APPEAL TO REASON

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Michael McGregor Corbett has become the 16th Chief Justice of the Republic of South Africa at a most critical point in the country's modern legal history. Arguably, no other Chief Justice since Lord De Villiers became the first Chief Justice of the Union in 1910 has been faced with a more difficult task in developing a public belief and confidence in the administration of justice and rule by law.

The past decade in particular has been a devastating one for the South African legal system. Since the accession to power of P W Botha, the focus of government has shifted from Parliament to an executive dominated by security chiefs. Initially, government strategy consisted of the development of a "total strategy" to control the so-called "total onslaught" it claimed was being launched by the ANC and SACP and orchestrated from Moscow. Government policy until the mid-Eighties could be summarised as "no security without reform". The unprecedented social turbulence of the past five years has caused government to place the emphasis upon security as a precondition for its policies of co-option. Thus we are now told there can be "no reform without security".

Whereas the Vorster government had used its massive majority in Parliament to implement its policies, the Botha government has reduced Parliament to a multiracial debating chamber. Policy is effectively being implemented by an archipelago of security management councils, accompanied by security action designed to remove all opposition to the consensus that the Botha government wishes to develop and preserve among "all moderate South Africans".

Within this political context, the third arm of government, the judiciary, has been reduced to political

(Opposite) Chief Justice Corbett.

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impotence, particularly as a result of the declaration of the State of Emergency in 1985 and again in 1986. South Africa now has a dual system of law. The Roman-Dutch legal system, although massively savaged by justice ministers C R Swart, B J Vorster and Jimmy Kruger, still contains certain basic legal principles that protect the individual against arbitrary executive excess. In this system, the courts have a significant role to play in ensuring that these basic principles continue to exist and function. However, the Emergency regulations have created a parallel system in which laws are not initiated through parliamentary procedures or judicial interpretation of Roman-Dutch legal authority, but rather by ministerial discretion. Today, almost all civil liberties in South Africa are governed by this second system of law.

Although temporary in theory, the Emergency regulations have now existed for almost three years. In 1988, they were published in the fashion of parliamentary statutes, each with its own title. For citizens to enjoy protection against arbitrary executive excess, the courts of South Africa should have scrutinised the legality of all these regulations to ensure that they meet the strict conditions laid down in the statute that empowers the State President to declare an Emergency, namely the Public Safety Act.

The onus of discharging this crucial challenge fell ultimately upon the Appellate Division, South Africa's highest court, under the leadership of former Chief Justice Pierre Rabie. Sadly, the Rabie court offered little in the way of a buffer between an executive armed with ferocious emergency powers, and the individual citizen wishing to enjoy the ordinary civil liberties to which each citizen in any society claiming allegiance to the Western democratic tradition is entitled.

In a recent review of the Rabie court, Chris Forsyth, author of a leading work on the record of the Appellate Division from 1950 to 1980, noted that the court had failed to make use of the opportunity provided by the flood of security cases to adopt a fresh approach to the problem of keeping the executive within legal boundaries regarding its treatment of detainees. Writing in the 1988 South African Law Journal, Forsyth noted: "Hefer J A's judgment in *Castel NO v Metal and Allied Workers' Union*, where ignorance of the applicable English law is displayed, brings to mind the vision of some Dark Ages lawyer surrounded by classical texts, peering over these jewels of legal scholarship, yet understanding almost nothing of them. This is the point, in public law at any rate, to which the Appellate Division has sunk."

No less a legal authority than Supreme Court Judge John Didcott recently described the current state of the nation as being "disfigured by lawlessness". Writing in the 1988 South African Journal of Human Rights, Judge Didcott argued that this characteristic had been hardened by the executive "intensifying the evil of imprisonment without trial, restricting wholesale our freedom of speech, assembly, movement and association and the freedom of the Press and often entrusting to its mere underlings decisions with the same consequences". Whereas there had been judicial endeavour to control the executive appetite for more power, Judge Didcott noted that these efforts had proved to be largely in vain as the Appellate Division, "in its wisdom, decided in case after case during the last couple of years that the capacity of the courts to assert and protect the Rule of Law in that situation is so attenuated as to be for all practical purposes insignificant".

Unquestionably, Judge Didcott has accurately summed up the recent record of the Appellate Division. A major reason for its reticence in rendering widely phrased regulations void on the grounds of vagueness is to be found in the composition of the benches that have heard the important Emergency cases. Since 1986, the Appellate Division has heard six major cases in which it had an opportunity to restrict executive power in terms of the Emergency regulations. They were *State President v Tsenoli* (1986), *Omar v Minister of Law and Order* (1987), *Mqumba and others v the State President* (1988), *Van der Westhuizen v UDF* (1988), *State President v Release Mandela Campaign* (1988) and *State President v UDF* (1988). Chief Justice Rabie presided in all six cases, Judges Hefer, Viljoen and Joubert heard four cases, Judge Vivier three cases and Judges Van Heerden and Grosskopf two cases. Judges who are known for a more liberal legal approach, such as the then Judge Corbett and Judge Hoexter, heard only one case each, while Judges Milne and Botha did not appear on the bench in any of the six cases.

