Dinner speech given to the World Bar conference held in Cape Town by the Chief Justice of South Africa Arthur Chaskalson, President of the ICJ.

Introduction

When I received the programme for the conference I was delighted to see that Param Cumaraswamy would be the guest of honour at tonight's dinner. Throughout his distinguished career he has worked actively to promote human rights, the rule of law and the independence of the judiciary. He is a most distinguished lawyer and it is appropriate that your Forum should recognise his contribution to the legal profession and the law, and that you should honour him tonight. By doing so you make a statement of your own, and send a message to the members of your constituent bars, that his concerns are your concerns, and that you respect and honour all that he stands for.

The conference programme

These concerns are reflected in topics chosen for discussion at the conference. There are naturally issues that bear directly on the functioning and future of independent bars. The emphasis, however, is not on domestic concerns, but on broader issues. The rule of law, terrorism, human rights and the law, the role of Supreme Courts and judicial independence are given prominence in the programme. These are issues of importance to society, and pertinent to the role that an independent legal profession has in a modern democracy. As such they are closely related to the bars as institutions, and it is right that they should be given prominence in the programme.

Our history

Our history is relevant to the themes of the conference. It was recalled when you visited Robben Island at the beginning of the conference and you will be reminded about it again towards the end of the conference in the session dealing with the Truth and Reconciliation Commission.

The programme says that whilst celebrating our tenth year of democracy, "South Africa is proud to be hosting the Second World Bar Conference of the Forum for Barristers and Advocates". We are not only proud to be hosting the conference. We are proud to be celebrating ten years of democracy.
We have lived through times when we were ruled by harsh and discriminatory laws, when an all-powerful state institutionalised racial discrimination and sought to curtail dissent by the application of draconian security laws. Ours was one of the most unjust societies in the world.

How, you may ask could this have been allowed to happen, and what was the role of the courts and the legal profession in all of this? The first part of the question implicates everybody in South Africa, and whites in particular, for they had the political power and elected the governments which pursued these policies. The second part, is pertinent to the judiciary and the legal profession. It is also relevant to a question still to be debated which is: "Supreme Courts: what are they for"

A history of racism, colonialism and the entrenchment of white political power by denying the franchise to blacks, provided the background for apartheid, which became state policy in the middle of the last century. Apartheid was underpinned by an ideology that expressed itself in various ways. Through culture, religion and language; through nationalism;, and ultimately through patriotism to the white state which its people were entitled, if not obliged, to defend against the tide of black nationalism that was sweeping down Africa.

Ideology provided the justification for apartheid and the security legislation used to enforce it. It fuelled the determination of the ruling elite to preserve their political and economic power, and to perpetuate their control over a state in which they would enjoy wealth and privilege and in which their language, their religion, and their culture would be dominant.

The security laws were introduced incrementally, each stage being justified on the grounds that the safety of the state was threatened, and that it was both necessary and legitimate for the state to take these measures to protect itself. Year by year the constraints on freedom were tightened. The state became all powerful, and thousands languished in gaols for their legitimate opposition to state policy. Those who benefited from the government's policies tended to rationalize their concerns, to believe that apartheid was justifiable, that conditions were not as bad as the opponents of apartheid inside the country, and people in the outside world saw them to be, and that the victims of the state's security legislation were people who deserved to be punished, having only themselves to blame for what had happened to them.

Harsh security action is seldom effective in curtailing dissent, particularly where dissent is the result of legitimate grievances. . This was true in South Africa. Despite the massive power of the state there was an on-going struggle against apartheid. The dissent could not be quelled and the conflict was ultimately brought to an end by a negotiated settlement.

The judiciary

What was the response of the courts and the legal profession to apartheid? The courts were called upon to enforce apartheid laws and did so, routinely and usually without hesitation or comment. The common law, however, recognised fundamental rights and freedoms. There were spaces within the network of apartheid legislation, and human rights lawyers attempted to occupy and defend these spaces, and where possible to make them wider. There was a small but vigorous human rights bar within South Africa which continually brought such issues before the courts and demanded decisions upon them. Although the powers of the courts were curtailed they remained an independent source of authority within the white power structure, and an important institution within which infringement of rights could be challenged.

Challenges were brought and some succeeded. The result was, as I have said before, that the courts at one and the same time were asked to articulate and give effect to equitable common law principles, and to uphold and enforce discriminatory legislation: at one time to be an instrument of justice, and at another an instrument of oppression. They attempted to steer a course between Scylla and Charybdis, clinging to the doctrine of parliamentary supremacy as the method whereby they could best serve two masters. The state proved to be the stronger of the two, and the result was a steady but persistent narrowing of human rights protection, and a steady but persistent erosion of the powers and the standing of the courts.

