Human Rights in the Post-Apartheid South African Constitution

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CONSTITUTIONAL PROTECTION OF HUMAN RIGHTS

JUDICIAL REVIEW

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There appears to be a large measure of agreement amongst those who are committed to the establishment of a non-racial, human rights based democracy in South Africa that a system of judicial review, in the wide sense of the expression, is essential not only for the effective protection of human rights but also for the viability of a new constitutional dispensation.

At the Lawyers Conference held in Harare from 31 January to 4 February 1989 on The Role of Law in a Society in Transition agreement was reached on "the need for a new constitutional order, a justiciable bill of rights and an independent judiciary."[1] In article 31 of the South African Law Commission's draft Bill of Rights, published in March 1989 as part of its Working Paper 25, such a right of review is conferred on the Supreme Court of the Republic of South Africa.[2]

By judicial review in this context I understand the right and duty conferred on a court, or particular courts, of a country not only to authoritatively interpret the constitution of such country but also to decide authoritatively on the constitutionality of laws, and executive and administrative acts, and in appropriate cases to declare such laws and acts invalid and unenforceable when they conflict with the country's constitution.

Where this form of judicial review is used to safeguard the basic legal values and the fundamental human rights in a country it invariably seems to occur in the context of a written constitution enshrining the above values and rights. The converse is not always true. Countries of, what David and Brierly call, the "Romano-Germanic family"[3] although they all have written constitutions, do not all recognise the doctrine of judicial review. The Netherlands does not, France only in the limited sense that the Conseil constitutionel may test the constitutionality of a statute before it comes into force and in Switzerland the federal court may only test the constitutionality of canton statutes against federal law but not the constitutionality of federal law itself.[4]

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1. The final Communique of the Conference issued on 4 February 1989.
2. Article 31 in Chapter 15, p 479 of the South African Law Commission's Working Paper 25, Project 58: Group and Human Rights. The South African Supreme Court, as presently constituted, comprises several Local and Provincial Divisions as well as the Appellate Division.
3. David and Brierly, Major Legal Systems in the World Today (1985) 108.
4. David and Brierly, 109.

In Latin America judicial review has from time to time been recognised in most countries and has apparently only been completely denied in Equador, Peru and possibly the Dominican Republic.[5]

Even in those countries which recognise wide powers of judicial review there is a marked divergence in the procedures employed and the effects of successful review. In some countries it is open to any judge to find that a statute is unconstitutional and to refuse to apply it.[6] In others only a Supreme Court may do so, while in several European Countries, such as, for example West Germany, Austria and Italy, this power is entrusted to a specially created constitutional court.[7]

The effect of a finding of unconstitutionality also varies. It has been suggested that in the USA such a finding is not binding on third parties and that the enforcement of the law in question has merely been suspended,[8] whereas in West Germany the Federal Constitutional Court in most cases declares the offending statute to be invalid.[9]

Countries (including South Africa) whose constitutional jurisprudence has developed from or under the influence of the British Westminster system of the "divine right" of so-called parliamentary sovereignty, know very little, if anything, of judicial review. Some case could, however, be made out for the proposition that the seeds for such a jurisdiction, while dormant, are not completely dead in the fields of Westminister jurisprudence.

It is of course notorious that Sir Edward Coke's dictum in 1610 in Dr. Bonham's case[10] to the effect that "in many cases, the common law will control Acts of Parliament, and sometimes adjudge them to be utterly void; for when an Act of Parliament is against common right and reason, or repugnant ... the common law will control it, and adjudge such Act to be void" has lain fallow for nearly four centuries although it was reaffirmed in Day v. Savadge[11] in 1614 and in City of London v. Wood[12] in 1702. The Orange Free State Constitution of 1854 was greatly influenced by that of the United States, borrowed directly from its provisions and even guaranteed, in the entrenched constitution, equality before the law. The Supreme Court assumed the right of judicial review, in the absence of express provision therefore in the Constitution.[13] This was of as little assistance to

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5. David and Brierly, 109 text and 109 fn 3.
6. eg. the United States, Argentina, Bolivia, Mexico (see David and Brierly 109).
7. David and Brierly 109-110.
8. Gerald Gunther, Constitutional Law (1985) 28-29.
9. Dr. Jörn Ipsen Constitutional Review of Laws in Main Principles of the German Basic (ed.) Christian Stark (1983) 132. In certain cases the Federal Constitutional Court has merely ruled that the statute is "unconstitutional," giving directives to the legislature to remove the ground of unconstitutionality.
10. 77 ER 646 at 652.
11. 80 ER 235 at 237.
12. 88 ER 1592 at 1602. See generally, Dugard, Human Rights and the South African Legal Order (1978) 14-15.
13. Cassim and Solomon v. The State (1892) 9 Cape Law Journal 58 and compare The State v. Gibson (1898) 15 Cape Law Journal 1.

