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**JUDGING UNDER A BILL OF RIGHTS**  
EBSWORTH MEMORIAL LECTURE, 24 JANUARY 2007

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**Justice Louis TC Harms\***

Thank you for the invitation. It is a great honour to deliver this lecture, the second in memory of the late Dame Ann Ebsworth.<sup>1</sup> I would also like to thank the audience for attending. Like accepting a judicial appointment, one tends to attend lectures like this out of a misplaced sense of duty.

There was some uncertainty about the date of the first lecture during the beginning of 2006 because the invited speaker, Michael Kirby, had been nominated as the Australian of the Year. To prevent a recurrence the organisers invited me. They knew that there was no chance of something similar happening to me.

My claims to fame are modest. One of them, let me state immediately, is not constitutional law. But I share something with Lord Denning: like him I ran a one-man commission of inquiry with political under- and overtones. His concerned Profumo; mine government-sponsored hit squads. Like him, I did not survive unscathed. My reputation in the words of Oscar Kokoschka died three times.

Because of the publicity surrounding the commission I was, with Mr Mandela, a runner-up as newsmaker of the year in 1990. Mr FW de Klerk won. At the time I was quite pleased with the award. Since then both of them went on to win the Nobel Prize; and I, not even a booby prize. Some years later, one Max was

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\* Judge of the Supreme Court of Appeal of South Africa. Professor Extraordinarius of Mercantile Law, University of the Free State, Bloemfontein.

1 This lecture honours Dame Ann Ebsworth who died in 2002 of cancer. She was but sixty-four years of age and was the first woman to be appointed directly to the Queen's Bench Division of the High Court.

nominated as the newsmaker of the year. Max, since deceased, was a gorilla at the Johannesburg Zoo. That hurt.

Under these circumstances I was somewhat apprehensive about accepting the invitation. It is a daunting task for someone with my background to address this audience; more so because I have to follow on the act of Michael Kirby. It is obviously absurd to attempt to imitate or eclipse a masterpiece (Vila-Matas). Since, as Barry Unsworth would have it, the truth lay in contradiction, I thought that I was expected to counterbalance Kirby.

He spoke about women at the bar and on the bench. One matter he failed to deal with was the origin of the discrimination against them. Let me deal with the omission. It all began with Calpurnia. She was a Roman lawyer. Dissatisfied with a ruling, the classics tell us, she turned her back on the Bench and lifted her toga – that was before the days of Victoria's Secrets. This led to the ban, which lasted for two millennia. Fortunately, there have been no reports of similar incidents since the removal of the ban.

Uplifting the ban did not lead to equality. For instance, it seems that the law reporters cannot come to grips with the fact that a woman could be a judge. The BAILII reports of the judgment in *Mark Jones v Welsh Rugby Union* refer to Dame Ann, as late as 1997, as *Mr Justice!*

### **Judging in general**

Having reached the age and stage where I can and should retire I have obviously formed some views about judging.

The great bullfighter, Belmonte, was once asked to explain his method of fighting.<sup>2</sup> He answered: "Well, I don't know! Honestly I don't. I don't know the

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2 Vila-Matas *Bartleby & Co* 157.

rules, nor do I believe in them. I feel bullfighting and, without worrying about the rules, I go about it in my own way."

The same applies to judging. It is, by and large, an unconscious act. And it is not only about law; it is primarily about facts. Once you have the facts, the law tends to take care of itself. That is unless you fall for what Sir Robert Megarry called the temptation of the Law by putting forth unappealable decisions of law or, in appeal judgments, by pontificating about irrelevant legal issues.<sup>3</sup>

Judges do not choose the facts unless they are dishonest. Occasionally a judge has a choice about the applicable law. Then, one would expect, the judge would act as any reasonable person would – apply the rule or interpretation that provides the fairest result.

What I intend to explore tonight is whether judging under a Bill of Rights is all that different from judging without one. If, at the end of it all, you conclude that I am an agnostic, deserving to be burnt at the stake, I shall not be surprised.

