

# Human Rights in the Twenty First Century: Real Dichotomies, False Antagonisms

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Sufficient unto the Century is the evil thereof. We in South Africa have more than enough to do in overcoming the ills of the present century before embarking on speculative journeys into the next. Yet here I am, invited to share the naive vitality of my under-choate country with what some of my Canadian friends regard as the over-choate sobriety of yours, and what is more, to join hands with you in a judicial seance into the future; fortunately, the failures of clairvoyance are almost immediately forgotten, while the occasional lucky hit is remembered forever.

Once upon a time, in the 18th century, the highest human endeavour was to advance life, liberty and the pursuit of happiness. Now it is to get a good rating on the HDI scale. The Human Development Index (HDI) has been designed by the United Nations Development Programme to measure a country's level of development on an annual basis; its components are productivity, equity, sustainability, and empowerment of the people, and it indicates whether people live a long and healthy life, are educated and knowledgeable and enjoy a decent standard of living.

Prosaic though the HDI may be, I would not mock its measurability. If science is the art of the soluble, law is the art of the resolvable. To resolve, we need criteria, structured yet mobile benchmarks of evaluation. We in the judiciary are aided in our task by the fact that there is increasing international consensus on what the criteria for protection of human rights should be. It is no accident that human rights have been called the great secular religion of our times. If there is one central theme that unites my various predictions, it is that the historic separation which has occurred between human rights and human development will be bridged. Even though morality and measurability are frequently seen as incompatible, in the human rights domain they often come together, hence the emphasis on balance and proportionality in modern jurisprudence.

I propose to deal with a number of what I regard as real dichotomies and false antagonisms. Much of what I say will be influenced by recent South African experience, where we have been learning to handle the severe contradictions in our society not by suppressing them but by acknowledging their existence and trying to contain them in a way that leads to vitality and growth. Constitutionalism and respect for human rights have played a major role in this respect.

We in South Africa recently instituted a constitutional Court as a major instrument for guaranteeing human rights. The Court was inaugurated by President Nelson Mandela, who reminded us, before we took the oath, that the last time he had stood up in a court was to find out whether he would be sentenced to death or not; now he was inaugurating South Africa's first constitutional Court. This occurred in February 1995. On the next day we heard arguments in our first case, which dealt with the constitutionality of capital punishment. In deciding on this complex issue we looked to the jurisprudence and constitutions of more than a dozen countries including: the USA, Canada, Germany, India, Hungary, Namibia, Zimbabwe, Tanzania and South Africa, as well as to international human rights instruments and the practice of neighboring countries in southern Africa. In the end, we decided that the text of our constitution left us no alternative but to declare capital punishment to be unconstitutional. The evolving values which we distilled from international experience proved to be extremely helpful. For my own part, I considered this to be one of the rare cases — like the right to conscience or the right not to be tortured — where proportionality did not enter the scene: there were no degrees of death to be measured and no incremental invasions of the right to life to be balanced. I should mention that several months later the Court was called upon to consider two Proclamations that President Mandela issued in preparation for our country's first

democratic local elections. The case turned on whether or not Parliament could entrust far-reaching legislative power to the President. We looked at Canadian, British, American, Indian, Irish and Australian precedents, and decided by majority that the Proclamations were invalid. President Mandela accepted our decision with characteristic aplomb and reconvened Parliament to rectify the constitutional deficiency. Once again, the approach adopted by courts in other countries proved to be of great assistance in establishing the values that were to guide us.

