Judges and Law Reform: Judicial Creativity or judicial activism?

Mr Justice C Howie

Ladies and Gentlemen

As a member of the South African Law Reform Commission, may I bid a special welcome to visiting Judges and Law Commissioners and other guests from abroad. I wish you a memorable stay at the fairest Cape.

The double role of being a law commissioner and a member of the judiciary leads me to ponder the situation where a draft bill, to the formulation of which I have contributed, becomes law and results in litigation in our Court. I am comforted by two thoughts: In allocating case loads I can pass the problem to my colleagues, and failing that, I may be one of possibly few with a tolerably clear idea of what the legislature intended.

The title of this session is not my own, but it has motivated what follows. Judicial activism and judicial restraint, or constraint, are usually opposing descriptions of judicial ventures beyond known or perceived boundaries. Their meaning, particularly that of judicial activism, has given rise to much discussion in the jurisdictions from which we come or to whose judgments we turn. ‘Activist’ would appear, in this context, to be a term of criticism and ‘creative’ a term
of approval. I do not propose to consider the merits of the attempted definitions to which the debate has given rise. Labels do not necessarily conduce to clear thinking. The real focus, I suggest, is: when and how can judges make law? You will understand, I know, and be forgiving, I hope, if I do so from a South African perspective.

The general position, well-known to Commonwealth lawyers and judges, and applicable in this country before it has a written constitution, was put like this in a recent lecture by Lord Steyn¹.

“In construing statutes the courts have no law-making role. On the other hand, in the exposition of the common law, the courts have a creative role … it is necessary for courts, when developing the common law, to proceed with caution lest they undermine confidence in their judgments. The courts may not make law contrary to the will of Parliament. The courts are therefore constrained when Parliament has spoken. But in general the courts are not so constrained when Parliament has not spoken since Parliament’s silence and inaction is usually ambiguous. The courts do not have the last word. Parliament may reverse any decision unacceptable to it.”

Now, in South Africa, the Constitution² but only declares that judges in this country have greater latitude, than that, it actually imposes obligations upon them to make law according to the values of the Constitution.

The Constitution, as you probably know, includes a Bill of entrenched rights. There is a limitations clause to which I shall come later. As far as the common law is concerned, the Bill of Rights can have horizontal application, and in such cases a court-

“(a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and
(b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with (the limitations clause).”

The Constitution goes on to provide that the Constitutional Court (the courts of final instance in constitutional matters), the Supreme Court of Appeal (the court of final instance in all other matters) and the High Court, all have the inherent power to develop the common law taking into account the interests of justice.

The Bill also lays down that when developing the common law the court must promote the spirit, purport and objects of the Bill.

As regards statute law, the last-mentioned obligation applies here, too, to judicial interpretation of legislation. When referring to this obligation to promote the Constitution I shall, for convenience, simply refer after this to the relevant section by number ie s 39(2).

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3 S 8(3). The limitations clause is in s 36(1).
4 S 173. This section is not part of the Bill but for the present nothing turn on that.
5 S 39(2).
Now strengthened by this armory how have we fared? I shall answer that by reference to illustrative instances.

Before the constitutional era the common law was changed by way of incremental shift as is, I would think, something familiar in all common law jurisdictions. For example, the element of unlawfulness in tort (or delict, we would say) had never been held to exist in the case of an omission unless the alleged wrong-doer had perpetrated a prior act of commission as well. That changed when a group of policemen in a police station, who could have intervened with ease, did nothing to stop an off-duty colleague assaulting a member of the public who has come there to lay a charge. The State was held vicariously liable. Expansion of the element of unlawfulness was founded on what were referred to in the judgment as ‘the legal conviction of the community’.6 The judgment of the then final court cited no authority to arrive at that formulation but its inherently just conclusion cannot be doubted.