Truth and Reconciliation Commission

During the recent truth and reconciliation process, some in the legal profession underwent a process of self-reflection regarding the institutional circumstances which rendered the gross violation of human rights possible. This will be discussed tomorrow at a session of the conference devoted to this issue. I will not comment on the hearings save to say that the findings of the Truth Commission relating to the legal sector are harsh and serve as a reminder to all in the profession of its role under apartheid. The profession is condemned for its silence in the face of unjust laws, for its defensiveness at international

gatherings, for its failure to make justice accessible to those who could not afford it, and for its muted acceptance of the legitimacy of the unjust laws. The judiciary is also condemned for having failed to uphold justice, and for its readiness to uphold and enforce unjust law and to accept untruthful police evidence. The Commission was probably influenced in this regard by evidence given by policemen seeking amnesty. They acknowledged that torture had been committed by the police and that some detainees had even been murdered by them. These allegations had always been denied, but the extent of the malpractices that were admitted at the amnesty hearings, suggested that the atrocities were widespread and that the security police considered themselves to be beyond the law.

Justice Edwin Cameron of the South African Supreme Court of Appeal recently delivered the Bentham Lecture in London. His topic was: "When Judges fail Justice". He considered three cases involving the security of the state. The Rosenberg case in the USA, the case of William Joyce (Lord Haw Haw) in England, and the case of one of the Sharpeville Six in South Africa. Rosenberg and Joyce had been convicted of treason and the Sharpeville six of terrorism. In each case the accused had been sentenced to death and appeals to the highest courts in the countries concerned were dismissed. In the Rosenberg and Joyce cases there were dissenting judgments. In both those cases, however, the sentences of death were executed. In the case of the Sharpeville six the sentences were commuted because of the subsequent political settlement of the greater conflict in South Africa and all the accused have been freed. In a compelling and convincing analysis of the facts and circumstances of each of the cases, Justice Cameron concludes that the decisions of these three highest courts were wrong. He went on to say:

Each case was decided amidst controversy. And its result was immediately attacked as unjust and incorrect and a misapplication of the law. The flaws in the judgments were not revealed only by hindsight - and the passing decades have vindicated the dissenters, and with them the contemporary critics

He pointed out that in each of the three cases the good faith and conscientiousness of the prevailing judges had never been put in doubt. They were good judges, who according to his analysis failed justice. He suggests that they did so because they believed that the accused persons in those cases deserved the punishment that had been imposed on them, and a different outcome required by the application of principle repelled their sympathies.

Whether we agree with his analysis of the three cases or not, we should heed what he says are "important lessons not only about the fragility of the craft we profess, but about our own fallibility in applying it."

Towards the end of last year Lord Steyn delivered the 27th FA Mann lecture in London. The title of the lecture was: "Guantanamo Bay: The Legal Black Hole". The lecture was prompted by7 what Lord Steyn said was a "recurring theme in history", that at times of perceived national danger even democracies adopt measures infringing rights in ways that cannot be justified according to accepted standards of international law and justice. Prolonged detention without trial, denial of due process including denial of access to courts, and even torture, or methods that fall little short of that, are resorted to. And in some parts of the world, a perceived threat to the authority of a ruling regime, as happened in South Africa, is treated as a national disaster calling for even more drastic measures than this. Actions that are invariably justified as being in the interest of law abiding citizens, and necessary for the security of the state.

Justice Cameron and Lord Steyn both referred to the famous dissent of Lord Atkin in Liversidge v Anderson, where he said that "amid the clash of arms the laws are not silent", and reminded us that we are living in times where we may be called upon to deal with similar issues ourselves. Will we too be shown to be fallible?

The role of courts in a democracy

That brings me to the questions about supreme courts and the independence of the judiciary. Democratic systems of government involve a complex interrelationship between social, economic, political and legal structures. Parliament, the executive and the judicary, the bearers of public power, have a crucial role to play in determining the framework within which this interrelationship is conducted. Each is bound by the Constitution. Each is independent and each has its own institutional culture. The independence and the culture are important for they determine the way the institution functions and the confidence that the public has in it. It is essential that it be part of this culture that power is exercised in the interests of the people of our country, and not in the individual interests of those who hold office within the institutions. A necessary corollary of this is that the way power is exercised must be open to public scrutiny.

Independence

Judicial independence is a cornerstone of judicial power. Without it, judges cannot perform the functions assigned to them in a democracy. A prerequisite for judicial independence is that the judiciary be free from interference by government and other powerful institutions in society. That is inherent in the separation of powers which in one form or another is part of any democratic system of government. But judicial independence involves more than this. An important component of judicial independence is a state of mind which enables judges to put principle above expediency, and in doing so, to withstand not only the pressures inherent in an understanding of what will be a popular or unpopular decision, but also an ability to acknowledge and confront pressures possibly more dangerous than this, that emanate from their own feelings or prejudices.

We are all people of our times, shaped by our own backgrounds, experiences and feelings. Judicial independence requires us to acknowledge this, to confront those feelings in coming to decisions, and to be willing if that be necessary for justice to be done, to give decisions that will be unpopular, even to ourselves.