## **I. FREEDOM OR BREAD**

Very early on in our constitutional negotiations we said that we did not want bread without freedom nor did we want freedom without bread. We wanted bread and freedom, and saw these notions as mutually complementary rather than mutually incompatible. We rejected the idea that the urgent need for national development and overcoming the effects of apartheid justified restrictions on freedom. On the contrary, the right to be free, to speak one's mind, to exercise one's preferences without being dictated to all the time, was something we had fought for all our lives. At the same time, the right to be free would be empty indeed if it were not backed up by the nutrition, education, shelter, health, and access to amenities necessary to make our choices meaningful ones. South African experience underlines the way in which the so-called three generations of rights overlap. The classic or blue rights of fundamental liberty, represent values to be defended in themselves. Yet they cannot be separated from the second generation or red rights, which refer to the basic entitlement to at least minimum standards of well-being. Contemporary rights of citizenship in the fullest sense of the word require more than just autonomy from state intrusion and the right to choose one's government; they necessitate active programmes to overcome the legacy of centuries of racially-based exclusion from citizenship. The uniting factor is respect for the dignity of all; where people are denied access to the amenities of a decent life because of their colour, their worth as human beings is being assailed. The same considerations apply in relation to the third generation or green rights. We cannot have a nation without a shared sense of freedom and equality; we cannot secure our physical and cultural heritage without a common citizenship and equal life chances; we cannot live in a decent environment without the voluntary involvement of the millions of people who make up our population. In our country with such diverse communities, with such an intense history of conflict and division, national development can only take place within an agreed constitutional framework that establishes principles and institutions acceptable to all. A few years ago I was bold enough to say that Canada was a Constitution in search of a country, while South Africa was a country in search of a Constitution. How quickly things have changed. Attempts at constitution-making in Canada seem to have put the land under strain, whereas in South Africa the very process of creating a constitution appears to have pulled the country together.

## II. MAJORITY RIGHTS VS. MINORITY RIGHTS (GROUP RIGHTS VS. INDIVIDUAL RIGHTS)

One of the main problems in South Africa was that the majority was the minority and the minority was the majority. By this I mean that the majority were excluded from political, economic and social power. Their languages were despised, their belief systems mocked, their land taken away, their political institutions destroyed and physically they were relegated to the margins of the cities and to peripheral rural reserves. The minority, on the other hand, exercised all the power and enjoyed all the privileges of a dominant majority; their languages were the official ones, their cultures became the normal points of reference for the whole of society and physically they owned and occupied the central business districts, the comfortable suburbs and the developed farm lands. In this context protection of minority rights could easily have become preservation of minority privilege. The function of constitutionalism in South Africa was therefore to ensure that the former oppressed majority could rescue itself from marginalisation and, at the same time, see to it that the former ruling minority would not be abused. Guarantees had to be given against any form of oppressive behaviour by the new State, whether against the majority, against minorities or against individuals. It was in this context that the difficult question of group rights vs. individual rights arose. We rejected the idea of political institutions being based on group rights, which would have segmented the population into permanently warring factions, as the tragic histories of Cyprus and Lebanon had taught us. Constitutions cannot solve the problem of people living together. If the will to coexist and share a common country does not exist, the constitution cannot force them to accommodate each other. Indeed, the battle over the Constitution itself becomes a scene of conflict, intensifying rather than containing divisions. Only when the necessity of one person — one vote in an undivided country was accepted by all the major role-players, could we pass on to consider the question of group rights on its merits. For the most part, we did so by catering for cultural and political pluralism through time-honoured devices such as a Bill of Rights, proportional representation and regional devolution. Nevertheless, we paid considerable attention to language, cultural and religious rights as such, as well as to the question of accommodating traditional authorities and customary law.

While doing some research on the question of a claimed right to state support for single-medium schools, I was interested to discover that in the period between 1922 and the second world war, international law did recognize and guarantee group rights as such. In fact, group rights got protection where individual rights did not; indeed they paved the way for recognition of individual rights. Thus, in the Albanian Language Case, Albanian-speakers in a particular part of Eastern Europe were successful in their demand for a ruling from the Permanent Court of International Justice that special Albanian-language schools be set up. After World War Two, however, there was a complete shift towards protecting individual rights only. The organized international community accepted that group interests in terms of language, culture and religion could be protected by individuals acting in association with other individuals, so that group rights would be superfluous and could be dangerous. The right to equality and the right not to be discriminated against became the core elements of all contemporary human rights law. Article 27 of the *International Covenant of Civil and Political Rights* dealt in the most timid way possible with group rights by providing merely that the state shall not deny to individuals acting in association with others enjoyment of the rights to language, culture or religion.