### **Introduction of a Bill of Rights**

Until 27 April 1994 we in South Africa had a 'supreme' parliament; and the function of courts was to enforce – and not to question – laws. On that date an interim Constitution came into effect which on 4 February 1997 was replaced by a final Constitution – how final is another issue. With this came a Bill of Rights. The Constitution is the 'supreme law' and, in its own terms, is the "cornerstone of democracy in South Africa". Importantly, law and conduct inconsistent with it is invalid, and the obligations imposed thereby must be fulfilled. It enshrines the rights of all people in the country and affirms the democratic values of human dignity, equality and freedom.

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3 Megarry 1980 *Austr LJ* 61.

The Bill of Rights can, with justification, be described as one of the most 'liberal' in the world. Given our history and given money, precedents and input from, amongst others, Canada, Germany and Scandinavia, it could hardly have been otherwise.

No one can doubt the value of a liberal Bill of Rights. The ability to scrutinise and declare laws of parliament invalid is awesome. The capacity to develop the common law is priceless. To be able to backchat when the lawgiver speaks – even coherently – is something to treasure. I would never wish to live under another system again.

But sometimes too much of a good thing can cause indigestion. This the Danes now know (I am not referring to their pork but to cartoons and the freedom of expression). A constitution can be too liberal or too democratic. For example, ours recognises eleven official languages and purports to give them equal status and protection. In addition, it requires the promotion of at least 15 others. This simply does not work.

Unfortunately, the word 'liberal' is undergoing a change of meaning. It is now used, usually with a racial undertone, as a synonym for 'rightwing'.<sup>4</sup>

One reason for the distrust of liberal values may be because African societal norms differ significantly from those of northern Europe – they are not inherently 'liberal' in the classical sense. The individual is less important than the community. For instance, communal property is the rule; not private ownership. In spite of what some Americans believe, a Bill of Rights designed for one community in a particular historical setting cannot, without complications, be adopted by another.<sup>5</sup>

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4 According to the Financial Times of 20 July 2006, the head of the national broadcaster said that "...the right, which in South Africa, is euphemistically and incorrectly referred to as liberal ...".

5 There are admittedly a number of third generation rights – some with compliments from India – entrenched in the Bill of Rights but, as I shall show, they have produced their own problems.

The Constitution requires of the judiciary to advance the values of an open and democratic society. Democracy is itself the highest political end (Lord Acton) unless one shares Malcolm Muggeridge's view that an autocracy tempered by the occasional assassination is somewhat better. Democracy is supposed to mean a government by the majority that respects the rights and interests of the minority. But the term is loaded; it means whatever one wants it to mean. As George Orwell once said:<sup>6</sup>

In the case of a word like *democracy*, not only is there no agreed definition, but an attempt to make one is resisted from all sides. It is almost universally felt that when we call a country democratic we are praising it: consequently the defenders of every kind of regime claim that it is a democracy, and fear that they might have to stop using that word if it were tied to any one meaning. Words of this kind are often used in a consciously dishonest way. That is, the person who uses them has his own private definition, but allows his hearer to think that he means something quite different.

Maybe I should not have been surprised when reading in a judgment that pre-litigation discovery is a "fitting philosophical approach to dispute resolution in an open and democratic society". Otherwise I am not sure what the effect of 'democracy' is on the interpretation of the Bill of Rights although I am reminded of the Rumanian law professor who was asked some years ago by a student to explain why the right to freedom of expression guaranteed by its Soviet-based Constitution was not the same as the right of freedom of speech one finds in, say, the USA. Replied the professor: We may have freedom of speech; but that does not mean that we have freedom *after* speech. The point is that a democratic constitution does not create a democracy. During November 2006, The Economist ranked South Africa as a 'defective democracy', even less democratic than Britain.