Institutional culture has an important role to play in this regard. It is absorbed by those who are part of the institution and it influences them profoundly in the way that they perform their duties. In South Africa and the other countries who are part of the Forum of Independent Bars, the legal profession is the main source of appointments to the higher judiciary. An independent legal profession is an important adjunct of an independent judiciary. It is here that the culture of independence is first experienced and fostered. It is crucial therefore that the legal profession should remain strong and independent and continue to value and promote this culture.

Public scrutiny

It is of the greatest importance that the public should have confidence in the judiciary. If that does not exist, the public will in time lose respect for the law and for the institutions of society through which law is enforced. The reputation of the judiciary will be eroded, recruitment to its ranks will be impeded, and irreparable damage will be done to one of the central pillars of democracy.

The judiciary is primarily responsible for engendering the confidence that is necessary. It has to come from the way that we perform our work and the independence and integrity evinced in doing so. This is one of the crucial responsibilities of an apex court. It sets a standard for other courts.

We no longer live in times where anything other than fulsome praise for the judiciary is regarded as contempt of court. Nor should we. The judiciary, like all other bodies that exercise public power, is accountable for the way it does so, and our decisions must be open to public scrutiny and criticism, including the erroneous comment inherent in that process. It is important that we should know how others see us. It is also important, however that the public be properly informed; that there be a proper understanding of how courts function and the reasons for judgments that are given. Without that there can be no proper scrutiny of our work, and harm rather than good may come from the debates.

A problem that confronts all courts is that the public is often ill informed. Public opinion is shaped by first impressions gained from TV sound bites, radio talk shows, and headlines. Factual inaccuracies and ill-informed comment go unanswered, are repeated, and assumes the status of fact. If there is subsequent reflection of a particular matter, and a more thoughtful discussion of what is at stake, this often goes unnoticed.

This is not a problem peculiar to South Africa. It is a problem that confronts judiciaries everywhere. I am not sure what the answer is. The media thrives on controversy, and rational debate about court decisions and the reasons for them, good or bad, does not put up ratings or sell newspapers Traditionally judges speak through their judgments and do not engage in public debate about them, even when the comment is based on premises that are clearly faulty. There are good reasons for this, but as good as they are, this practice can and often does, have adverse consequences. We need to find ways of dealing with this. Should courts have media officers charged with this responsibility? Should judges engage more freely in public debate than they are accustomed to doing, and if so, how should this be done? If not by judges themselves, how do we communicate to a sceptical public the complexity of judging and the importance to society of an independent judicary? I hope that there will be some discussion of this when we talk tomorrow about Supreme Courts and what they are for.

Terrorism, human rights and the law

I conclude with matters discussed today. Terrorism, human rights and the law. We are living in troubled times. There is no part of the world that is immune from terrorism, or from the evils of organised crime. Xenophobia, fuelled partly by concerns over such matters, is resurgent. Great danger lies in succumbing to the seductive call that law abiding citizens have nothing to fear from harsh and arbitrary laws put in place to deal with such matters. That is how a descent into arbitrary rule invariably begins. We need to be on our guard lest overwhelmed by a legitimate concern to combat these evils, we find ourselves abandoning hard won rights, and resorting to practices which undermine the fabric of our democracy.

In saying this I do not suggest that the reality of the threat posed to all societies by terrorism and organised crime should be taken lightly. On the contrary, the threat is real and calls for a firm response from the state. The response should, however, be proportional to the danger involved and carefully tailored to address it. That danger includes not only the harm done by terrorism and organised crime but also the harm to the fabric of our society by responses that undermine democracy itself.

We can learn from our history and from warnings such as those given to us by Justice Cameron and Lord Steyn. When we talk about South Africa today we sometimes forget where we have come from.

What it meant to live in a country in which there was no respect for human rights, and how much has been achieved by our country during the ten years of our democracy.

Although we are still an unequal society, much has changed since then. We have rejected the past where the law was partial and unequal. In contrast with that we have a Constitution which is the supreme law. A Constitution that calls for an open, non-racial, non-sexist and democratic society founded on human rights; a legal order in which the legislature and executive may exercise no power and perform no function beyond that conferred upon them by law; a legal order in which courts are mandated to declare invalid, legislation or conduct inconsistent with the Constitution. Courts have been entrusted once more with their rightful role.

For us, the establishment of a constitutional state has been a legal watershed. The onset of constitutionalism has infused the law with new opportunities and the law has regained its rich texture and inherent creative ambiguity. South African lawyers and judges can now practice their professions honourably. We must continue to do so and confront the problems that we face consistently with the requirements of our Constitution.

Human rights protection and the rule of law, two of the foundational values of our Constitution, stand to protect us all. But, they can only protect and serve us as citizens, if we, as judges and lawyers protect and serve them. I hope that will be the message of this conference.

Arthur Chaskalson
Chief Justice of South Africa