In recent years, however, there has been a move back towards acceptance of group rights by imposing on states a positive duty not only not to discriminate, but to take positive measures to enable people to express their collective identities in a meaningful way. In some cases, affirmative action to overcome past disadvantage is either authorized or required. In others, cultural diversity is seen as a value in itself that requires appropriate state acknowledgment. Thus, special measures have been taken to secure the group rights of vulnerable communities such as migrant workers and indigenous peoples. It seems that international law is increasingly acknowledging that rights can be claimed by groups and not just by individuals, particularly if the groups are or have been subject to historic disadvantage. Thus, the rights of women, workers, the aged, children, disabled people, migrant workers and prisoners are increasingly being evaluated not simply in terms of formal equality of individuals but in relation to the concrete collective life experiences of the groups concerned. Clearly, there is an interactive dialectic between group and individual identities and claims. The tension can be creative or it can be destructive, but it will always be with us. In my view, we should openly acknowledge the tension, and resist the temptation to overcome it by simplistically suggesting either that group rights automatically suppress individual rights or that group rights can be fully promoted through protection of individual rights. The implications for accommodating group rights in our current judicial processes will need careful attention.

### **III. TECHNOLOGICAL PROGRESS VS. HUMAN RIGHTS**

It is well recognized that technological progress puts increasing strain on human rights. This was forcefully brought home to me in some work that I did at UNESCO in Paris just before coming to Canada. I was part of a legal team of the International Bioethics Committee working on the text of a Declaration on the Human Genome and Human Rights. I can see from your expressions that you are as ignorant of what the human genome is as I was. The human genome is all the genetic material that makes each one of us the persons we are, as well as all the genetic material that make humanity. Until recently, these were questions for philosophical speculation. Now scientists can intervene in such a way as to shape future individuals and humanity as a whole. The idea of the Declaration was to establish a set of guiding principles, agreed upon by international consensus, to serve as a framework for domestic law and genetic practice in each country. This is an area where religion, belief, culture and historical experience play a strong role, so we adopted a pluralistic approach which granted a wide margin of appreciation to each country and called for pluralism within each country. Nevertheless, we felt that unbridled technical advance, particularly when appropriated to serve purely nationalistic or commercial interests, could have devastating implications for the respect of human dignity. The dilemmas we confronted were profound. Science will out. Knowledge begets itself and restraints on inquiry frustrate the human mind. Ameliorative intentions armed with scientific technique, however, could be as manifestly evil to human dignity as destructive ones. Thus, eugenic programmes were always presented as being aimed at the betterment of humankind. One of their major vices was to establish prototypes of the ideal human being and thereby destroy the dignity and even the lives of those who diverged from the prototype. How to balance out all these competing criteria? One idea was to refer to the human genome as the common heritage of humankind, thus making it subject to

international supervision like the seabed or outer space. I was unhappy with this concept as being too patrimonial in character, and suggested that we proclaim the human genome as the common heritage, responsibility and concern of all humanity. I had difficulty regarding the genome as a species of property. To me, it was more an area of human intervention that needed to be governed by agreed-upon processes, principles and procedures against a background of as much consensus as possible on values and ethical concerns. The discussion continues. No doubt, other forms of technological advance will put new kinds of pressure on human rights and require new forms of meaningful human rights response and development. In my opinion, the answer is not to lament scientific progress, even less to attempt to suppress it, but rather to emphasize the legal and ethical responsibilities of scientists, commercial enterprises and governments at all times. A precondition for "getting it right" is the active involvement in the discourse of all those most directly concerned. I am happy to say that a number of judges from the World Court and from national courts are actively involved in drafting the proposed Declaration. Our task here is not to interpret the law, but to make it!