A brief survey of cases since 1994 reveals the following. In a defamation action against a newspaper company7 the previous absolute liability of the media was discarded. Giving greater weight to the common law right of free speech, the Supreme Court of Appeal held that it was a good defence if publication was in all the circumstances reasonable. The decision was influenced partly by a

6 Minister of Justice v Ewels 1975.
7 National Media Ltd v Bogoshi 1998 (4) SA 1196 (SCA).
New South Wales statute. The resort to common law was because all but one of the articles involved were published before 1994 and the prevailing view at the time of the case was that the constitutional provisions, including particularly the entrenched right to freedom of expression,\(^8\) did not have retrospective effect. The same result could have been attained under the Constitution had the articles been published after 1994. This is clear from a later Constitutional Court judgment in which the court of appeal decision was held to have stated the law correctly in so far as the entrenched right was concerned.\(^9\)

The element of unlawfulness in delict was again to the fore in a case involving an assault on a woman by a man who had been released on bail pending his criminal trial.\(^10\) She sued the State for damages alleging that the release on bail was due to a failure by the prosecutor, among others, to place the man’s full history before the magistrate who ordered the release. Apart from the fact that the charge, pending which he was released, was one of rape (not on the plaintiff), he also had a previous conviction for indecent assault. The issue was whether the prosecutor owed the plaintiff a legal duty to prevent her loss by furnishing all the relevant information and opposing bail. This, in turn, depended on whether there was a relationship of sufficient proximity between them to distinguish her from any member of the public. On the facts presented by the plaintiff the Supreme Court of Appeal thought not. It upheld an order

\(^8\) The s 15(1) of the Interim Constitution, Act 200 of 1993, now s 15(1) of the Constitution.
\(^9\) Khumalo v Holomisa 2002 (5) SA 401 (CC).
\(^10\) Charmichel v Minister of Safety and Security 2001 (1) SA 489 (SCA).
absolving the defendant at the close of the plaintiff’s case. There was no constitutional issue raised in that appeal. Nonetheless, the plaintiff appealed to the Constitutional Court on the basis that there was a constitutional issue.11 Relying on the obligation on a court under s 39(2) the Constitutional Court held in her favour that evidence yet to come on behalf of the defendant could reveal facts which might establish the necessary legal duty after all, bearing in mind obligations on the State vis à vis the plaintiff’s entrenched rights to life, human dignity and personal freedom and security. The trial resumed and the plaintiff succeeded. The final act in the saga was an appeal by the State. This time the Supreme Court of Appeal held that the existence of the duty in issue had to be determined in the light of the provision of the Constitution and that it had in fact been established. To sum up: the unlawfulness question, correctly put, does not now depend on proximity and the ‘legal convictions of the community’ but on a plaintiff’s entitlements, and the State’s corresponding obligations to the plaintiff, all as provided for in the Constitution.

The freedom to contract and the obligation to be bound by one’s contract has always been fundamental at common law, (leaving aside contracts that on public policy grounds are not enforceable or are inherently offensive). The Constitution reinforces contractual autonomy. With that in mind I come now to a trio of cases concerning this subject. In the first12 (for short, *Brisley*) a defaulting lessee

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11 *Carmichel v Minister of Safety and Security* 2001 (4) SA 938 (CC).
12 *Brisley v Drotsky* 2002 (4) SA a (SCA).
sought to avoid eviction by reliance on alleged oral rental terms in conflict with her written lease. There was, however, a non-variation clause. She contended that the clause conflicted with principles of good faith and/or public policy. Forty years ago the court of appeal had decided that such a clause bound the parties. The Supreme Court of Appeal held that the clause was indeed binding and, further, that the public policy contention could only prevail in the rarest cases, of which that was not one. In this respect the main judgment in *Brisley* referred to another earlier appeal court case which, in turn quoted with approval these words of Lord Atkin in a 1938 case in the House of Lords:¹³

“… the doctrine [whereby contracts are declared contrary to public policy] should only be invoked in clear cases in which the harm to the public is substantially uncontestable, and does not depend upon the idiosyncratic inference of a few judicial minds.”

The main judgment in *Brisley* proceeded to hold, as regards good faith, that it was not a ‘free-floating’ principle of contract law but a value underlying specific rules and principles of that law. Another such value was the public interest in enforcing contracts. Where such values conflicted they had to be subjected to careful judicial evaluation before adopting the law gradually where necessary.¹⁴ Any free discretion to strike down for reasons of perceived inequity or unreasonableness would undermine the principle of contractual

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¹³ *Fender v St John-Mildmay* [1938] AC 1 (HL). ¹² cited in Sasfin (Pty) Ltd v Beukes 1989 (1) SA 1(a) 9B-E.

