

**INAUGURAL GRIFFITHS AND VICTORIA MXENGE MEMORIAL
LECTURE**

**DELIVERED AT THE FACULTY OF LAW - NELSON MANDELA
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BY JUSTICE DIKGANG MOSENEKE**

**“ESTABLISHING SOCIAL CONSENSUS ON THE SHIFTING
BOUNDARIES BETWEEN JUDICIAL AND EXECUTIVE
FUNCTIONS OF THE STATE -
LESSONS FROM THE RECENT PAST”**

Introduction-

Professor Derrick Swartz, the Vice Chancellor of the Nelson Mandela Metropolitan University as well as the Professor Vivienne Lawack-Davids, the Executive Dean of the Faculty of law, I must at the outset make plain my happiness and gratitude. I am overjoyed by the initiative of the Faculty of Law to inaugurate this memorial lecture in order to remember and pay tribute to two remarkable compatriots, freedom fighters and indeed courageous civil rights lawyers. The memorial lecture series will not only keep alive the lessons of the courage and selflessness their lives so well epitomised but also will create space to engage in rigorous, if not robust, conversations about the elusive intersection between law and justice and society.

My gratitude stems from your kind invitation in asking me to deliver the first of the memorial lectures in the names of Griffiths and Victoria

Mxenge. I have accepted this assignment in recognition that it is an honour to be asked to pay tribute to so revered a pair of patriotic lawyers. I am not unaware of the quiet work of the Law School in putting together this special occasion. I am equally thankful that so many from the university community, its council members, staff members of the Law Faculty and post- and undergraduate students have made time to attend this lecture. I am thankful for the presence of our civic leaders from the mayoral committee. I know that some members of the advocates and attorneys professions who include colleagues from the Director of Public Prosecutions and the Master's Office have found time to be part of this occasion. I have no doubt that all of you are here to pay your due respect to the Mxenge family.

Before I turn to the task at hand, it is appropriate that I acknowledge members of our calling, fellow judges. Judge-President Somyalo, I truly appreciate your kindness and generosity of finding time in your pressing engagements and be here this evening. That goes too for my esteemed colleague Justice Thembile Skweyiya who tracked me all the way from the Constitutional Court, Johannesburg to NMMU. My appreciation also goes to Judges Kroon, Plasket and Dambuza and other judicial colleagues who may be here.

This evening I am minded to explore a perennial, if not intractable, discourse on the shifting boundaries between the judicial and executive functions of our state. It is commonplace that the judiciary and the executive government are arms of the state. They are deployed (that now famous word) to achieve constitutional ends. The

public power each wields derives from our supreme law. Our basic law confers on each far-reaching but intrinsically different genre of public power. Both arms are bound by and are obliged to exercise only the public functions and within the limits that the Constitution permits. There are of course powers which only the judiciary may exercise and others which only the executive may perform. However, there are judicial and executive functions which intersect in order to create checks and balances against an over-concentration or abuse of power and to exact accountability. In some instances the exercise of a judicial or executive function may be qualified or limited by self-restraint in order to avoid breaching the terrain of another arm of the state. It may be added that the constitutional text which confers functions to the judiciary and the executive is open ended may sometimes be capable of more than one plausible meaning.

For all of these reasons the contours of judicial and executive functions are not always clear. In practice, they are the subject of ongoing contestation. On occasion the judiciary and elements of civil society would point to perceived executive interference with the judicial function. On the other hand, the executive may complain about judicial trespass into its exclusive terrain. At the edges, the boundaries do shift; they are not cast in constitutional stone.

Recent events in our embryonic constitutional democracy have yielded stark illustrations of the contestation, albeit sometimes unwittingly, in the exercise of judicial and the executive power. The question must be asked whether, in instances of great social or

political contests that take the form of litigation, there is an emerging consensus within the broader community about the legitimacy of the manner in which judicial power is exercised. This lecture seeks to explore these shifting boundaries of public power and of public perceptions of the judiciary by drawing from lessons from the recent past. Before I do so, I pause to look briefly at the lives of the Mxenges.

Griffiths Mlungisi Mxenge

Griffiths Mlungisi Mxenge was the eldest son of Johnson Pinti and Hannah Nowise Mxenge. He was born in 1935. His parents were well respected peasant farmers of Rayi, a small rural settlement located barely 5 kilometers from King Williams Town. After his primary education from a local school, he obtained his secondary education at Forbes Grant Secondary School in Ginsburg and in 1956 matriculated at Newell High School in this very City. In 1959 he completed the BA degree at the University of Fort Hare majoring in Roman Dutch Law and English.