Messrs. Cassim and Solomon in their dispute with the state,[14] as judicial review was to mr. Dred Scott[15] some 35 years earlier on the other side of the Atlantic, for the court held in Cassim and Solomon v. The State[16] that a law of 1890 which prohibited Asians from settling in the Free State was not in conflict with the requirement of equality before the law. Nonetheless it is interesting to observe that in 1898 Hertzog, J. (who later became Prime Minister of South Africa) held that while the Volksraad (House of Assembly) might be the highest legislative authority it was not the highest authority and that "above the legislative authority stands the constitution - giving authority - that is, the sovereign people, to whom the majesty belongs."

Amidst the welter of prolix and irrelevant provisions of the Grondwet (Constitution) of the Transvaal Republic an elaborate procedure was laid down for ordinary legislation but none specified for amendment of the constitution. Inevitably the cumbersome procedure proved irksome and was frequently dispensed with, laws being informally passed without compliance with the prescribed procedures and by means of a simple majority of the Volksraad. These informal laws were referred to as "besluiten" (resolutions). In Brown v. Leyds N.O.[17] the High Court, per Kotzé C.J., exercised a right of justicial review, relying heavily on and quoting extensively from Marbury v. Madison, and declared the resolutions invalid. The final result of the political storm that ensued was that Chief Justice Kotzé was dismissed from office pursuant to a bill which President Kruger had rushed through the Volksraad conferring on himself the right to dismiss any judge who failed to give an assurance that he would not exercise the right of review.

In 1951 the South African Parliament purported to enact the Separate Representation of Voters Act, 1951 (Act 56 of 1951) which was aimed at removing so-called "coloured" voters from the common voters' roll. The Bill was passed by the House of Assembly and the Senate sitting separately and not in accordance with the entrenched sections of the South African Act, secs. 35 (1) and 152, which required a joint sitting of both houses and an acceptance of the Bill by a two-thirds majority at the third sitting. In Harris and Others v. Minister of the Interior and Another,18 (the "vote case") the Appellate Division of the Supreme Court, invoking a limited right of review, issued an order declaring the Act in question "invalid, null and void and of no legal force and effect." The effect of this limited right of review was that the court could enquire whether parliament was properly constituted to enact the particular legislation and whether the Bill was passed in accordance with the procedures prescribed by the entrenched provisions (so-called "manner and form" provisions). The Court specifically disavowed any right to review an Act of Parliament on a question as to whether its contents were "reasonable or unreasonable, politic or impolitic".[19] Surprisingly little attention was given to the Court's power to exercise any right of review at all,

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14. Footnote 13 above.
15. Dred Scott v. Sandford 60 US. 393 (1875).
16. The State v. Gibson (1898) 15 Cape Law Journal 1 at 4.
17. (1897) 4 off. Ref. 17.
18. 1952 (2) SA 428 (A).
19. At 456 G.

there being but passing reference to the fact that "The Court in declaring that such a Statute is invalid is exercising a duty which it owes to persons whose rights are entrenched by Statute."[20] and that to hold otherwise "would mean that Courts of law would be powerless to protect the rights of individuals which were specially protected in the constitution of this country."[21] The South Africa Act conferred no express power of review.

For present purposes the judgment does indicate that, historically, South African lawyers are prepared to accept that the highest legislature in a country can impose self-limitations on its powers.

Of greater significance is the "second" Harris judgment (the so-called "High Court of Parliament" case).[22] In response to the "first" Harris judgment (the "vote case") the government introduced Act 35 of 1952, which established a High Court of Parliament, consisting of all Senators and Members of the House of Assembly, with power to review decisions of the Appellate Division in which any provision of any Act of Parliament was declared invalid or unenforceable. The High Court of Parliament Act was passed bicamerally and not in accordance with the entrenched provisions. Once again the Appellate Division exercised a right of review and confirmed the lower court's order that the Act was "invalid, null and void and of no legal force and effect." Once again the Court considered it unnecessary to justify extensively its powers of review, merely observing[23] that the entrenched provisions

> "contain constitutional guarantees creating rights in individuals, the duty of the Courts, where the question arises in litigation, being to ensure that the protection of the guarantee is made effective, unless and until it is modified by legislation in such a form as under the Constitution can validly effect such modification .... The method employed by sec. 152 to entrench the rights conferred by secs. 35 and 137 is the sanction of invalidity. This can only mean invalidity in law as determined by Courts of Law which consider issues raised by parties who bring their disputes before such courts."

