interaction with those who exercise public power is when we vote once every five years.[8]

While the concepts of accountability and responsiveness overlap, cumulatively they are an acknowledgement that there has to be a dynamic, ongoing and effective discourse and interaction between those who exercise public power and those who are affected by that exercise. They also represent the recognition that the quality of decisions made by public functionaries is enhanced and improved by this interaction. It serves to check arrogance on the part of those in power by imposing the duty to consult, listen and substantiate their decisions. The component of accountability acknowledges that the people must be empowered to make representations and be listened to effectively. Responsiveness requires members of government to explain and justify their decisions in the light of the objectives they seek to achieve and the representations made by those whom they serve. It requires a demonstration that there is a rational and coherent link between the information and facts before government and the decision that is finally reached.

Our law regarding the regulation of public power, including that of administrative action, has undergone profound and revolutionary changes since 1994. Section 33 of the Final Constitution protects a cluster of rights related to administrative justice. It protects the right to lawful, reasonable and procedurally fair administrative action. In addition, everyone whose rights have been adversely affected by the administrative action is entitled to reasons. The Promotion of Administrative Justice Act of 2000 (PAJA)[9] has been enacted to give more content to these rights and provides the means of access to the right to just administrative action.

The requirement of procedural fairness is an inherently flexible concept and its content depends on the circumstances of the case. Along the continuum of

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[7] *Id* 189.

[8] Mureinik 'Reconsidering review: Participating and accountability in Bennett *et al Administrative law reform* (1993) 35.

[9] Promotion of Administrative Justice Act 3 of 2000.

procedural fairness, government office holders may simply be required to notify those who will be affected of the proposed administrative action, or this may escalate to making a written representation, an oral representation or, finally, to holding trial-like hearings. It requires that the people whose rights or legitimate expectations are going to be affected be given an opportunity to interact with or to speak to those in power before the decision is made.

Included in the concept of lawfulness is the requirement that the administrative action be reasonable. In *Bato Star*,[10] the Constitutional Court held that the test is whether the administrative decision is one which a reasonable authority could reach. The court of review is required to journey into the merits of the matter and to determine whether there was an adequate basis for the decision. The more coherent and thought through the justification for the decision was, the more likely it is that the decision would be deemed to be reasonable. In determining whether an administrative action is reasonable, regard must be had to the nature of the decision, the statutory objectives, the broader constitutional obligations and duties of government, whether a proper balance has been achieved between competing objectives, the impact on affected persons and the reasons given for the decision. Importantly, it opens up the reasoning process of the administration to scrutiny. This undoubtedly contributes to what has been referred to as a 'culture of justification'. However, in deference to the doctrine of separation of powers, the courts have to exercise caution in not straying beyond the bounds of reasonableness and trespassing onto the terrain of the executive and the administration.[11]

In addition, there is a responsibility to provide reasons where administrative action adversely affects rights. The right to reasons in section 33(2) of the Constitution is more hedged in with constraints than the other provisions of the right to just administrative action. One of the issues with which are confronted is whether the obligation to provide reasons is restricted to instances where rights are diminished or if it also applies to instances where rights are simply being determined. Practically, the issue is whether applicants for benefits or licences, who are applying for something that they did not have, are entitled to reasons if their applications are unsuccessful. In *Wessels v Minister of Justice and Constitutional Development*,[12] the High Court endorsed the view that that the determination theory applied and a Magistrate who had applied for a promotion and was not successful was entitled to reasons from the Minister of Justice and Constitutional Development.

The definition of 'administrative action' in section 1 of the PAJA is convoluted and confusing. It refers to a decision of an administrative nature that involves the

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[10] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 4 SA 490 (CC).
[11] Hoexter 'The future of judicial review in South African administrative law' (2000) 117 *SALJ* 484 at 501.
[12] 2010 1 SA 128 (GNP).

exercise of public power or the performance of a public function which adversely affects rights and has a direct external legal effect. Essentially, if a public official is exercising discretionary power and implementing legislation, it is likely to be administrative action. In short, as far as administrative action is concerned, the functionary is required, prior to making the decision, to act with procedural fairness, and she or he is obliged to make the decision in a lawful fashion, reasons have to be provided on request where rights are being diminished or determined, and the decision must be one which a reasonable decision-maker could make.