En passant, in the one emergency case in which Judge Corbett did sit, namely that of Tsenoli, he concurred with the judgment of Chief Justice Rabie. Lawyers believe that the Rabie judgment, upholding the validity of the regulation concerned, was correct on this occasion. However, civil rights lawyers were disappointed by the fact that Judge Corbett had not taken the opportunity of handing down a separate concurring judgment in order to distance himself from the executive-minded approach to the interpretation of security legislation adopted by the Appellate Division since *Rossouw v Sachs* in 1964 and confirmed in Chief Justice Rabie's judgment. What made this omission more disappointing was the fact that Judge Corbett had, as a judge on the Cape bench, set out far more equitable guidelines for interpreting security legislation in *Gottschalk v Rossouw* (1966) than those adopted by the Appellate Division.

Be that as it may, the core of the Emergency bench consisted of Chief Justice Rabie and Judges Hefer, Viljoen and Joubert, all of whom are considered to have a conservative legal approach. Only in the first Emergency case, that of Tsenoli, did the bench comprise of the five most senior judges of the Appellate Division. In all the others, the succession of judgments that represent a judicial retreat from supervision of the Emergency became predictable, given the judicial outlook of the bench.

The ability of the Chief Justice to appoint the bench to hear a particular case has a major impact on the nature of the court's jurisprudence, notwithstand-

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ing the claim that the judge's task is simply to give effect to the intention of Parliament and to be politically neutral. The plain truth is that there is no such thing as an absolutely unitary or common use of language, and hence any presumption that all parties who are subject to a legal document, whether it be a contract or statute, must necessarily share the same meaning thereof or employ the same conceptual tools of interpretation, cannot be sustained.

Instead, different individuals, groups or classes experience varying and often incompatible aspects of the legal system that cannot be reduced to common legal usage. Thus, in the process of the interpretation of security legislation, certain judges who accept the validity of the "total onslaught" thesis will more readily take judicial cognisance of such a political framework, even if subconsciously, when giving effect to the intention of Parliament.

For this reason, a profile of the former Chief Justice Rabie by Steve Mufson, based on an interview with him and published in the *Sunday Star* on May 3 1987, has considerable significance. The relevant extract reads as follows:

> [Chief Justice Rabie] seems unperturbed by the government's encroachment on the rights guaranteed by Roman-Dutch common law. "As far as the court is concerned, there is no question of conflict. Once Parliament says this is law, it is the law," he says. He views a Bill of Rights with scepticism and says that in the United States it "has produced a bit of a shambles". To him, the United States represents "freedom run mad".
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> He is unwavering in his belief that the Internal Security Act is justified by what he perceives as a violent onslaught from outside the country. He says that, without the Act, the government "wouldn't be able to cope with the situation for six months".
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> "We must be realistic. We have strangers coming in across the borders with bombs and mines. There is nothing in the common law to deal with a situation like that. The ordinary law of criminal procedure would require that the man be charged within 48 hours and that you can't question him any more after that.
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> "We must get information from people we arrest, especially when they are carrying weapons from the Soviet bloc; otherwise we can't defend ourselves."
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> Since his commission made recommendations on security legislation, the situation has worsened, Mr Justice Rabie says.
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> "The situation in the country is pretty near that of a civil war. It is naive to think you can quell it by bringing people to court."

In interpreting security legislation and Emergency regulations, Chief Justice Rabie repeatedly noted in judgments that the court was committed to the so-called even-handed approach to the interpretation of statutes that encroached upon the liberty of the subject, namely one that accorded preference neither to the "strict construction" in favour of the individual, nor to the "strained construction" in favour of the executive.

Given his openly expressed belief that the Emergency regulations are necessary, it becomes clear that, far from being even-handed, this approach affords considerable support to those judges who support the legislation and are not prepared to limit its ambit in order to make it correspond to the legal morality contained in the Roman-Dutch legal heritage, with its liberal emphasis on the freedom of the individual.

As an American academic, James Boyd-White, has written: "The law is something that lawyers themselves make all the time wherever they act as lawyers, not something that is made by a political sovereign."

In deciding applications on the validity of Emergency regulations, judges who hold the views expressed by Chief Justice Rabie may therefore claim to be adopting an even-handed approach – but in effect they will not accept the possibility of ambiguity, with the inevitable consequence that the interpretation of such regulations will work in favour of the executive.

The implication of this argument is that the composition of the court does matter. Hence the true significance of Judge Corbett's elevation to the position of Chief Justice. He brings a different legal outlook to the position – one that is more in keeping with the immanent liberal morality of a legal system, the rules of which are to be found embedded in the legal soils of English and Roman-Dutch jurisprudence.

Michael McGregor Corbett was born in Pretoria on September 14 1923. In his junior years he attended schools in Pretoria and Cape Town and later the Rondebosch Boys' High School in Cape Town, from where he matriculated at the end of 1939. He then began studying for the degrees BA LLB at the University of Cape Town. In April 1942 he enlisted in the South African Tank Corps. After completing an officer's course in 1943, he was transferred to the 1st Royal Natal Carbineers and saw service in Egypt and Italy with that regiment as part of the 6th SA Armoured Division.