It is interesting to note that as authority for this conclusion reference was made to the following remarks of Lord Selborne in The Queen v. Burah, 3 AC 889 at 904 as approved by the Privy Council in James v. Commonwealth of Australia, 1936 A.C. 578 at 613:

> "The established Courts of Justice when a question arises (in regard to a Constitution) whether the prescribed limits have been exceeded, must of necessity determine that question."

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20. At 456 F.
21. At 470 E.
22. 1952 (4) SA 769 (A).
23. Per Centlivres C.J. at 779 F-780 A and compare 786 A-B, 787 E-F, 794 F.

The particular importance of the High Court of Parliament case is that it took an uncompromising stand on the inviolability of separation of powers. All five concurring judgments conclude, in effect, that when regard is had to substance rather than to form:

1. The High Court of Parliament would not be functioning as Court of Law but still as Parliament masquerading under another name;

2. Its pronouncements would not be judicial pronouncement but legislative pronouncements;

3. The effect of the High Court of Parliament Act was to authorise Parliament, sitting unicamerally, to render nugatory the entrenched provisions.

4. This being the case the Act, not being passed in accordance with the entrenched provisions, was null and void.[24]

The idea at least of judicial review and the inviolability of the separation of powers, whatever might have happened since 1952, is not wholly foreign to our jurisprudence.

What precise form judicial review is to take in a new South Africa cannot be decided in the abstract. It will depend upon the more precise content which is given to the non-racial, human rights based democracy in South Africa we are speaking about, including the new constitutional, political and economic dispensations.

The conventional task of courts is to adjudicate on and protect rights and to enforce duties. Judicial review serves to fulfil this task on the level of basic constitutional rights and duties.

Impossible demands must not be made on the courts in the same way that impossible demands must not be made on constitutions. There are limits to judicial intervention and activism and to what courts, even the highest courts, can order a government to do. I personally am of the view that economic and social rights, properly defined, are as much human rights as political and civil rights; that it is meaningless to speak of freedom to people who are starving and that constitutional recognition ought to be given to economic and social rights. Likewise equality before the law is a hollow shibboleth if not associated with equality of access to the material means, without which self-realisation and self-fulfillment on anything approaching an equal basis is not possible. Nevertheless I incline to the view that, apart from legitimate and meaningful negative protections which can be given to certain rights in the field of labour and trade unions, economic rights cannot

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24. Per Centlivres C.J. at 784 D-H; Greenberg JA at 785 G, 786 A, 787 B-C; Schreiner, JA at 788 B-C, 788 H - 789 A, 789 D-E; Van den Heever, J.A. at 792 E-F, 793 D and Hoexter, J.A. at 796 F-H.

look for their enforcement to some, as yet undiscovered, general constitutional formula. There is certainly every warrant for their recognition in a constitution in the sense of setting some general norm which the government is enjoined to fulfil. We might give closer attention in this respect to the German concept of "Staatszielbestimmung" which Professor Philip Kunig describes[25] as "a term of constitutional theory" and which is translated as "a norm describing a goal to be pursued by the state". Closely linked with this norm is the "principle of social justice" ("Sozialstaats prinzip") which is almost entirely a creation of constitutional theory, inasmuch as the word "social" only appears twice in the German Basic Law; in Article 20 (1) where the Federal Republic of Germany is characterised as "a democratic and social federal state" and in Art 28 (1) which stipulates that the constitutional order in the Laender must conform, inter alia to "the principles of ... social government based on the rule of law, within the meaning of (the) Basic Law". The term "social", as Kunig further points out,[26] is not used in the Basic Law "to place the burden on decision-makers in administrations and courts to solve the riddle individually. What is 'social' has to be worked out and laid down by the legislator taking due account of basic human rights especially."

We can furthermore note that while property and the right of inheritance is guaranteed in Article 14 (1) of the Basic Law Article 14 (2) immediately qualifies this by enacting that "Property imposes duties. Its use should also serve the public weal." An elaborate jurisprudence has arisen around this "social function" of property, balancing the function of property as a safeguard for the personal freedom of the individual against its social relevance of function. A new constitutional dispensation in South Africa if it is based on a mixed economy[27] and if, at least, property for personal use and consumption is constitutionally protected[28], must give carefully attention in its constitution to these different functions of property. The burden ought not to be placed on the courts to solve the riddles.

Courts by themselves cannot make economic justice come true. More modestly and correctly stated, courts can do little on their own to limit economic injustice. Courts can neither stimulate nor control the economy.