However, section 33 of the Constitution and the PAJA only apply to decisions of an administrative nature. What of decisions that are not administrative in nature, but that involve the exercise of public power and impact, sometimes significantly, on persons? The courts have developed the doctrine of legality to regulate executive and legislative power in order to oversee the exercise of public power in all its manifestations. The concept of legality finds expression in the rule of law and in other provisions of the Constitution. This is an evolving concept and includes the requirement that a public authority is constrained to acting within its powers and its actions will be deemed unlawful if it acts outside its powers.[13] In *Matsetla v The President RSA*,[14] the Constitutional Court held that the principle of legality does not include the duty to act procedurally fairly. There was an important dissent by Justice Ngcobo who was of the view that the duty to act procedurally fairly should be part of the principle of legality and that the exact content of the obligation will depend on the circumstances of the case. A further requirement of the principle of legality is that the decision must, from an objective perspective, be rationally related to the purpose for which the power is given.[15] In *Ryan Albutt*, the Constitutional Court set aside the decision of the President, based on the recommendations of the Pardon Reference Group, to pardon persons who did not participate in the Truth and Reconciliation Commission process. The objective of this process was to achieve national unity and reconciliation. Given that objective, the court held that it was irrational and unconstitutional to prevent the victims from making representations to the Pardon Reference Group and on that basis set aside the decisions to pardon. No doubt the concept of legality is an evolving one and its full impact will be incrementally felt. At present the standard of review under legality is that of rationality whereas the more exacting standard of reasonableness can be used in terms of the PAJA when reviewing administrative action. Thus, when the President pardons someone, the decision to pardon has to meet the less stringent standard of rationality as opposed to the higher standard of reasonableness.

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[13] *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Council* 1999 1 SA 374 (CC).
[14] *Matsethla v President RSA* 2008 1 BCLR 1 (CC).
[15] *Albutt v Centre for the Study of Violence and Reconciliation* 2010 5 BCLR 391 (CC).

In addition to regulating the exercise of public power by the administration and by the executive, the legislature must act rationally[16] within its powers[17] in a manner that facilitates public participation in the legislative process[18] and in accordance with the Constitution. If it fails to do so then its actions will be inconsistent with the Constitution and will be set aside. If it fails to do so then its actions will be inconsistent with the Constitution and will be set aside as in the *Hugh Glenister* case.[19]

In the last seventeen years, the law has journeyed from a haphazard and vulnerable state of judicial review to a comprehensive system of oversight over the exercise of public power. The vision of accountable, responsive and open governance embodied in the Constitution signalled a decisive break with the past. Imagine if Jimmy Kruger, as Minister of Justice, had been obliged to act procedurally fairly, to ensure that his decision to carry out an oppressive administrative act was lawful and reasonable and to provide reasons for his decision. These reasons would have had to demonstrate a logical coherence between the reasons reached and the requirements of the statute and the Constitution. In addition, the statute that empowered him to act would have to have been consistent with the Constitution in general and with an expansive Bill of Rights in particular.

We now have a relatively progressive legal regime in place to ensure accountability, responsiveness and openness. Such a legal regime is indispensable for a functioning constitutional democracy as it constrains the naked and arbitrary exercise of public power. Having lauded ourselves in making this journey, it would be indeed tempting to stop this lecture here. However, to stop here would be misleading and would paint but a part of the total picture and, hence, the rest of this lecture.

4 Ensuring the proper exercise of public power at source

The serious challenge that still confronts us relates to ensuring that public power is properly exercised at source and that the legal regime is not simply reactive, serving only to set aside unconstitutional decisions. We have a relatively inexperienced civil service making decisions with wide-ranging implications and having to comply with increasingly complex and intricate legal principles. A colleague described this as the 'tripwire effect'. There are a variety of legal norms that can trip up the unprepared administrator. When an administrative decision is set aside it carries a number of implications and this can be frustrating to both the

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[16] *New National Party of South Africa v Government of RSA*.
[17] *Fedsure v Greater Johannesburg Metropolitan Council* 1999 1 SA 374 (CC).
[18] *Matatiele Municipality v President RSA* 2006 5 BCLR 622 (CC).
[19] *Glenister v President of the RSA* 2011 7 BCLR 651 (CC)

administrator and to government. The law overseeing the exercise of public power has ridden ahead and we need to ensure that the capacity of the civil service to meet the demands of the law is supported. We all have a vested interest in this because if decisions are regularly set aside there will be an almost irresistible temptation to blame the law rather than to view this as a failure to act in accordance with, and a failure to abide by, the law. The net effect could be that the major gains made over the last 17 years in this area may, ultimately, be in jeopardy.