¹⁴ My emphasis.
sanctity and legal certainty. No societal value was threatened by declining to adopt a ‘special equity’ approach. Resort to the good faith argument therefore provided no independent ground to argue for non-enforcement of contracts.

In a separate concurring judgment in *Brisley* it was emphasised that public policy is ‘rooted’ in the Constitution and it values. And, quite apart from the soundness of the precedent which upheld non-variation clauses and its binding effect, the Constitution’s equality provisions if anything enforced that precedent. Such clauses did not necessarily protect the strong at the expense of the weak. In many situations the converse was likely to be true.\(^{(15)}\) The judgment went on:

“(T)he constitutional values of dignity and equality and freedom require that the Courts approach their task of striking down contracts or declining to enforce them with perceptive restraint … contractual autonomy is part of freedom. Shorn of its obscene excesses, contractual autonomy informs also the constitutional value of dignity.”

This last passage was approved in a unanimous judgment of the Supreme Court of Appeal, some months after *Brisley*, in the second case of the trio,\(^{(16)}\) *Afrox* for short. The plaintiff decided to go to a private hospital for an operation. On admission he signed a form indemnifying the hospital in respect of any negligence on its part.

\(^{(15)}\) Per Cameron JA at 34D-F [90].
Such negligence occurred and he suffered substantial damages. When he sued, the hospital raised the indemnity. In response, he claimed the indemnity was contrary to the public interest and in conflict with good faith and was in any case not drawn to his attention beforehand. With regard to a court’s obligation to develop the common law in line with constitutional values, he contended that the indemnity conflicted with the entrenched provision guaranteeing the right to medical care.\(^\text{17}\)

I shall leave aside the factual defence and, as regards the public policy and good faith argument, simply say that \textit{Brisley} was endorsed. Coming to the right to medical care and the application of constitutional values, the plaintiff conceded that the indemnity was itself no bar to the provision of medical services or to the hospital’s assertion of legally acceptable conditions for such provision. Apart from that, so the court reasoned, the right in issue was not the only constitutional consideration to take in account. Freedom of contract (as illustrated in the second quote from \textit{Brisley}) was an important component of the values of freedom, equality and dignity. The claim failed.

\textit{Afrox} gave rise to another constitutional issue. In a sweeping comment the trial Judge in the High Court had said that s 39(2) overrode the principle of \textit{state decisis}. The Supreme Court of Appeal could not leave that statement to stand. It held\(^\text{18}\) that as regards the

\(^{17}\) S 27(1)(a).

\(^{18}\) At 39 [27] to [29].
binding effect on the High Court of pre-constitutional decisions on common law of the court of appeal (then known as the Appellate Division of the Supreme Court, and the court of final instance in all matters) there are three situations that can arise:

(1) Where the High Court is satisfied that a common law rule or principle is in conflict with the constitution. In that event precedent is not binding.

(2) Where the precedent is based on changeable considerations such as *boni mores* or public interest. In that instance the High Court, if of the view, taking constitutional values into account, that the precedent no longer reflects *boni mores* or the public interest, is not bound.

(3) Where the High Court is satisfied that the rule or principle of common law must be developed in terms of section 39(2). In that event the High Court is nevertheless bound. The reason is that the High Court was always free to develop the common law before but that freedom was limited by *stare decisis* then and nothing had removed that limitation.

In parenthesis, it might in future be contended that *stare decisis* is itself a rule of common law and liable to development, even by the High Court.

The last case of the trio\(^\text{19}\) involved a dependant’s claim. The plaintiff’s late husband was killed by lightning on the golf course of the club where they were both members. The club rules purported

\(^{19}\text{Johannesburg Country Club v Scott and Another 2004 (5) SA 511 (SCA).}\)
contractually to exempt the club from liability for ‘personal injury or harm’ however caused, to members on the club’s grounds. In a split decision in the Supreme Court of Appeal the majority left open, but nevertheless pertinently raised, the question whether a radical exclusion of liability for negligently causing death was not against public policy for being in conflict with the entrenched right to life. In this regard the majority judgment also pointed to the Unfair Contract Terms Act 1977 in the United Kingdom according to which both the exemption in the case at hand as well as the indemnity in *Afrox* would have been unlawful.

The subject of unfair and unreasonable contractual terms was subject of a Law Commission investigation and a report to the Justice Ministry. It has not led to legislation. For the present it is therefore for the courts to use their constitutional powers on a case by case basis to ameliorate harsh or excessive terms.