#### IV. UNIVERSALITY VS. RELATIVITY

Another widely debated and profound dichotomy underlying all human rights analysis is that between universality and relativity. Is the human rights idea, particularly when focused on the individual, a purely Western notion being imposed on the rest of the world? However much certain people in the West, the East and the South might believe it is, I think the answer must be that it is not. I say this on the basis of two suppositions. The first is that universalism should be distinguished from globalization. Globalization proceeds when institutions, practices and values developed in certain parts of the world, are spread to the rest of the globe and become universal in their application. In other words, it involves a diffusion from centres of power to the rest of the world. Universalism, on the other hand, is just the opposite. It presupposes a gathering-in of experiences from all over the globe and a discovery of commonalities underlying the human condition. If certain values are declared to be universal then, it is because they arise out of a distillation of the shared sufferings and hopes of all humanity. There are strong elements of respect for the fundamental dignity of each and every human being to be found in all cultures and all religions. Furthermore, the part of the world where there has never been oppression or resistance to it, does not exist; colonialism and two world wars eliminated that possibility. I understand the *Universal Declaration of Human Rights* and the *International Human Rights Covenants* as having emanated from the common experience of humankind in all continents, and a shared determination to overcome manifest forms of disrespect and inequality. In my view, these documents should not be considered as good legal news produced by a few enlightened minds in the West, and then spread by legal missionaries to the nether parts of the world. In my country, it was people of African origin who emphasized the importance of respecting universal values, while it was those who called themselves Europeans who insisted on African exceptionalism. Elsewhere on our continent, the concept of African values was perverted by many an authoritarian ruler to suppress African trade unions, ban African opposition parties and stifle dissent by African patriots. At the same time the African historical and cultural dimension was frequently suppressed in the name of developing new democratic institutions. The particularity of

each society feeds into and contributes towards the universality of the whole. The universalism of an idea stems from the fact that it corresponds to the needs and solves problems of people wherever they are. This has been our experience in South Africa with respect to constitutional democracy and recognition of human rights. We adopted constitutionalism not because we wanted to show the rest of the world that we were civilized, but because it created a framework within which we could live together as equals in a common society while respecting our diversity. To have imposed on ourselves the values of human rights developed in certain rich and powerful societies, would in itself have been a violation of our human rights. At the same time, we had to create institutions and give them a tone and texture appropriate for our reality. Visitors to our parliament, for example, comment on what they consider the relaxed African spirit that prevails even while the precise rules of parliamentary procedure are being enforced by Madam Speaker. We like to feel that South African experience not only draws upon but enriches global experience.

The second way in which universalism and relativity are reconciled is through acknowledgment of pluralism. Pluralism itself has emerged in the modern world as a universal value; it accepts the inevitability of variety and difference in human society not as a contradiction of universality but as an expression of it. Human rights doctrine cannot and should not try to escape from the interaction between the particular and the universal, nor to evade the implications of a pluralistic universe held together by common foundations.

## **V. THE RIGHT TO BE THE SAME VS. THE RIGHT TO BE DIFFERENT**

A central conceptual problem we had to resolve in South Africa was the relationship between the right to be the same and the right to be different. There is surprisingly little literature which deals directly with the subject. The usual assumption is that these are competing rights: for the one to live, the other must die. Under apartheid, difference in origin, appearance and culture was used as the foundation of a system of separate and unequal rights. Opponents of apartheid accordingly struggled to achieve a unified South Africa based on universal franchise and a common citizenship, without distinction based on "race, colour or creed". At the same time, we wished to acknowledge and even celebrate the great variety of historical experiences and forms of cultural and personal identification to be found in our country. How were we to combine a system of political non-differentiation with one of cultural diversity?

A formulation based on an interaction between the right to be the same and the right to be different came to me in a totally non-South African context. I was still in exile attending a seminar at the Aspen Institute in Colorado, with Mr. Justice Harry Blackmun presiding in benign and articulate fashion. The issue on that day related to the question of human rights for women. A number of feminists led the debate, and it soon became clear that two different positions were being articulated. The first presentation was to the effect that women should be entitled to the same treatment as men in every respect and to be able to do everything that men could do on the basis of full equality and non-differentiation.