Bills of rights are by their very nature drafted in general terms and cannot be too specific to have any permanent value. They have to cater for future generations. A bill of rights is, contrary to what Justice Scalia believes, a living organism. Ours, it has been said, is not only a formal document regulating public power but it also embodies an objective, normative value system. However, as a legal document it says some things and doesn't say others. And

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6 Orwell *Politics and the English Language*.

it sometimes employs high-sounding words containing incompatible concepts.<sup>7</sup> This enables judges to fudge and jargon to replace principle. It also can lead to the politicisation of issues and judgments:

Constitutional cases [says Richard A Posner] in the open area are aptly regarded as 'political' because the Constitution is about politics and because cases in the open area are not susceptible of confident evaluation on the basis of professional legal norms. They can be decided only on the basis of a political judgment, and a political judgment cannot be called right or wrong by reference to legal norms...<sup>8</sup>

There is another downside. Politicians who are unwilling to make difficult or unpopular decisions are able to hide behind a bill of rights, not only when drafting it but also thereafter. For example, it is a matter of common knowledge that violent crime is endemic in South Africa – 18 000 murders during 2005 – and that we had the death penalty. In view of the popular support in the country for the retention of the death penalty, those who negotiated the bill of rights chose to avoid the issue. Instead, they left it to the courts to decide in the light of the relatively vague basic rights. They intentionally created what they called 'constructive ambiguities'. Now politicians can and do hide behind the judgment of the Constitutional Court, which declared it unconstitutional, if the matter is raised. And the courts and the Bill of Rights get the blame for the crime rate.

The equality provision in the Bill of Rights is, in the light of the country's history, at the forefront. Discrimination based on marital status or sexual orientation, amongst other factors, is specifically proscribed. In spite of this, government could not make up its mind how to deal with same-sex relationships. It had a few options but, because of its concern about the public acceptability of legislation, it simply sat back and waited for the Constitutional Court to tell it how to deal with the matter. When the deadline set by the Constitutional Court arrived a bill, said to comply with the Constitutional Court's prescripts, was rammed through Parliament without proper debate. Once again, responsibility for a political decision was shifted from the political arm of government where it belongs to the judicial, where it does not belong. Blame the courts, again.

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<sup>7</sup> Justice Young's phrase: (2006) 80 ALJ 148.

<sup>8</sup> Posner 2005 *Harv LR* 40.

Let me be clear about this: I do not favour the return to the death penalty and I do not object to the formalisation of same-sex relationships. I mention these examples to raise, without answering, the question of whether a bill of rights should reflect existing societal values or whether it should create them. The upside is that bills of rights remove the debate about basic rights from the democratic process because democracy, in the sense of majority rule, is inimical to the protection of classical liberal human rights.<sup>9</sup>

This tension between liberalism and democracy is acutely felt in judging. Add to that third generation rights such as rights to housing and the like. The Germans, as could be expected, made many thorough theoretical analyses of the issue. One writer came to the conclusion that judicial review is a practice suspended between notions of populism, progressivism, constitutionalism and democracy.<sup>10</sup> Democracy at least is not an –ism.

The power to strike down legislation has its own limitations. It may lead to chaos. For this reason the Constitutional Court uses a rule of prospective unconstitutionality: it declares laws unconstitutional from a future date. This gives rise to incongruous results because the successful litigant is in fact unsuccessful.

Another method to solve the problem caused by invalid legislation is to use interpretational devices to make the legislation compatible with the Constitution. These devices are called 'reading down', 'reading-in' and 'severance'. The effect of this is that explicit words of statutes are ignored.

As the Bard said about roses, a spade remains a spade even if called a shovel or a pitchfork. It goes further: The distinction between interpretation and legislation is fast disappearing and the separation of power, which is so fundamental to the Constitution and any bill of rights, is being eroded.

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9 Hayek *The Road to Serfdom* argues this point well.

10 Ulrich Haltren, discussed by Venter 2005 *ZaöRV* 129.



## Judicial activism and judicial realism

A bill of rights does not provide any justification for courts to disregard any legal rule, statutory or common-law. On the contrary, it is *the* reason why courts must act within the confines of legal rules. Many judges do not understand this. One finds a bit too often that judges use the Bill of Rights as an excuse for ignoring the law. The difference between the dictatorship of the proletariat and the dictatorship of the wig and gown is one of degree and not one of substance.