Reverting to delict, two surgical patients harmed by a defective local anesthetic sued the manufacturer for personal injury damages on the sole basis that it had a legal duty as manufacturer to avoid its product causing harm. There was not privity of contract. There was not allegation of fault. The plaintiffs relied on strict liability. They contended that the age old common law remedy by which to protect and enforce their constitutional right to bodily integrity\(^\text{20}\) was inadequate because it required them to prove fault and that was a virtually impossible task given that they had no knowledge of or

\(^{20}\) S 12(2).
access to the manufacturing process. The claim failed in both the High Court and the Supreme Court of Appeal. In the appeal judgment\textsuperscript{21} it was held that to find for the plaintiffs would involve no mere incremental shift but rather a complete rejection of long-standing principle. It would saddle all manufacturers with strict liability without other kinds of manufacturer having been heard and it would establish such liability on a one-case basis when in major jurisdictions elsewhere (excepting the United State of America) imposition of strict liability has been effected by statute. The court concluded that the subject was therefore eminently one for the legislature to deal with.

Lastly in relation to the common law I must mention a case in which an appeal is pending to the Constitutional Court.\textsuperscript{22} Naturally I shall not discuss it. It suffices to say that the Supreme Court of Appeal ordered, in terms of the Constitution, that the common law concept of marriage be developed to include same-sex partners. I may add that this is also one of the subjects on which the Law Commission is due in the near future to furnish a report to the Justice Minister for tabling in Parliament.

In so far as s 39(2) has had a bearing on statutory interpretation, a useful example of the operation of the subsection involves an application for declaratory and mandatory relief brought by a rail commuter action group against, ia, the State-owned operator of the

\textsuperscript{21} Wagener v Pharmacare Ltd; Cutting v Pharmacare Ltd 2004 (4) SA 285 (SCA).

\textsuperscript{22} Fourie and another v Minister of Home Affairs and Others [2005] 1 All SA 273 (SCA).
commuter railway network in the Western Cape and the respective national and provincial Ministers of Safety and Security. Rail commuters in the Western Cape had been plagued by violent crime on suburban trains. One of the orders the applicant sought was a declarator that the commuter services, in so far as safety and security services and the control of access to and egress from stations were concerned, failed to comply with a statutory provision governing operation of the rail network. The provision, enacted in 1989, required the provision of a rail commuter service that was “in the public interest”.

For the respondents it was contended that this means no more that a train service had to be provided for the general public benefit in the sense that such service allowed members of the public access to an affordable and reliable mode of public transport. In addition the operator said that combating crime on trains was not its obligation but that of the police in terms of s 205(3) of the Constitution. The High Court held that the phrase ‘in the public interest’ required the operator of the network to adopt a policy promoting the general welfare of the public using the trains, particularly by providing the public with a service which adequately protected their safety and security. The application succeeded. On appeal to the Supreme Court of Appeal that result was reversed. Three judgments were given but there was no majority view as to the meaning of the expression in question. The consensus decision was that neither the facts nor the law obliged

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23 Rail Commuter Action Group and Others v Transnet Ltd t/a/ Metrorail and Others 2003 (5) SA 518 (C).
the operators to take on police obligations. In an appeal by the action
group to the Constitutional Court it was held that the words in issue
had to be construed against the provisions of the constitution
entrenching the rights to life, dignity and freedom and security of the
person.\textsuperscript{24} Construed in that way the expression obliged the operator
as an organ of state to take reasonable measures to provide for the
protection of commuters against crime on the trains. That
construction was reinforced by the consideration that s 195 of the
Constitution demands an accountable public administration. The
section applies to organs of state. The operator performed a public
function and was therefore accountable to the public in respect of the
services required of it.

What this survey tend to show is that creative use has been
made, and no doubt will continue to be made, of the leeway afforded
in this country by the Constitutional provisions to which I have
referred in developing the common law and in achieving purposive
statutory construction. As long as it conforms to the constitutional
limits allowed, innovative lawmaking cannot fairly or logically attract
the label “activist”.