President Zuma's keynote address[20] to celebrate Freedom Day at the Union Buildings identified the benefits that state involvement was able to achieve in the lives of the most marginalised in South African society. According to the President, in 1994, 62% of households had access to clean water but this figure stands at 93% today, and in 1994, 50% of households had access to sanitation, and today 77% have access to adequate sanitation. Similarly, 36% of households had access to electricity in 1994, and today, this figure stands at 84%. Almost 15 million people have access to various forms of social grants. These statistics reveal progress towards the constitutional imperative of improving the quality of life and freeing the potential of all. However, the President's speech was also interpreted as a call for greater technical competence and experience in appointments to senior positions in the administration. The service delivery protests may be an indication that this statistical improvement is not adequate and greater urgency, skill and efficiency needs to be brought to the fore.

On the 'Fareed Zakaria GPS' (Global Public Square) show on CNN on Sunday 24th April 2011, interesting comments were made on the qualities of effective Chief Executive Officers. David Brooks, a *New York Times* columnist, discussed his research on successful CEOs. He found that they were a disparate group of people possessing many different qualities, but nearly all appeared to share the qualities of order, discipline and execution. If the rest of the world is moving towards emphasising these qualities then it is submitted that these must be salient factors to be considered in our context when making appointments. Given the inequality of our past a variety of factors need to be taken into account to redress past imbalances. I submit that appointments to managerial and leadership posts must achieve a proper equilibrium between factors aimed at affirming people and ensuring that those appointed can create and maintain ordered environments, be self-disciplined and are able to execute. The weight to be assigned to the various relevant factors will depend on the nature of job and its responsibilities.

By and large the appointment of judges has struck the appropriate balance. It is for this reason that the judiciary retains a significant degree of respect as being an institution that is independent, able and possessing integrity. I would submit that the African National Congress has a sufficiently large political majority

[20]Summary reported in the *Daily News* (2011-04-28).

to take the risk of appointing able and effective technocracts as administrators to implement its policies, and to avoid deployees. If there is not a significant improvement in the service delivered, it is more probable than not that protests would not be restricted to the local sphere of government.

Oversight bodies such as the chapter 9 institutions and the Public Service Commission must be strengthened. It is profoundly unproductive to create bodies and then to compromise their power either by staffing them with poor appointees or to undermine their effectiveness in other ways.

Recently a resurgent Office of the Public Protector found that the South African Police Service (SAPS) and the Department of Public Works had acted unlawfully and unconstitutionally in signing a lease agreement. The Public Protector concluded that the parties had engaged in maladministration and had dealt with public funds in a reckless manner. This is a stinging indictment of the SAPS and of the Department of Public Works by an office that was set up to support constitutional democracy. Various findings and recommendations have been made including the setting aside of the lease agreement. The report has practical and symbolic significance. At a practical level, public officials should not unlawfully and unjustifiably enrich others at taxpayers' expense or at the expense of the most marginalised members of society.

At a symbolic level, the manner in which government deals with these findings would be an indication of whether there is the discipline to govern within the confines of the Constitution and the rule of law. The Office of the Public Protector cannot make binding findings and order that the lease agreement be set aside as these would conflict with the doctrine of separation of powers. Other organs of state now have to take up the cudgels. However, the findings of the Public Protector are not without legal effect. The independence of the Public Protector is expressly protected in the Constitution. There is a direct constitutional duty on all organs of state to assist and protect the Office of the Public Protector and to ensure its independence, impartiality, effectiveness and dignity.[21] The same duty exists in respect of other chapter 9 institutions such as the South African Human Rights Commission and the Independent Electoral Commission. This constitutional responsibility would be violated if these findings are not carried forward by the relevant organs of state in a determined, purposeful and assiduous manner. A docile, compliant and servile Public Protector will be of absolutely no use to us. By way of contrast an independent, competent and effective Public Protector, the sort envisaged by our Constitution, would be able to contribute profoundly to the development of our constitutional democracy, to safeguarding our rights and to the realisation of the objectives of the Constitution. Accountable public servants will perform better than those who believe they can underperform with impunity.