The rising levels of political consciousness and resistance of the 1950's must have had an abiding influence on his world view. It was at Fort Hare where Griffiths Mxenge joined the Youth League of the African National Congress. He would have been alive to the formation of the Youth League and its adoption of the 1949 Programme of Action. Like many African youth of his time he would have supported the Defiance Campaign of 1952. In 1955 the

Congress of the People was held in Kliptown and it adopted the Freedom Charter only a year before he matriculated. The pass campaign of 1960 led to the Sharpeville massacre. The government declared a state of emergency and banned the ANC, PAC and the Communist Party of South Africa. In 1961 the formation of Umkhonto we Sizwe (MK) and the African People's Liberation Army (APLA) were announced. All these momentous events occurred just after he had graduated from Fort Hare and he had registered the LLB degree at the University of Natal.

His LLB studies were interrupted when in 1965 he was detained for 190 days and later convicted under the Suppression of Communism Act¹ for his political activities within the ANC. "Boet Griffs", as I fondly called him, was brought to Robben Island on a two year imprisonment term. I was in my second of ten years of imprisonment. There we met. I had just started my studies in law through Unisa. Besides ideological debates and analyses of trends in resistance politics, the very bread and butter of political prisoners, I had much to learn from him as he had majored in Roman Dutch Law.

¹ 44 of 1950 (which has since been repealed). A "communist" in terms of the Act was:

"a person who professes to be a communist or who, after having been given a reasonable opportunity of making such representations as he may consider necessary, is deemed by the Governor-General or, in the case of an inhabitant of the territory of South-West Africa, by the Administrator of the said Territory, to be a communist on the ground that he is advocating, advising, defending or encouraging or has at any time after the date of commencement of this Act advocated, advised, defended or encouraged the achievement of any of the objects of communism or any act or omission which is calculated to further the achievement of any such object".

After his release from Robben Island he was served with a two year banning order which was followed by intermittent detentions including 109 days in solitary confinement. In time he completed the LLB degree, served articles and met all requirements for admission as an attorney. That however was not enough to gain him admission because of his previous political conviction. After many representations in 1975 he was duly admitted to practice law. He set up a practice in Durban.

I digress to recall something very personal. My wife Kabo and I, as newly wed, visited Durban during the very month that he had opened a law office. He together with Thembile Skweyiya, a young advocate at the time, and their spouses hosted us most generously. At dinner no one could miss his unwavering resolve to make a difference in the lives of others less fortunate and in the broader cause for a just society.

Let it suffice to record that his law practice was an unashamed mirror of his dedication to the achievement of democracy and freedom and the protection of the civil rights of his often beleaguered clients. He often swung into action to defend many activist of the time. Despite his well known ANC roots his law practice served all activists alike. A few examples should make the point. He appeared for Joseph Mdluli detained for *Mkhonto we Sizwe* activities. Mdluli died in police detention². Another client, Mapetla Mohapi of the *Black*

² On 19 March 1976, Joseph Mdluli died in police custody in Durban at the age of 50. He died within 24 hours of his detention. Two days after his death, a post-mortem examination was held;

Consciousness Movement died in police detention too.³ In the 1979 Boet Griffs was the instructing attorney in Bethal terrorism trial of the *Pan Africanist Congress* stalwart, Zephaniah Mothopeng and others.⁴ Predictably he briefed young Adv Skweyiya as counsel in the matter. Then I had just been admitted as an attorney in 1978, shortly after my release from Robben Island. As fate would have it, he appointed me as his Pretoria correspondent. There we were collaborating in defending PAC activists in jeopardy of very long prison sentences.

On the night of 19 November 1981, Boet Griffs was assassinated and his body was severely mutilated in an act of barbaric savagery. His murderers used three okapi knives, a hunting knife and a wheel spanner because they were ordered not to kill him with a gun. They inflicted 45 lacerations and stab wounds that pierced his body, lungs, liver and heart. They slit his throat and cut off his ears. They ripped open his stomach.⁵ The magistrate who sat in the inquest into his

however, a private pathologist appointed by his family was excluded from the examination. Four police interrogators were accused of culpable homicide in relation to his death, but they were acquitted. After the trial, a judge commented that the wounds on his neck were "most probably" inflicted by police. See <http://www.sahistory.org.za/pages/library-resources/online%20books/biko-no46/xiii-courts.htm> and <http://www.time.com/time/magazine/article/0,9171,879773,00.html>.