When speaking about 'judicial activism' a good starting point is the warning of Lord Bingham that "[c]onstitutional dangers exist no less in too little judicial activism as in too much".<sup>11</sup>

Somewhere [said Michael Kirby in Judicial Activism] between the spectre of a lawless judge, pursuing political ideas of his or her own from the judicial seat, irrespective of the law, and the idealised mechanic of the daydreams of the strict formalists, lies a place in which real judges perform their duties; neither wholly mechanical or excessive creative.

In general, I agree because he here equates judicial activism with judicial realism and not surrealism.

The lawless judge can pursue ideas other than political ones. And the lawless judge can also have a knee-jerk reaction to issues with which the judge is besotted. It is perplexing to know of judges whose answer to any particular problem, irrespective of the facts, irrespective of the law, and irrespective of the argument, is predictable.

Two further points may be made in this regard. First, as Justice Heydon observed, many modern judges think that they can not only right every social wrong, but are also able to achieve some form of immortality in doing so.<sup>12</sup> They disregard the 'principle of judicial modesty'. They are blissfully unaware of the fact that 75 percent of Americans know the names of two of Snow White's dwarfs but that only 25 per cent know the names of two Supreme Court giants.

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<sup>11</sup> *A v Home Secretary* [2005] 2 AC 68 par [41].

<sup>12</sup> *Barker* 2005 ALJ 783.

They write for selected newspapers and not for the law reports. It really is easy to write popular judgments; the unpopular ones require intellectual honesty.

The second point is that "the dignity of intelligence lies in recognising that it is limited; and that the universe exists outside it".<sup>13</sup> Judicial flashing and intellectual arrogance are too often part of the judicial armoury. The tutor of Emperor Marcus Aurelius (Epictetus) argued that we must distinguish between what lies within our power and what lies outside; we must learn to master the former and accept the latter.<sup>14</sup> Put differently, one should be the spectator of oneself always, at least a little (paraphrasing Ronald Firbank).

### **Courts old and new**

With the adoption of a constitution as the supreme law came a constitutional court. The result was two so-called apex courts, the Constitutional Court for constitutional issues and the other, the Supreme Court of Appeal (SCA), for all other matters. Initially our court (then still called the Appellate Division or AD) could not decide constitutional matters at all. That gave rise to so many problems that its jurisdiction was extended to include constitutional matters. With that came an appeal from the one apex court to the other.

The jurisdiction of the Constitutional Court is supposed to be limited to 'constitutional issues' and 'issues related thereto'. In fact it is unlimited. Implicitly the argument is along these lines: the Constitution is the *Grundnorm* of all law (common or statutory); because the common law derives its authority from the Constitution all common law rules raise constitutional issues. Because statutes derive their force from the Constitution, so, too, are all statutory issues constitutional. And since these legal issues can arise only in a factual context, all factual decisions are 'related to' constitutional issues.

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13 The Baron of Teive (Fernando Pessoa's one heteronym).

14 Grayling *The Heart of Things* 202.

## Judging or fudging

The common law has always provided (more or less) that everyone has the right to administrative action that is lawful, somewhat reasonable, and procedurally fair. This right has now been constitutionalised and is entrenched. Obviously, if a statute provides differently, it is invalid. Otherwise everything remains pretty much the same. Except this, one has to get used to a new vocabulary. Buzzwords such as accountability, transparency and proportionality abound. One has to write with circumlocution. Subsidiary legislation is not merely *ultra vires*. (Sorry, I forgot that Latin is strictly *verboten*.) No, one has first to refer to the principle of legality; throw in some quotes; mention that the Constitution is built on it; explain the break with the past; throw in more quotes; move to purposive construction; remember that context is everything; look at the provision through the prism of the Constitution; add further quotes; then see whether the enabling statute is compatible with the Constitution; make another analysis of the subsidiary legislation; reach for a thesaurus for adjectives and adverbs with a compassionate undertone; reach for the noter-up to pad footnotes; and so it goes on.