Apart from the quality of these advances it is nevertheless
instructive to note their extent. Sweeping changes have not been
made to the common law. In large part that is because the essential
values of the common law have been embodied in the Bill of Rights.
Where changes have been made they tend still to be incremental and

\textsuperscript{24} Ss 10, 11 and 12.
not radical. In the case of legislation we have, in many countries, moved forward from strict legislation to purposive construction. And we have a broader more far-sighted constitutionalism nowadays to guide us whether our constitutions be written or not. Yet here, too, judicial pronouncement lies between narrow parameters however important and far reaching its effect on the people and the law. This should not surprise. Any change on a large scale must inevitably be for the legislature to have to make.

In its lawmaking task the judiciary here and in all our jurisdictions is fortunate to have the assistance of a dedicated profession. I include the academic branch. Their learned articles and intellectual leads help profoundly. More and more, too, we benefit from the research of our Law Commissions. I have had the special advantage of a close view of that research in progress and the results it yields in South Africa. Our Commissions do admirable and essential work worldwide and it deserves the recognition our courts give it, whether our legislatures adopt it or not.

Having just said that my mind goes back to chairing a project committee of our Commission which was given the task of a report and draft bill on counter terrorism. Earnest representations from the security lobby pleaded for protracted detention without trial. It was hard to believe. This was 2000. The specters of recent decades danced on the walls. Obviously some could not see them. We cut that out. Then there was September 11. What we then allowed, based on a model in operation elsewhere in the Commonwealth and
prompted by September 11, was judicially protected interrogation where if it was not completed by the end of the day, the person being investigated could be but did not have to be, detained overnight. There was also a host of provisions dealing with terrorist funding, property forfeiture and related matters. Material came in from all over the world. The agonizing was endless. Eventually a bulky and detailed report and bill went off to Parliament. The then respective Ministers of Justice and Safety and Security jostled for the role of promoter. The hot potato we produced turned into a squash ball that ricocheted from one Ministry and Portfolio Committee to the next. That was a good four years ago. A statute eventually resulted. It was published in February. Slim and trim, it says nothing about interrogation much less detention. It has left all that to the ordinary criminal procedure. You will have heard from Lord Steyn that criminal procedure can be anything but ordinary.

Still, however slow ours may be at times we fondly regard it as good and ordinary. So it will take care of all we chewed over. Why did we bother? The answer is that just as counsel must present us with all the options, so the Law Commissions must present the legislatures with all the options. Inevitably some options will rank as preferred but it is the depth and quality of the spread that is not only wanted but essential.

A last word is that we take it for granted that judicial lawmaking must be carried out by independent judges. Anything less than independence, would be unthinkable. Gravely we apprehend that
proposals are in existence here for judicial training to take place under Government departmental administration and instruction. On all sides, training of the higher judiciary is accepted as necessary. Unavoidably Government has to pay. But that is not a price. An independent judiciary is priceless. The point is: the judiciary must not only be left to draw up the curriculum, it must also be unfettered in the choice of teachers. It is axiomatic that they must understand the essence of what independence is and how to give expression to it. That simply will not be possible if instruction is by departmental employees. There is more to it than that. More is for another day. I shall leave it at this. Independence is not only independence in reality. It is independence in appearance just as much. The public must never be able to think that the government trains the judges.

This is why. It is just as much judicial lawmaking as changing the law to upholding the law.

Cases will inevitably arise in all our countries, probably in times when national security is under stress, when legislative curbs on fundamental rights will bring the judiciary and the other arms of government into confrontation. In South Africa such legislation would first have to clear the limitations hurdle raised by s 36 of the Constitution.\(^\text{25}\) that is, it would have to be reasonable and justifiable in

\(^{25}\) S 36(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-
(a) the nature of the right;
(b) the important of the purpose of the limitation;
(c) the nature and extent of the limitation;
an open and democratic society. If it left a loophole, or afforded differing interpretation, the right would remain uninfringed. But assume the provisions of that section play no part and the courts are at large, and indeed the last resort, when executive action threatens personal liberty. It will be for the courts, if necessary by fearless independent and innovative lawmaking, to give effect to their constitutional role as upholders of the constitution\textsuperscript{26} and the ultimate arbiters as to its meaning.\textsuperscript{27} If that were to be called activist so be it. It would be nothing less than their duty.

(d) the relation between the limitation and its purpose; and
(e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

\textsuperscript{26} S 165(2).
\textsuperscript{27} S 167(3) and (7).