³ On 5 August 1976, Mapetla Mohapi died in police custody. Upon his death, police produced a "suicide note", claiming he had committed suicide in his cell. An inquest held later did not make a finding on the suicide claim - the note was confirmed by a leading British handwriting expert as forgery but found that no one could be held responsible for Mohapi's death. See http://www.thepresidency.gov.za/orders_list.asp?show=205.

⁴ 1979 (2) SA 180 (T).

⁵ TRC Hearing on the death of Griffiths Mxenge available at http://www.sahistory.org.za/pages/library-resources/official%20docs/1997_TRC-hearing-mxenge-murder.htm. Also see: D Coetzee-*Vlakplaas and the Murder of Griffiths Mxenge*, Pretoria, 1994 and J Manenzhe *The Politicization of Funerals in South Africa During the 20th Century (1900 – 1994)* MA Thesis in History, University of Pretoria, January 2007.

death found that his death was caused by “the act of some unknown person or persons.”⁶

His murderers are now known. They are self confessed. They are Dirk Coetzee, Almond Nofomela, Joe Mamasela, Brian Ngqulunga and David Tshikalanga. All were policemen and agents of the apartheid government’s death squads. In 1996, 15 years later the Amnesty Committee of the Truth and Reconciliation Commission granted them amnesty. The record of the hearing on the death of Griffiths Mxenge before the Amnesty Committee contains the confessions of his murderers. The confessions make harrowing reading⁷. They amount to a chilling account a state that had lost its way; that had forsaken the rule of law and justice in favour of brutality, terror and murder against its political adversaries.

Victoria Mxenge

Victoria Nonyamezelo Mxenge was born in 1942 in Tamara Village in King William Town to the late Wilmot Goso and Nobantu Ntebe. After completing her primary education at Tamara, she went to Forbes Grant Secondary School where she completed the junior certificate and in 1959 she matriculated at Healdtown. She later qualified as a nurse at Victoria Hospital in 1964 and moved to Natal soon after marrying Griffiths Mxenge. As we already know, her husband was whisked away to Robben Island not long after their marriage. She

⁶ G Mona “Mxenge, Griffiths Mlungisi Kind William’s Town, 27 February 1935 – Durban, 19 November 1982” in *New Dictionary of SA Biography* at 150.

⁷ See note 5 above.

completed a midwifery course at King Edward Hospital and took up service as a community nurse in Umlazi. She however studied law by long distance tuition through Unisa.

In 1981, some five years after her husband had set up practice she acquired legal qualifications, joined the practice and was subsequently admitted as an attorney. As we now know, her husband was murdered in November 1981. It fell on her to identify his mutilated body at a government mortuary the morning after his murder. Her direct confrontation with the repressive system had come. She vehemently refuted the claim of police general Coetzee that her husband had been murdered by the ANC. In fact the ANC issued a public statement from Lusaka decrying his murder and paying tribute to his inestimable contribution in the struggle.⁸ Victoria Mxenge publicly vowed never to rest until the truth about her husband's murder is known. That was not to be.

After the passing on of her husband, Sis Victoria displayed remarkable courage and dedication not only in her law practice but also in the cause for equality freedom and democracy. She shouldered on with the law practice with amazing fortitude whilst fending for their two sons, Mbasu and Viwe and one daughter Namhla who were 15, 10 and 6 when he died. Her practice too reflected her political and social activism. She often intervened to protect youth ill-treated in detention. She was part of the defence

⁸ <http://www.anc.org.za/show.php?doc=ancdocs/history/or/or81-17.html>.

team in the treason trial against leaders of the United Democratic Front and the Natal Indian Congress in the Pietermaritzburg Supreme Court.