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[21] Sections 181(2) and (3) of the Constitution.

If the investigation into the SAPS lease issue represents the high water mark of independence and aptitude, the investigation into the allegations involving PetroSA, an organ of state, and Imvume (Pty) Ltd represents the very antithesis of this. The latter investigation was carried out under the tenure of the predecessor of the present Public Protector. The full extent of the ineptitude, the timidity and the lack of commitment to carrying out effectively the constitutional and legislative mandate of the Public Protector was laid bare in the case brought by the *Mail and Guardian* against the Public Protector.[22] The *Mail and Guardian* reported that PetroSA transferred R 15 million to Imvume which, in turn, made a donation of R11 million to the ruling party, the African National Congress. In effect, the tenor of the newpaper's articles was that Imvume was used as a conduit to transfer state funds to the African National Congress and the Public Protector was requested to investigate whether this was the object of the exercise. The Public Protector reasoned that while it could investigate the activities of PetroSA, once the money passed to Imvume, it became private money and was outside the jurisdiction of the Public Protector. This simplistic analysis overlooked the fact that public money may have been improperly converted into private money. The court reminded us of the trite proposition that improper conversion of public money to private money amounts to an improper use of public funds.[23] The Public Protector found that the advance to Imvume was part of a commercial transaction and, at that point, abandoned the investigation. Because the Public Protector's investigation failed to delve into whether PetroSA intended the money to reach the African National Congress, the essence of the complaint was never addressed. The court's damning conclusion was that the investigation was so scant that it could not be deemed to have been an investigation. It was this that probably prompted the court to provide the following advice:[24]

> The office of the Public Protector is declared by the Constitution to be one that is independent and impartial, and the Constitution demands that its powers must be exercised 'without fear, favour or prejudice'. Those words are not mere material for rhetoric, as words of that kind are often used. The words mean what they say. Fulfilling their demands will call for courage at times, but it will always call for vigilance and conviction of purpose.

Timidity and meek acquiescence to the will of those in power cannot be characteristics of an effective Public Protector. The problem with the approach in PetroSA is that it signals to those exercising public power that they will not be held accountable by bodies like the Public Protector and they can behave with impunity. It, thus, not only allows one impropriety to go unaddressed, but it signals that similar behaviour in the future will also be countenanced. It encourages a

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[22] *Public Protector v Mail and Guardian* 2011 ZASCA 108.
[23] *Id* para 95.
[24] *Id* para 8.

pattern of deviant behaviour. Thus decisions of this nature fundamentally undermine the very objectives that bodies like the Public Protector are meant to achieve.

Chapter 9[25] institutions such as the Public Protector, the South African Human Rights Commission, the Independent Electoral Commission, the Commission for Gender Equality and others have the potential to play pivotal roles in strengthening our democracy and holding to account those that exercise public power. These institutions should be particularly accessible to those that do not have means to approach the courts directly. The reality has been that some of the institutions have performed reasonably, but others not. In July 2007, a Parliamentary *ad hoc* Committee on the Review of Chapter 9 and Associated Institutions chaired by Professor Kader Asmal[26] made a number of important recommendations on how to strengthen and improve these institutions. It included amalgamating some of the institutions to create better resourced and capacitated bodies to tackle the constitutional responsibilities and more effective reporting structures. It made the point that many of these bodies were created and designed to deal with the context South Africa faced in 1994. Much has changed since then and these bodies must reflect current needs and realities. This report represents the most comprehensive review undertaken of these institutions and yet there is no indication that its recommendations are being seriously interrogated and reflected upon. We need credible institutions and I submit that it would be unwise for us, having identified some of the challenges within these institutions, to allow some of them simply to limp along ineffectually as opposed to engaging in a dialogue that would result in more effective, more competent and better executing institutions.