I found myself nodding in agreement. The next presenter, however, said that she did not want to be like men, who had made such a mess of the world, but rather claimed the right to express qualities and values and articulate a life style of quite a different kind. And I found myself agreeing with this position as well. It then occurred to me that the right to be the same, in the first case, and the right to be different, in the second, were not opposed to each other. On the contrary, the right to be the same in terms of fundamental civil, political, legal, economic and social rights, provided the foundation for the expression of difference through choice in the sphere of culture, lifestyle and personal priorities. In other words, provided that difference was not used to maintain inequality, subordination, injustice and marginalisation, it represented a positive value in human society. In South Africa this approach of reciprocal relationships has been fundamental. It was only when common citizenship and respect for fundamental rights were guaranteed in the Constitution that the diversity of culture, common language and religion could be fully acknowledged. I suspect that the relationship between the right to be the same and the right to be different has implications well beyond our borders in relation to far more questions than just race or gender.

## **VI. PUBLIC VS. PRIVATE RIGHTS**

This is an area where I would predict considerable re-conceptualisation taking place in the future. The need for rethinking was strongly brought home to me by arguments on the question of torture presented by certain feminists to the Vienna Conference on Human Rights. Torture is the greatest violation of human rights. It is intended to subjugate the human being by the infliction of pain, to humiliate, degrade and to strip the victim of any sense of dignity or rights. International instruments rightly give high priority to the prohibition of torture or cruel, inhuman or degrading punishment or treatment. Yet, the prohibitions in these instruments refer only to torture practiced by agents of the State acting in the name of public authority. They do not refer to the systematic torture of human beings which takes place on a massive scale in all societies in the private sphere. Torture in the home, like torture in police cells, stems from inequality of power and subordination. It involves forms of abuse that have their origin not simply in the particular psychology of certain authoritarian individuals, but from features embedded in our societies and our cultures. When John Stuart Mill wrote about the abuse of women in English homes a century ago, he could have been describing South Africa today and, I suspect, contemporary UK and Canada too. Yet our legal culture defines the issue as one of ordinary criminal law, not of human rights. The mischief to be combated is seen to be that of personal misconduct, not of violation of internationally accepted standards. The state is left off the hook, because its involvement is one of abrogation rather than of perpetration. I think this public/private question is going to occupy much of our thinking in the coming decades, with boundaries becoming softer in some areas and harder in others.

## **VII. OUTSIDERS VS. INSIDERS**

One of the great contradictions of the judicial process, so obvious as to pass unnoticed, is that it is usually outsiders who sit in judgment of insiders. Judges in our society are a professional caste who deal with the lives, pains, tribulations and confusions of people from a totally different section of the community. The applicable norms, values and sense of justice are those that belong to the outsider judges, not to the insider litigants or accused. Even at international conferences the people talking about the disabled, the hungry and the homeless, are normally not people who themselves are homeless, hungry or disabled. Yet, as judges, we have to apply recognized objective criteria. That is our job, even if we do so without having been through the experiences of the persons with whose lives we are dealing. The norms we uphold are derived from conferences of this kind, rather than from life experience. I think we have failed to grasp the importance of the observation by Oliver Wendell Holmes a century ago when he said that the life of the common law comes not from logic but from experience. In my case, I was suddenly thrust into what I call the great democracy of the disabled as a result of a bomb attack. Some of us are born into disability, others enter it through trauma or simply as a result of the aging process, but what we have in common is that we are different, look different and are treated differently. It was through a movement called Disabled People of South Africa that I came across the phrase "nothing about us without us". I also learnt that the main human rights claims of the disabled did not, as I had previously thought in my existence as an able-bodied outsider, relate to material support or more health facilities, but to freedom to circulate in society, be employed and engage in public and private activities.

The same theme comes through strongly in feminist human rights literature. Writer after writer stress the importance of people being able to develop norms and standards based on their own life experiences, and not find themselves compelled at all times to adapt to the norms and standards established by others. We are advised against adopting "the stir and mix solution", in terms of which you take a given situation, stir in a bit of woman or a bit of disabled, mix it and see what the result is. The proper approach, we are told, is to allow the problem to be redefined by those who are affected by it. It is they who should have a direct say in the kinds of values to be upheld and the protections to be applied.