Sis Victoria played an increasingly prominent role in the struggle for liberation. She started a bursary fund in memory of her husband. She became a member of the Release Nelson Mandela Committee, the National Organisation of Women and the Natal Treasurer of the UDF. In July 1985 she was invited to speak at the funeral of Matthew Goniwe, Fort Calata, Sparrow Mkhonto and Sicelo Mhlauli (also known as the Craddock Four) attended by approximately 50, 000 mourners to mark the death of activists who had been murdered. Amidst the endemic assassination of activists she was not deterred. She mustered the courage to call the murders “dastardly acts of cowardice” and that the murdered four must “tell [their] grandfather [that] we are coming because we are prepared to die for Africa”⁹

Within days of the funeral speech, on 1 August 1985, Mrs Mxenge was attacked by four men in the driveway of her home in Umlazi, Durban and murdered in front of her minor children. She was laid to rest next to her husband at Rayi Cemetery in the presence of 10, 000.00 mourners. That was a mark of her sway within the community. Messages of condolence from Nelson Mandela in prison and Oliver Tambo in exile were read at the funeral.¹⁰ It is variously

⁹ G Mona “Mxenge, Victoria Nonyamezelo Kind William’s Town, 1 January 1942 – Durban, 1985” in New Dictionary of SA Biography at 151 to 152.

¹⁰ http://www.thepresidency.gov.za/orders_list.asp?show=420.

documented that large scale unrest in Natal from the time of her death through to 1987 was associated with protest connected with her brutal murder. Not even the state of emergency of June 2006 inhibited the sporadic unrest in the Durban and Pietermaritzburg areas.¹¹

In 1987 the inquest magistrate refused a formal inquest hearing but held that she had died from head injuries and had been murdered by persons unknown.¹² The Truth and Reconciliation Report on the assassination of Victoria Mxenge records that one Marvin Sefako (alias Bongi Raymond Malinga) was allegedly recruited by the security branch and that Brigadier Peter Swanepoel was his handler. Malinga allegedly confessed that he had killed Victoria Mxenge. Malinga is said to have claimed that he shot her five times in the chest, but she never fell and that he followed her with an axe and chopped her next to her dining room door. The TRC Report contains no indication whether any person had applied for or had been granted amnesty in relation to her murder.¹³

In 2006, Griffiths and Victoria Mxenge were awarded posthumously the national order known as the Order of Luthuli in Silver for their excellent contribution to the field of law and sacrifices made in the

¹¹ <http://www.ebandlakzn.co.za/site/awdep.asp?dealer=7037&depnum=52005>, http://www.thepresidency.gov.za/orders_list.asp?show=420. See the Truth and Reconciliation Commission Report (TRC Report) on the aftermath of the assassination of Victoria Mxenge, volume 3, chapter 3, page 232 – 241. <http://www.justice.gov.za/trc/report/finalreport>.

¹² http://www.sahistory.org.za/pages/library-resources/official%20docs/1997_TRC-hearing-mxenge-murder.htm; <http://www.durban.gov.za/durban/discover/history/famous/politics/mxenge>.

¹³ TRC Report, volume 3, chapter 3, page 232.

fight against apartheid oppression in South Africa. The citation aptly records that “they paid the supreme price for defending the rights of the oppressed South Africans to exist in conditions of freedom, justice, peace and democracy.” The citation continues to note that that “as husband and wife, they forfeited family life in pursuit of the broader family of humanity, united under non-racialism, non-sexism and justice for all South Africans.”¹⁴

Broad social consensus

This nightmarish account of our past reminds us that law has played a very important role in our history. Apartheid oppression was itself a collection of laws which were harnessed to achieve unjust economic and political ends. The government, its security apparatuses and courts were obliged by laws of a sovereign minority parliament to give effect to apartheid. Unjust as the system was it always hankered for a veneer of the rule of law. However, in the eyes of the majority of people there was no rational divide between law and politics. Law served narrow political ends and courts were seen as mere instruments. In the process their legitimacy suffered and waned. For that reason, and as we have seen through the lives of Griffiths and Victoria Mxenge, spirited political struggles were prosecuted in courts and through the law. Activists too used courts and the law to proclaim their cause. This point is made rather sharply by Dennis

¹⁴ http://www.thepresidency.gov.za/orders_list.asp?show=420.

Davis and Michelle Le Roux in *Precedent and Possibility*.¹⁵ They correctly observe that:

“During the long night of apartheid, courts were often sites of vigorous political struggle, being places where different visions of the country were presented to the public by competing litigants, usually the state against accused persons or applicants whose rights were at stake. Since 1994, and the advent of constitutional democracy, similarly significant contests have taken place in the courts. There is however a major difference: Litigation now takes place within the context of the Constitution which provides a vast range of rights for all who live in the country.”