The Asmal report provides an appropriate starting point for the re-evaluation of chapter 9 and associated institutions. If government is, for whatever reason, reluctant to do so, civil society organisations, universities and NGOs, especially those concerned with the protection of the rule of law, need to reopen this debate urgently. Our Constitution protects three types of democracy: representative democracy, participatory democracy and direct democracy. Representative democracy refers to us voting for our elected representatives, participatory democracy requires that opportunity be created for us to participate in decision-making processes and direct democracy allows us to express our views directly or through institutions. Civil society led by determined NGOs successfully engineered a fundamental shift in governmental policy regarding the treatment of people living with HIV and AIDS. The different types of democracy including court actions were used in pursuit of this objective. It is absolutely vital that we

[25]These are some of the institutions identified in chapter 9 of the Constitution and described as state institutions supporting constitutional democracy.

[26]Report of the Ad Hoc Committee on the Review of the Chapter 9 and Associated Institutions (2007).

have independent, credible, effective and competent institutions. The constitutional space exists for our voices to be heard in this regard and we must engage on an ongoing basis.

Perhaps a more mundane and practical suggestion would be for the Minister of Justice and Constitutional Development to make regulations for and appoint an advisory council in terms of section 10(2) of the PAJA. Such a council would focus on educating administrators and the public regarding Administrative Law and promoting the objective of making proper decisions at the source. The cost implications, delays and frustrations caused by administrative decisions being set aside must be staggering. In my opinion the cost occasioned by the establishment of an advisory council will be money well spent if it enables proper decisions to be made. My instinctive reaction is that not having an advisory council is something that we can ill afford.

We need to move to a position when those exercising public power worry less about whether they will be challenged in a court of law and more about whether their decision accords with the Constitution.

It was probably inevitable that the Christian Institute would move from being an organisation whose primary responsibility was to change white attitudes to an organisation that would provide support for the cause of justice, liberation and a more egalitarian and caring society.[27] This change in direction brought it into direct conflict with the apartheid state. This brings me to the second enquiry: to what extent are we succeeding in progressively improving the quality of life for all.

The right to equality is one of the central themes of our constitutional democracy. It is linked to the right to human dignity and the courts have stressed the interconnectedness between the right to equality, human dignity and socio-economic rights. A bill of rights would be ill suited to South Africa if it did not impose obligations to deliver on core socio-economic rights. Our Bill of Rights protects the right of access to housing, to health care, food, water and social security. Various rights of children are protected and there is a right to basic education and to further education which the state must through reasonable measures make progressively available. The objective is that the progressive realisation of these rights would reduce the unacceptable and dangerous levels of inequality in this society. Many years ago I wrote that there was a moral, political and constitutional imperative to achieve the progressive realisation of socio-economic rights. It is still morally necessary to address the disparity and poverty, there is a constitutional obligation to do so and those in power have to understand that the failure to do so will ultimately cost them politically.

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[27] De Gruchy 'A short history of the Christian Institute' in *Resistance and hope: South African essays in honour of Beyers Naude* (1985).

Very early on, the Constitutional Court held that socio-economic rights were not simply aspirational, but were enforceable.[28] They left to succeeding courts the question of how and the extent to which the rights are to be enforced, but were unequivocal that budgetary implications were not a bar to their enforceability. Individuals are immediately entitled to claim the benefit of civil and political rights such as the right to equality, expression and political activity. Socio-economic rights are differently structured. Thus, in terms of section 27 of the Constitution, everyone has the right of access to sufficient food and water. The state is obliged to take reasonable legislative and other measures within available resources to achieve the progressive realisation of these rights. The idea is that the state must work towards the full realisation of these rights over a period of time.