Verbosity is the name of the game. We have a problem with grandiosity; and we tend to embellish judgments with needless puffery (paraphrasing Posner). All this leads to 'staleness of imagery' and 'lack of precision' (again George Orwell). A prism, by the way, breaks up and bends light.

Benjamin Wittes remarked with reference to the US Supreme Court that:

The justices don't have to observe precedent, so they fudge doctrine. They don't have to describe facts accurately, so they take liberties. They don't have to restrain themselves, so they don't. And they don't have to write opinions rigorously enough to give precise guidance to the lower courts, which do not have the luxury of winging it. So they hand down opinions that sometimes leave the lower courts breathless with astonishment...<sup>15</sup>

Our common law was, and still is, Roman Dutch law, a system closely related to Scots law and suffused by natural law concepts. Bear in mind that its

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15 Quoted by Posner (n 8) 63.

greatest exponent was Hugo Grotius. Our constitutional law, however, was English law.

From these two great systems we inherited a large number of basic rights including equal justice, freedom, freedom of speech, dignity, and rights such as the right to privacy and the like. These rights were not entrenched, but the judiciary always saw it as its duty to protect them to the fullest extent possible.

Roman Dutch law can adapt itself to deal with new challenges and changing conditions consistent with its inherent basic principles. This enabled higher courts on sound policy grounds to change the direction of the law because "the law must be sensitive to human development and social change" and "judges must necessarily look to the present and to the future as well as to the past". On the other hand, the public requires certainty from our law rather than doctrinal purity or juristic rightness because the law is not seamless (as an Australian judge said).

In one of the leading cases in the Constitutional Court, Sir Sidney Kentridge, who sat on that court occasionally, made two important findings. First, one should, if possible, decide cases without reference to the Constitution, and second, the Constitution did not create rights retrospectively. Taking these points seriously, our court was soon faced with the problem of the press's liability for defamation in *Bogoshi*. It had during 1982, in *Pakendorf*, held the media strictly liable for factual inaccuracies. The series of defamatory articles in issue in *Bogoshi* were published in the main before the advent of the interim Constitution. We could not rely on its guarantee of freedom of expression. We had, consequently, to decide whether we could, as a matter of policy, overrule *Pakendorf*. We then took a conscious decision to overrule it, bringing our law more or less in line with later English developments in *Reynolds v Times Newspapers Ltd* [1999] UKHL 45 and *Jameel v Wall Street Journal Europe Sprl* [2006] UKHL 44. But some who read with blinkers, although happy with the result, were upset because we did not rely on constitutional values. We did not understand, says one learned professor, 'transformative constitutionalism'. He did not understand the facts of the case.

The *Pakendorf* judgment is also quoted by some as proof of the fact that the SA common law was "fundamentally affected by the cancer of apartheid". The problem is that the case had no racial undertones and our court thought that it was adopting English law.

By the way, a newspaper recently referred to the Anton Piller procedure as an apartheid era procedure.<sup>16</sup> So much for labels.

In another instance, a judge sought to create a rule about police liability "shaped by memory of that which lay at the very heart of our apartheid past". The SCA subsequently reminded him that his 'new' rule had been the law since at least 1912.

Not much different is a judgment by the SCA that decided that a 1972 judgment was right on the question of law – political office bearers can sue for defamation – but for good measure found that it had been wrong on the facts.

When the SCA held that a particular exemption clause or a non-variation clause was valid, according to the same professor it –

denied the fundamentally political, transformational nature of the constitution and the developments that are required by its adoption as the heart of the post-apartheid legal system.

Another academic was more lyrical. The judgment he said:

could have been mapped out in an Argentinean dance hall, so much it resembles a tango. The nimble little blind dancer, Justice, manages a tentative step forward once in a while only to be brutally reversed the length of the floor by her big, brutish partner, Business. Gliding along the floor she is subjected to a repetitive monologue, condemning her hopes and dreams as naïve and out of touch with reality.