That ‘major difference’ is the advent of constitutional democracy which was forged on the anvil of division and past injustice and economic inequity. The Constitution does not only establish its supremacy, rule of law and fundamental rights but also recites our collective convictions. It contains our most recent and joint ideological and normative choices of what a good society should be. It enjoins all to take reasonable steps without undue delay to achieve that good society. The virtuous society envisioned has a significant social democratic flavour. It protects and advances fair labour practices. It compels all to preserve an environment that is not harmful; for the benefit of present and future generations. It does not

¹⁵ Davis and Le Roux *Precedent and Possibility-The (Ab)use of Law in South Africa* (Juta, Cape Town 2009) at p 1.

permit arbitrary deprivation of property but permits expropriation and redistribution of land for public good provided that it is against just and equitable compensation. The envisioned society set itself firmly against poverty, ill health and ignorance. This it does by promising everyone the right to have access to adequate housing, healthcare, food, water and social security subject to available resources and progressive realisation. A child's best interests are of paramount importance in every matter concerning it. And everyone has a right to basic education including adult basic education. What is more, in our constitutional arrangements all of these aspects of our ideal society are justiciable before courts.

It must follow from what I have said that the tenets of our constitutional democracy adopted in 1994 constitute the most recent reliable and binding social consensus on what a fully transformed society would look like. The elusive question is not whether or not there is a social consensus but rather whether the internal boundaries between judicial and executive functions are properly suited to deepening democracy through our constitutional project. In order to understand better the boundaries we must first examine the manner in which our Constitution apportions public power.

Separation of powers

The principal public instruments for the reconstruction of our society are the state and its organs. The 1996 Constitution makes no express provision for separation of powers. It is however self evident

from its architecture and dispersal of public powers that the Constitution creates legislative, executive and judicial functions. In parliament and provincial legislatures vests the law-making authority.¹⁶ The executive authority vests in the President who exercises it together with other members of the cabinet.¹⁷ The judicial authority is vested in the courts.

In the First Certification judgment of 1996, the Constitutional Court found that the new Constitution did provide for separation of powers:

“There is, however, no universal model of separation of powers and in democratic systems of government in which checks and balances result in the imposition of

¹⁶ Section 43 of the Constitution provides:

“In the Republic, the legislative authority-

- (a) of the national sphere of government is vested in Parliament, as set out in section 44;
- (b) of the provincial sphere of government is vested in the provincial legislatures, as set out in section 104; and
- (c) of the local sphere of government is vested in the Municipal Councils, as set out in section 156.”

¹⁷ Section 85 of the Constitution provides:

- (1) The executive authority of the Republic is vested in the President.
- (2) The President exercises the executive authority, together with the other members of the Cabinet, by-
 - (a) implementing national legislation except where the Constitution or an Act of Parliament provides otherwise;
 - (b) developing and implementing national policy;
 - (c) co-ordinating the functions of state departments and administrations;
 - (d) preparing and initiating legislation; and
 - (e) performing any other executive function provided for in the Constitution or in national legislation.”

restraints by one branch of government upon another, there is no separation that is absolute.”

It continued—

“[t]he principle of separation of powers, on the one hand, recognises the functional independence of branches of government. On the other hand, the principle of checks and balances focuses on the desirability of ensuring that the constitutional order, as a totality, prevents the branches of government from usurping power from one another. In this sense it anticipates the necessary or unavoidable intrusion of one branch on the terrain of another. No constitutional scheme can reflect a complete separation of powers: the scheme is always one of partial separation.”¹⁸

In *Doctors for Life*¹⁹ the Court explained separation of powers and the role of courts in the following manner:

“The structure of the provisions entrusting and separating powers between the legislative, executive and judicial branches reflects the concept of separation of powers. The principle ‘has important consequences for the way in

¹⁸ Id at para 109. In *De Lange v Smuts NO and Others* [1998] ZACC 6; 1998 (3) SA 785; 1998 (7) BCLR 779, Ackermann J again observed repeated that there is no universal model of separation of powers.