Another issue that has confronted us is whether to adopt the international standard of the enforceability of the minimum core content of the right. This refers to a minimum standard which must be progressively improved. Once the minimum core content is established, it becomes directly enforceable against the state. The right of access to sufficient food and water moves from being a relatively soft right to one which is enforceable at some level. This would mean that if the minimum core content of the right to water is deemed to be 50 litres per person per day, it becomes a hard right in that it can be directly enforceable against the state. After some reflection on the issue of the minimum core content in the *Grootboom*[29] case, the notion was rejected in favour of a more flexible standard of whether the government action was reasonable in the circumstances. In the *Treatment Action Campaign*[30] case, the Constitutional Court set aside the government's policy of not supplying nevirapine to indigent HIV positive mothers outside specific test sites. The court was careful in its order not to dictate the policy to be followed, but identified the shortcomings in government policy and allowed government to reformulate the policy. Recently the Constitutional Court had to consider its role in enforcing socio-economic rights in *Mazibuko v City of Johannesburg*.[31] Amongst the various demands of the applicant was the claim that the supply of 25 litres of water per person per day free of charge was inconsistent with the Constitution as it did not match the minimum quantity of water required for leading a dignified and decent human life. They contended that the minimum quantity of water should be 50 litres per person per day. The court found that if it were to find for the applicant in this regard it would be acknowledging and endorsing the enforceability of the minimum core content of socio-economic rights. Analysing the text of the Constitution, the court concluded that the obligation was to take reasonable legislative and other measures to

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[28] *Certification of the Constitution of the Republic of South Africa, 1996* (CCT 23/96) [1996] ZACC 26.
[29] *Government of the Republic of SA v Grootboom* 2001 1 SA 46 (CC).
[30] *Minister of Health v Treatment Action Campaign* 2002 5 SA 721 (CC).
[31] *Mazibuko v City of Johannesburg* 2010 3 BCLR 239 (CC)

progressively realise the right and not to provide sufficient water on demand. It emphasised the importance that the obligation be a flexible one as opposed to a rigid duty to meet the benchmark irrespective of context. From a broader constitutional perspective, it is the primary obligation of the legislature and the executive to determine an appropriate policy and then to execute it. They are then held accountable in democratic elections for their choices and for its implementation. When the courts exercise oversight, they must be cognisant of that.

This is the quintessential conundrum associated with enforcing socio-economic rights. When a court is interrogating whether a particular socio-economic right has been infringed, it is engaging in an exercise that is quite myopic. It does not have the capacity to consider all the implications on other constitutional imperatives. What would be the effect on the budget for roads if the obligation to supply free water is increased from 25 litres to 50 litres per person per day? It is these very choices that the elected representatives have to make and be held accountable for. Hence, the court retreated from an interpretation that would make some aspects of socio-economic rights immediately and directly enforceable regardless of the context. However the enquiry on reasonableness is a relatively substantive and sophisticated one. Government must fully explain and defend its policy choices, must consult with those affected, must demonstrate the steps that are being taken to implement the right, must ensure that the most marginalised are catered for and must regularly re-evaluate its policies. Thus underpinning this requirement is the obligation to be accountable and to be responsive to those who are affected by the policy choices.

Since 1994, our courts have had to make some difficult decisions, sometimes with serious political overtones. The primary responsibility for delivering on socio-economic rights is that of the elected leaders. Courts intervene if they act unreasonably but do not and should not determine governmental policy. Our interaction with the state structures must be informed by this realisation and by an understanding of the separation of responsibilities. The Gini Coefficent Index for 2010 indicates that South Africa still has a worrying level of inequality within its society.[32] The inequality would have been significantly worse had it not been for the expansive social grants scheme presently operational. We are a significant distance away from the egalitarian society promised by the Constitution.

I wonder what rating Dr Naude, and people like him, would give us for our efforts since 1994 to meet the objectives set out in the Constitution. I recently heard relatives of Dr Monty Naicker, one of the former leaders of the Natal Indian Congress (NIC), say that Dr Naicker would be deeply disappointed. On reflection I think people of this disposition are likely to be more magnanimous. I suspect that they will be disappointed that we are not further along the path in improving the

[32]South Africa was ranked the 10th most unequal society in 2010 with a Gini coefficient of .0578.

quality of lives of people. We have been magnificently extraordinary in part and disappointingly substandard in part. However I suspect that they will reflect on the massive inequality deficit that we have inherited, the immense challenges faced by this fledgling nation and on the various conflicting interests that need to be reconciled and on balance, determine that our performance as a nation has been passable thus far. I think we all owe it to the Dr Naudes of this country to improve the quality of the performance of this nation.