By the way, the successful party was a widow who depended on the rental income and not big, brutish business. Once again, disagree if you wish with the

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16 The Citizen 14 September 2006.

result, but why introduce politics into the debate. A bill of rights is supposed to be apolitical. But then, I am probably judicially challenged and judiciously impaired.

### **Enforcing the Constitution**

Sir Hugh Laddie once remarked that "the courts are not a branch of social services whose job is to help the infirm or the unwise".<sup>17</sup> Under a bill of rights which emphasises social rights, this is not correct. Reading judgments, legal textbooks or law reviews nowadays can be confusing because it is difficult, if not impossible, to distinguish between law and the more esoteric social sciences.

The problem is how to enforce social rights without impinging on the doctrine of separation of powers in a country where the lack of capacity (human and financial) is a serious problem and where there is not enough to go round. So far the courts have been singularly ineffective in making a difference.

A group of rail commuters was able to claim a pyrrhic victory in the *Metrorail* case.<sup>18</sup> Travelling by train, in South Africa, is a dangerous venture attempted only by the audacious or the poor. Fed up, a group of commuters sought wide-ranging relief, including a declaratory order that the train operator had a statutory duty to provide proper security for passengers and that it had failed to do so in violation of a number of constitutional rights. They asked for a mandamus requiring the railways to implement certain safety measures. The main factual dispute was whether or not the steps in place were reasonable and what other steps could or should be taken. The ultimate order was once again a declaratory order, this time declaring that Metrorail had an obligation to ensure that reasonable measures are taken to provide for the security of rail commuters. Back to square one, I would have thought, and little comfort for the

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17 Laddie R in *Merck & Co Inc v Generics (UK) Ltd* [2003] EWHC 2842 (Pat).

18 *Rail Commuters Action Group v Transnet t/a Metrorail* 2005 (2) SA 359 (CC).

fourteen commuters who, during May 2006, were flung to their death from a train during a strike of security guards. Members of the pragmatic school of jurisprudence would be horrified, I suppose.

### **Developing the common law**

There rests a duty on courts to develop the common law in accordance with constitutional demands. What this entails, though, is not quite clear. Sometimes it may seem that if the result is unpalatable this jurisdiction is relied on without defining the new rule. And it may appear that the identity of the plaintiff or that of the defendant may play a role in this regard. To illustrate the point I intend to limit myself to a comparison between two cases in the field of vicarious liability. Yes, vicarious liability may be a constitutional issue. Well, at least sometimes.

In *Phoebus Apollo Aviation CC v Minister of Safety and Security*<sup>19</sup> the facts were, briefly, that Phoebus had been robbed of a very large amount of cash. The robbers buried the cash on land belonging to the father of one of the robbers. Three policemen who were not involved in the investigation of the robbery went to the premises on false pretences, in a police vehicle, and induced the father to hand over the cash. The money was never traced. The SCA held that the state was not vicariously liable for the wrongdoing of the policemen. And the Constitutional Court dismissed an appeal because the case did not raise a constitutional issue and because there was no reason, it said, why the common law should be developed so as to impose liability on the State for the conduct of its employees committed dishonestly and in pursuit of their own selfish interest. The court accepted counsel's concession that the common-law test for vicarious liability, as it stands, is consistent with the Constitution. And the court accepted that the application of this test to the facts of a particular case is not a question of law but one of fact pure and simple.

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19 2002 (5) SA 475 (SCA); 2003 (2) SA 34 (CC).