¹⁹ *Doctors for Life International v Speaker of the National Assembly and Others* [2006] ZACC 11; 2006 (6) SA 416 (CC); 2006 (12) BCLR 1399 (CC).

which and the institutions by which power can be exercised'. Courts must be conscious of the vital limits on judicial authority and the Constitution's design to leave certain matters to other branches of government. They too must observe the constitutional limits of their authority. This means that the Judiciary should not interfere in the processes of other branches of government unless to do so is mandated by the Constitution."

It is indeed so that there is no universal model of separation of powers in a constitutional democracy. Correctly so, our Courts are developing a distinctively South African design of separation of powers. It must be a design which in the first instance is in harmony with our Constitution itself.

Professor Vile in the seminal work *Constitutionalism and the Separation of Powers*,²⁰ distinguishes three elements of the doctrine. First, is the distinction of the legislative, executive and judicial functions of the state. Second, is the separation of agencies that create "autonomous centres of power that will develop an institutional interest" and thereby the state being checked internally. And, third, is the separation of persons in a way that the three branches are composed of separate and distinct groups of people with no

²⁰ M Vile *Constitutionalism and the Separation of Powers* (2nd ed.) (Indianapolis, Liberty Fund 1998).

overlapping membership.²¹ These three elements are often seen as negative methods of checking arbitrary rule. Professor Vile suggests that there is the positive mechanism of checks and balances which in essence permits the separate arms of the state to interfere partially in the affairs of the others. An obvious example of this positive mechanism would be the power of judicial review which courts exercise over executive decisions.

In my view our model of separation of power must also recognise that constitutional adjudication has far reaching impact on the manner in which the country should be governed in all spheres and at all levels. Judges are obliged to decide on disputes with and between organs of state, decisions on the validity of executive decisions and conduct; the constitutional validity of legislation; constitutional challenges related to elections and amendments to the Constitution. All of these matters have political implications in the sense that they relate to conduct of politically elected or appointed executive or legislative functionaries.²² It is thus self evident that conflict between the judiciary and the executive or the legislature is inevitable. This contestation, however, has been foreshadowed by the Constitution.

²¹ For this summary I am indebted to Rautenbach et al(ed) *Politics, Socio-Economic issues and Culture in Constitutional Adjudication*, A Resource Manual published by the faculty of Law North-West University, November 2004.

²² Here, I am however not using the word politics in the narrow sense of the express or implied support for specific political party or formation.

The Constitution seems to make an express election in resolving the inevitable political implications of judicial activity. It provides that courts are independent and subject only to the Constitution and the law. It is crucial to emphasise that courts are bound by the democratic will of the people as expressed in legislative instruments that are constitutionally compliant. Courts may not depart from valid legislation, executive decisions or policy in preference to their own worldview. They must apply the law impartially. The Constitution requires that no person or organ of state may interfere with the functioning of the courts. If anything, they must assist and protect courts and obey their final decisions.²³

This however is not the end of the matter. Our model of separation of powers must strike equilibrium between rigorous judicial review, on the one hand, and the historic need for effective executive government to pursue reconstruction and development of society. The balance must be struck without relinquishing the rule of law requirement that all public power must be sourced from the law. Our system of separation of powers must give due deference to the popular will as expressed legislatively or through executive decisions and policies provided that the laws, decisions and policies are consistent with constitutional dictates.

²³ Section 165(1) of the Constitution provides:

“(1) The judicial authority of the Republic is vested in the courts.”

This observation is prompted in part by ‘counter-majoritarian dilemma’.²⁴ Judges are not elected democratically and yet the Constitution itself entrusts them with the authority to invalidate any law or conduct that is unconstitutional. This authority to upset a legislative or executive choice must be exercised sparingly and in clear case of unconstitutionality. The judicial officer must decide according to the facts and the law and not according to subjective predilection.²⁵ A judge must put any party political loyalties behind her or him on elevation to the bench. Experience teaches that judges worthy of the office do. And above all, a decision on the unconstitutionality of the conduct of another arm of the state must be clear, strongly motivated and accurate on the nature and extent of the impugned unconstitutional conduct.