Where interests and perspectives differ so much, the only answer that suggests itself to me is to acknowledge a certain measure of pluralism, choice and overlapping. Only through interactive and respectful dialogue can we achieve a just and ongoing balancing of all the different interests. In the meantime, as far as the bench is concerned, the outsider/insider divide could be diminished by ensuring greater diversity of life experience amongst those selected for judicial office, more lay participation in the judicial process, special programmes to sensitize judges to the lives of others, and more legal education for the broad community.

## VIII. ABSTRACTION VS. CONTEXTUALIZATION

This is a problem that constantly bothers me as a new judge battling to write judgments. A major problem which I have is the relation between the isolation and abstraction of an issue on the one hand, and its contextualization on the other. Both are necessary. In order to answer a question, we have to isolate and typify it. We create an artificial universe in the way that scientists do, cutting out all the variables that are irrelevant to the answer. We have no choice; we cannot deal with the whole history of the world in relation to each case. Yet, this makes me feel at times that I am producing strained and artificial results that have little to do with the actual lives people lead.

Allow me to give a little example to illustrate the point. One of our early cases dealt with the constitutionality of imprisonment for civil debt. My colleagues felt that they should strike down the law simply on the basis that it failed to provide a hearing to the nonpaying judgment debtor before he or she was sent to prison for what was called contempt of court. I felt that I could not deal with the matter just on that limited procedural basis, technically sound though it might be. I wanted to know whether it was constitutionally permissible in our new democracy to use deprivation of liberty as a mechanism for ensuring that one person paid what was owing to another, or whether the ordinary means of attachment of property or income should suffice. This raised broad philosophical and contextual questions — I was concerned to know the nature of the beast. I might say that to the possible dismay of some of my colleagues, I found the word "synergy" as used by your former Chief Justice Dickson most helpful, that is, the synergetic relationship between a principle and the context which prompts it being utilised. I must confess that I do not quite know what the term synergy means, but it seems to help resolve the dilemma which I have articulated above, and, hopefully as I explore its meaning over the years I will end up being able to explain it.

## IX. RIGHTS AND RELATIONSHIPS

I have a feeling that we will find it increasingly necessary to re-conceive the very nature of rights. In many areas of life, rights become meaningless if seen purely as spheres of legally protected autonomy abstracted from ongoing interactive relationships. Rights are not fixed entities so that you either have them or you do not; it all depends. Nor do they have fixed values so that one right is automatically superior or inferior to another; again, it all depends. Indeed, rights may exist on a continuum in time and have flaring or disappearing degrees of intensity depending on the context.

These reflections came through strongly to me in relation to what are called "father's rights". We are presently considering in South Africa a matter concerning the rights of unwed fathers in relation to the proposed placing of their children for adoption. Our adoption law provides that if he is married, then even a bad father must give consent whereas if he is not, then only the mother must do so. Much though I support the active involvement of all fathers, whether wed or unwed, in the lives of their children, I have difficulties with the term "fathers' rights". I think it is inappropriate to speak of rights in relation to a child, as though a child were an object or a species of property in terms of

which rights could be exercised. A parent has responsibilities and powers in terms of a relationship with a child; the child has claims on the parent. It is a two-way, mutually interactive process with a dynamic that does not fit comfortably in a rights framework. Rights in the classical sense do not expand or contract or extinguish themselves in the way that the responsibilities and claims of a parent-child relationship do. A parent/child relationship alters spontaneously over time. The same can be said about the obnoxious term "marital rights" which until recently was used in relation to sexual activity between spouses. Paradoxically, the question of marital rights, properly used, only arises when the marriage breaks down and the ongoing relationship of interdependence has to be severed. No court can order specific performance of marriage vows; the rights arise when the marriage ends, not when it starts. The idea of rights as relationships also fits well in respect of many other forms of regulated or acknowledged interdependence, where, in contemporary parlance, we speak of rights being at stake, for example in the case of the right to education or the right to use one's language. The importance of re-conceiving rights as relationships is not purely philosophical. It affects the kinds of intervention appropriate for the courts, the sort of evidence that should be considered, and the nature of the remedies that should be available.