He returned to UCT in 1945 and completed the LLB degree in June 1946 after the university had given him special permission to write his final examination so soon. He had been awarded an Elsie Ballot Scholarship, and entered Trinity Hall, Cambridge, in October 1946. On the strength of his South African degrees he was permitted to proceed immediately to Part II of the Law Tripos, which he completed in June 1948 with first class honours. Fellow South Africans in his law class at Cambridge included G G Hoexter, now a judge in the Appellate Division, D L Shearer of the Natal bench, and W H B Schreiner, SC, of the Johannesburg bar.

He returned almost immediately to South Africa and after a brief period spent reading in chambers with Adv Marius Diemont, subsequently a judge on the Cape bench, he joined the Cape bar on November 5 1948. He did a good deal of part-time law lecturing (at UCT and elsewhere) during his first few years at the bar. He took silk in February 1961, was appointed to act on the Cape bench as from February

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1 1963 and was permanently appointed to the Cape Provincial Division on October 28 1963. He acted in the Appellate Division from August 15 1970 to May 31 1971 and again from February 15 1974 to May 31 1974. He was appointed as a permanent member of the Appeal Court from June 1 1974.

Among civil rights lawyers, Chief Justice Corbett is perhaps best known for his minority judgment in *Goldberg v Minister of Prisons*, which was heard in 1978. A group of "political prisoners" had applied to the Supreme Court for a ruling that the Commissioner of Prisons had wrongly exercised his discretion in denying them access to radio news and reading matter on current events. The application failed, and their appeal was rejected by a majority of the court.

In a minority judgment which has been recognised as a classic judicial defence of individual liberties, Judge Corbett held that "fundamentally, a convicted and sentenced prisoner retains all the basic rights and liberties of an ordinary citizen, except those taken away from him by law, expressly or by implication, or those necessarily inconsistent with the circumstances in which he, as a prisoner, is placed". Reasoning from this premise, he argued that there can be no assumption that basic rights do not include access to news and reading material.

For a "well-educated, intelligent prisoner" serving a long sentence, deprivation of all news of what was happening in the outside world would be a "very serious psychological and intellectual deprivation indeed". An exercise of discretion by the commissioner designed to prevent "political prisoners" from receiving all news – even news which could not possibly be harmful to prisoners or to prison security or to the maintenance of good order and discipline within prisons – would infringe a basic right of the prisoners concerned and would be an improper exercise of the commissioner's discretion.

One year later, Judge Corbett opened an international human rights conference at UCT. In his speech, he observed that some form of majority rule appeared to be "logical and inevitable" to many thinking persons, and urged the incorporation of a Bill of Rights in South Africa's constitution, to be upheld by an independent judiciary, in this context. He went on to say that a "free Press is indispensable to the proper administration of justice . . . indeed, in upholding the freedom of the Press, the court is securing its own viability".

Chief Justice Corbett therefore not only comes to his office with a distinguished academic and judicial career, but has also expressed opinions that are more in accordance with the earlier, more liberal tradition of the South African courts than the narrow executive approach which has been in evidence in recent years. Most recently, he revealed his commitment to this

tradition in *Attorney-General, Eastern Cape v Blom and Others* (1988). In handing down the unanimous judgment of an otherwise conservative bench, he upheld the view that, when an Attorney-General refused bail to an arrested person in terms of the Internal Security Act, he was obliged to hear the arrested person before making a decision. In response to the argument that such a hearing could prejudice State security by compelling the Attorney-General to disclose sources of police information, (the then) Judge Corbett commented that "secrecy in regard to matters of security should . . . not be allowed to become a fetish".

Will Chief Justice Corbett's appointment alter the direction in which the Appellate Division has been leading the South African legal system? Obviously, a chief justice can influence the quality and nature of judicial jurisprudence, both by personal judicial example and in his choice of judges to hear cases. But his scope is limited. Without a Bill of Rights, and operating within the context of a system of parliamentary sovereignty, a judge has limited scope for curbing the power of the executive. Furthermore, as has been argued above, present government policy requires continued rule by Emergency regulations, to be followed by government's version of reform. For this reason, a court that attempts to impose legal constraints on government powers will rapidly enter into conflict with government.

However, owing to the compliant approach of the Appellate Division in recent years, the limits of judicial resistance to executive excess have never been truly tested. As circumscribed by present government policy as the courts may be, undoubtedly the very legitimacy which they lend to the South African political system affords judges a real opportunity to exercise some restraint on the various arms of the administration.

There is little doubt that the alteration of the judicial climate, while keeping within the narrow constraints the Botha government believes to be appropriate for judicial activity, will continue to be an extremely difficult task.

What is therefore most likely to happen during the four and a half years during which Chief Justice Corbett will hold office? This seems to be that government will bypass the courts to an ever-increasing extent while the Appellate Division, in its ever narrower sphere of influence, will cautiously reverse some of the judicial excesses of the Rabie court. But even this will provide some hope to those who presently despair for an independent judicial system in South Africa.

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