Under apartheid oppression the judiciary had no legitimacy in the eyes of the disenfranchised majority. Despite that backdrop, our constitutional democracy, which requires us to build a bridge from an evil past to a just society, has, given our judiciary the power of judicial review. In effect it installed the Constitutional Court as the final arbiter and a forum that will give full voice to our constitutional norms. However questions have been raised on whether in its rulings, the judiciary is being accepted as credible in the eyes of the public. Prof Max du Plessis raises the legitimacy dilemma sharply in a journal

²⁴ Moseneke “The Fourth Bram Fischer Memorial Lecture” 2002 SAJHR 310; Chaskalson and Davis “Constitutionalism, The Rule Of Law, And The First Certification Judgment : *Ex Parte Chairperson Of The Constitutional Assembly In Re: Certification Of The Constitution Of The Republic Of South Africa 1996*, 1996 (4) SA 744 (CC)” (1997) SAJHR 430.

²⁵ *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* [1999] ZACC 11; 2000 (1) SA 1; 1999 (10) BCLR 1059.

article: *The Constitutional Court and Public Opinion*.²⁶ He observes that: “[t]o strengthen respect for human rights, under the Constitution, the court is expected to be fearless in upholding rights in the sway of public opinion. But to ignore public opinion, Constitutional Court runs the risk of being labelled undemocratic and illegitimate”. The essence of the dilemma he raised is that courts are duty bound to give full effect to the Constitution in order to transform society. However, if their judgments are substantially at odds with the dominant political and social views of society they may lose the respectability they so sorely need to function well. Lessons from the recent jurisprudential past suggest that there is no one correct answer to the question posed. As I near the end of this lecture, I turn now to a few cases that highlight the inevitable tug of war, at the one level, between executive and judicial activity and, at another level, between judicial decisions and dominant political and social outlook.

Lessons from the recent past

I look first at decisions of the Constitutional Court which very well may be at odds with popular sentiment. In the death penalty case, *S v Makwanyane*²⁷ the Court took a strident stance that when it interprets the Bill of Rights it will not resort to head counting as a reliable means of substantive reasoning. In essence, the Court took the view that when it protects individual rights it does so even against the clamour

²⁶ Max du Plessis “Between Apology and Utopia — The Constitutional Court and Public Opinion” (2002) 18 SAJHR 1.

²⁷ *S v Makwanyane and Another* [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1.

of public opinion. We know now that the *Makwayane* decision was met with angry response from the retentionists lobby which frequently pointed to the rise in crime rate and alarming increase in atrocious crimes of violence. Many have argued that the Court has failed to reckon with the political character or implications of its judicial activity. And often the following statement by Kriegler J is called to question:

“The issue is not whether I favour the retention or the abolition of the death penalty, know whether this Court, Parliament or even the overwhelming public opinion supports the one view or the other. The question is what the Constitution says about it”.²⁸

In a collection of decisions,²⁹ the Court has struck down a series of laws which discriminated unfairly against gay and lesbians. In another decision, the Court held that gays and lesbians had the right to enter into a union akin to marriage. There is no gainsaying the fact that gays and lesbians have faced the brunt of social prejudice in this country and elsewhere for centuries. The public mindset has not changed much. However, the jurisprudential stance of the Court is that fundamental rights are meant to provide a dyke against the sea of popular prejudice provided that the Constitution requires the Court

²⁸ See *Makwayane* at para 206.

²⁹ *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* [1998] ZACC 15; 1999 (1) SA 6; 1998 (12) BCLR 1517; *Satchwell v President of Republic of South Africa and Another* [2002] ZACC 18; 2002 (6) SA 1; 2002 (9) BCLR 986; *Hoffmann v South African Airways* (CCT17/00) [2000] ZACC 17; 2001 (1) SA 1; 2000 (11) BCLR 1235; [2000] 12 BLLR 1365 (CC) and. *Fourie and Another v Minister of Home Affairs and Another* [2003] ZACC 11; 2003 (5) SA 301 (CC); 2003 (10) BCLR 1092 (CC).

to do so. The solution may very well be to amend the Constitution rather than to require courts to respond to popular conviction, which in a diverse society such as ours, may very well provide partisan and inaccurate diagnoses.

In the terrain of indigenous law, the Court has on a good few occasions adapted its rules tainted by patriarchy in order to give effect to the gender equality and dignity dictates of the Constitution. Many steeped in the indigenous tradition would not consider the rule that adult male offspring's are entitled to all inheritance and status within the family. However, mere public clamour for retention of this patriarchal arrangement ought not to weigh heavier than the express dictates of the Constitution to obtain equal worth for all.