## **X. STATE INTERVENTION VS. STATE ABSTINENCE**

One of the great dilemmas of our age is to decide when the state should abstain and when it should act. The German Constitutional Court has made a notable jurisprudential contribution by underlining the importance of both requiring the state not to infringe constitutionally protected subjective rights, and enjoining on the state the duty to create objective conditions to enable people actively to enjoy their rights. The failure of the state to act can be as noxious to enjoyment of rights, as over-intrusive intervention. This is a well-known dilemma which has been touched upon previously in this paper. What has been less discussed is the developing role of the courts in this process. The state, and particularly the nation state, has taken quite an intellectual bashing in recent years. Globalization and regionalization are diminishing the importance of state sovereignty. Influential anti-statist movements, both from the Left and the Right, have come into being. Yet, historically, the nation state was associated with movements towards freedom and democracy. The very concepts of constitutionalism, individual rights and limits on governmental power, emerged with the rise of the nation state. Liberalism in its most energetic and revolutionary phase was associated with the rights of citizens against the domination of absolutist rulers or the hegemony of religious bodies. To this day, democratic institutions survive with the aid of guarantees in state constitutions; the state accepts responsibility for ensuring that at least minimum conditions of a decent life are made available for all; it is also called upon to curb oppression by private power, to restrain antisocial conduct, to enforce the terms of the civil law, to mediate between competing interest groups in civil society, and to provide a framework of institutions, law, culture and public life to enable civil society to develop freely. The state and civil society might inherently be in tension, but they also inevitably need each other. In this context what role can we expect the judiciary to play, when it has both to enforce the will of the state and to restrain it? In the constitutional sphere at any rate, I suspect that less and less will our function be to pronounce on justice and more and more will it be to mediate

between competing claims. Questions of fair process, balance and proportionality will have ever more importance. The significance of dialogue, interaction and change over time will also become greater. Less emphasis will be placed on the idea of simply discovering the right answer to a legal conundrum by virtue of a process of strict legal logic, and more on finding appropriate principles to govern the balancing of competing interests in a pluralistic society.

Before sitting down and allowing the rest of this century to run its course, may I express two hopes for the development of human rights in the 21st century? The first is that the human warmth, organic social solidarity and sense of community that characterized preindustrial societies, will link up with the individual autonomy and freedom of personal self determination achieved in industrial society. The second is that the human rights endeavour ceases to be the gloomy business it has become, focussing almost entirely on naming and shaming, and that it finds a way to develop an internal exuberance consistent with the vitality of the human personality which it wishes to see writ large in the world.

*The following cases referred to in the above presentation can be found on the Internet (address: <http://www.law.wits.ac.za/lawrepal.html>).*

*S. v. Makwanyane and Another* 1995, (3) SA 391, 1995 (6) B.C.L.R. 665 (CC) (Death Penalty).

*Executive Council, Western Cape Legislature and Others v. President of the Republic of South Africa and Others* 1995, (4) SA 877; 1995, (10) B.C.L.R. 1289 (CC) (Presidential Proclamations struck down)

*The Gauteng Provincial Legislature In Re: Dispute Concerning the Constitutionality of Certain Provisions of the School Education Bill of 1995*, 1996 (3) SA 165; 1996 (4) B.C.L.R. 537 (CC) (State support for single medium schools).

*Fraser v. The Children's Court, Pretoria North and Others* 1997, (2) B.C.L.R. 153 (CC) (Rights of unwed fathers).

*Coetsee v. The Government of the Republic of South Africa and others; Matiso v. The Commanding Officer, Port Elizabeth Prison and Others* 1995, 1995 (4) SA 877 (CC), 195 (10) B.C.L.R. 1289 (CC).