The outcome in *K v Minister of Safety and Security*<sup>20</sup> was different. K, a young woman, went out for an evening with her boyfriend. They left a pub at about midnight but then had an argument and the boyfriend refused to take her home. A police car drew up; three police officers in uniform were in the car. The driver asked her where she wanted to go and offered to take her home. She got into the vehicle. They took her to a remote spot where all three raped her. They were all convicted and are serving life sentences. K sued the state for damages, claiming that the Minister was vicariously liable for the wrongdoing of the three police officers. The SCA, following *Phoebus*, held that the state was not liable. The Constitutional Court held otherwise because the policemen, while committing the rapes, were acting for their own purposes, but at the same time neglected to perform their duties as policemen. Significantly the Constitutional Court said that vicarious liability is a question of policy with a constitutional dimension.

I do not wish to debate the right or wrong of either judgment. I just do not know what the 'new' common-law rule is supposed to be. If one has regard to the fact the United States Supreme Court is able to hold that exhibiting the Ten Commandments in a court building is unconstitutional but not if they are exhibited in a public park one can only conclude that constitutional judgments need not be consistent.

Let me recall the fate of the famous French chemist Antoine Lavoisier, also known as the father of modern chemistry, who lost his head – literally – in 1794. When the guillotine blade came down an inofficious bystander, Joseph-Louis le Grange, remarked that it took Lavoisier a second or so to lose his head but it will take France a few centuries to grow another one like his. Once you mess for the sake of the revolution with a rule that works it may take a long time to put matters right again.

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20 2005 (3) SA 179 (SCA); 2005 (9) BCLR 835 (CC).



## **Amending the Constitution**

Our Constitution – including the Bill of Rights – can, effectively, be amended with a two-third majority. And although government has never suggested an amendment to the Bill of Rights, the rest of the Constitution, which is the result of careful negotiations and which is supposed to be evolutionary and not revolutionary, is the object of regular amendment, on average twice yearly. This in itself is not necessarily a bad thing but some are concerned.

A bill of rights should, like the bell tower of Pisa, stand the test of time. Although built somewhat askew on an unstable foundation, and sagging, it should keep standing for hundreds of years, even if it requires to be propped up regularly. A bill of rights should not be like the Zimbabwe ruins: built perfectly but now in complete ruin and we do not even know who built it.

## **Conclusion**

I did not come to tell you about my judgments that had a constitutional element because, as Antoine de Saint-Exupéry said, "It is harder to judge oneself – and, one may add, the fruits of one's labours – than to judge others". I also did not come to tell you about all the great constitutional judgments our courts have delivered. Others have done so and will no doubt do so in the future. They may sometimes create the impression that we have invented the wheel, which is not quite true. What I did come to tell you, and you have experienced it already, is that judging under a bill of rights is sometimes different from judging without one, and it has its own challenges.

A bill of rights is very much like any sacred text – Bible, Koran or whatever. Any true believer appreciates it as the primary and ultimate source of law and ethics and it regulates one's life immutably. On the other hand, true believers tend to interpret such texts differently. The Calvinists find pre-destination in the same text where others find the free will. They can give rise to the philosophy of St Thomas Aquinas or the sophistry of his greatest critic, the 'subtle Scots doctor'

Duns Scotius. Most find in them things not said or intended. They are open to abuse. Even the devil can cite scripture for his (or her) own purpose.

One could write a history (wrote the Nobel Prize winner FA Hayek) of the decline of the Rule of Law, the disappearance of the *Rechtsstaat*, in terms of the progressive introduction of vague formulae like 'fair' and 'reasonable' into legislation and jurisdiction, and of the increasing arbitrariness and uncertainty of, and the consequent disrespect for, the law and the judicature.<sup>21</sup>

But that is not what a bill of rights is supposed to do. It is supposed to remove arbitrariness, not only of legislation but also of adjudication. It is supposed to create legal certainty, not uncertainty. It is supposed to create respect for the law and the judicature, not disrespect. That it can do – and usually does – if we as judges respect its spirit.

And for you on the Damascene road, ready to be blinded by a bill of rights, let me recall the words of Viscount Falkland (1641):

When it is not necessary to change, it is necessary not to change.

Coming to think of it, maybe I share something else with Lord Denning, in saying things that should rather have been left unsaid.

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21 Hayek (n 9) 81.

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