In conclusion, on this aspect, it must be emphasised that the Court is not alien to but part of the democratic ethos that the Constitution puts in place. It must operate fully conscious of the dilemma that confronts it. It must give effect to the democratic will of the people as expressed in the Constitution and in other legislation. It must remain alive to the collective mindset of the people over which it presides. It must find the careful balance between the dictates of the Constitution and public opinion that may be properly had regard to in resolving contested social claims.

On the other side of the scale, there are cases which Davis and le Roux refer to as “lawfare”. The learned writers refer to a recent work by John and Jean Comaroff³⁰ who describe “lawfare” as follows:

“politics in many societies is played out more in the courts than it is in the streets, more by the use of law and is disguised violence than by unfettered brutal force, absent of any legal constraint. In an age of constitutionalism and a dominant discourse of human rights, conflicts once joined in parliaments, by means of street protests, mass demonstrations and media campaigns, through labour strikes, boycotts and blockades and other instruments of assertion, tend more and more if not only, in just the same way everywhere – to find their way to the judiciary. Lastly, class struggles seem to have metamorphosed into class actions”.

Of course the layman’s understanding of all this is political warfare that converts into legal warfare. In the last twenty four months our society has had a fair share of political contestations that have played themselves out in our courts and in the Constitutional Court in particular. There is no price for guessing which cases I am referring to. You read about them everyday or saw them on your television every other night. Our Court as you all remember, was called upon to deliver judgments in matters of grave public, if not political controversy. We had to adjudicate on the fate of Mr Schabir Shaik; of

³⁰ See *Precedent and Possibility* note 16 above page 185.

Mr Billy Masetlha when his term as Director-General of Intelligence was brought to an abrupt halt; on the bid of Mr Hugh Glennister, to prevent the disbanding of the unit known popularly as the Scorpions, on the application of Mr Mbeki shortly after he had been recalled from his position as President and on a few interlocutory applications, brought by Mr Jacob Zuma; and on the right of foreign based South Africans to cast their vote where they are.

In the words of Davis and le Roux, in all these cases the elephant in the courtroom was the public. “Lawfares” inevitably opened courts to potential political criticism because the law is engaged to pursue battles that belong properly in the hinterland of political contestation. Given the limited space, I will not in this lecture, venture an opinion on the appropriateness of “lawfares” on balance judicial resolution of the gravest conflict must rank higher than violent and unlawful methods of mediation.

Lastly, there in recent times the Court had to mediate increasing conflict between the state and its citizens on matters that may loosely be described as service delivery. We have had to make determinations on access to water,³¹ to sewage and electricity,³² education in the language of ones choice,³³ arbitrary eviction³⁴ and

³¹ *Mazibuko and Others v City of Johannesburg and Others* [2009] ZACC 28, decided on 8 October 2009, as yet unreported.

³² *Johnson Matotoba Nokotyana and Others v The Ekurhuleni Metropolitan Municipality and Others* (CCT 31/09 (CC), judgment was pending from the Constitutional Court at the time of writing.

³³ *Head of Department : Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* [2009] ZACC 32, decided on 14 October 2009, as yet unreported.

access to electricity by tenants.³⁵ In each of these cases, entrenched socio-economic rights were invoked. The Court was well alive to the importance of allowing the executive a margin of appreciation in the execution of their constitutional duty, to diminish poverty and to facilitate a better life for all. However, there had been blatant violation of socio-economic rights in issue, the claims of the citizens concerned have been upheld.

Conclusion

Ours is a complex project to entrench democracy. The executive, so too courts are siamese partners. Whilst the roles in the project are defined with some measure of precision in the Constitution, its text is open-ended and in effect creates shifting boundaries. What is required of us is to display the highest possible level of sensitivity keeping at all times the genuine need to create that transformed society for which Griffiths and Victoria Mxenge lived and died for.

I would like to thank you for listening and God bless.

³⁴ *Abahlali Basemjondolo Movement SA and Another v Premier of the Province of Kwazulu-Natal and Others* [2009] ZACC 31, decided on 14 October 2009; *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* [2009] ZACC 16, decided on 10 June 2009, as yet unreported; *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* [2008] ZACC 1; 2008 (3) SA 208 (CC) ; 2008 (5) BCLR 475 (CC)

³⁵ *Joseph and Others v City of Johannesburg and Others* [2009] ZACC 30, decided on 9 October 2009, as yet unreported.