Of course the majority of South Africans demand and are entitled to political power and economic justice. Modern international human rights law includes both universal adult franchise and economic rights. But human rights require more than majoritarian rule. Neither majoritarian rule, nor the elimination of economic injustice, requires that fundamental civil and political rights be denied: Moreover majority rule does not guarantee good or competent rulers. The prime problem of politics is still not answered by the question "who should rule?" I side with Karl Popper in asserting that the correct question is: "How can we so organize political institutions (now and in a

25. Kunig, The Principle of Social Justice in The Constitution of the Federal Republic of Germany (ed) Ulrich Karpen (1988) at 194.
26. At 200.
27. Constitutional Guidelines for a Democratic South Africa para. (q).
28. Ibid para (t).

future South Africa) that bad or incompetent rulers can be prevented from doing too much damage."[29]

I would suggest that the best currently known way of doing this is by means of a Bill of Rights underpinned written Constitution which, as I see it, cannot operate effectively without full judicial review.

I accept, as an initial premise, that extensive social and economic restructuring will have to take place in a new South Africa, but materially greater social and economic justice cannot take place without continuing the creation of material resources. When doubts are expressed as to the wisdom or efficacy of large-scale, all-encompassing blueprints for economic and social reform it is dangerous to dismiss such criticism out of hand on the ground that it is inspired by oppressive capitalism and racism. We cannot achieve the right result if we use the wrong method and therefore we must select the correct scientific methodology for social and economic change. My contention, based on Popper's philosophy of science and scientific methodology, is that knowledge cannot advance and solutions be applied scientifically, if the falsification of theories and proposed solutions are not permitted.[30] One of the reasons why Popper argues that all-encompassing, large-scale schemes for social change, what he calls "large-scale social engineering", are not only fatally flawed in their scientific methodology but doomed to failure is because they cannot be subjected to falsification and because the architects of large scale social engineering dare not, for psychological reasons and for reasons of self-interest, tolerate criticism and opportunities for falsification. "It is difficult enough to be critical of our own mistakes, but it must be nearly impossible for us to persist in a critical attitude towards those of our actions which involve the lives of many men. To put it differently, it is very hard to learn from very big mistakes."[31]

One of the greatest dangers of large scale social engineering is that it cannot and does not tolerate criticism.[32] This is the reason why Verwoerdian Apartheid and its various successors in title, as

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29. Karl Popper, The open Society and its Enemies, as quoted in A Pocket Popper (ed. David Miller) p. 320.
30. It is impossible in this short paper to deal properly with Popper's thesis on scientific methodology. Reference may be made to Chapters 7, 13, 24, 25 and 26 of A Pocket Popper, note 29 above.
31. Popper, as quoted in A Pocket Popper (ed. David Miller) p. 315. See pp. 312-317 for his criticisms of the Holistic Theory of Social Experiments.
32. "The reason is that every attempt at planning on a very large scale is an undertaking which must cause considerable inconvenience to many people, to put is mildly, and over a considerable span of time. Accordingly there will always be a tendency to oppose the plan, and to complain of it. To many of these complaints the Utopian engineer will have to turn a deaf ear if he wishes to get anywhere at all; in fact it will be part of his business to suppress unreasonable objections. But with them he must invariably suppress reasonable criticism too. And the mere fact that expressions of dissatisfaction will have to be curbed reduces even the most enthusiastic expression of satisfaction to insignificance. Thus it will be difficult to ascertain the facts, i.e. the repercussions of the plan on the individual citizen; and without these facts scientific criticism is impossible.

well as Marxist/Stalinist large-scale social engineering were obliged to suppress freedom of speech and why both systems have been taking such a long time to die or adapt.

Freedom of speech is absolutely essential, apart from its other values, in order to preserve knowledge and in order to ensure that social and economic planning takes place correctly. It is thus vitally necessary to establish and protect freedom of speech in a new South Africa and in any transition to a new South Africa. State power and State intervention is inherently potentially dangerous and, for the reasons stated, freedom of speech must be protected in order to prevent big mistakes from being made. This is one of the most powerful reasons for entrenching freedom of speech in a Bill of Rights and protecting if through judicial review. The interventionist legislature and executive are the last institutions to be entrusted with this duty.

It has been suggested that judicial review by an elite, elderly, mountaintop judiciary will in fact be a serious impediment to the progress of democracy and the redistribution of wealth, particularly when such judiciary will be composed, for the most part, of persons inherently opposed to the process of democratisation. For this reason, so the argument runs, the process of economic reform ought not to be subject to judicial review but should be carried out by commissions responsible only to the "representatives of the people" in the legislature. This argument overlooks three important factors. The first is that such an approach simply ignores the cumulative history concerning power abuse when executive action is not effectively controlled. Secondly, it removes the only effective institutional means, in the form of judicial review, of "criticising" and "falsifying" the economic and social programmes of the legislature and executive and thus ensuring that such restructuring is rational and effective. Thirdly, it ignores the possibility that judicial review need not be a reactionary force and that there might well be models of judicial review which could enhance credibility amongst those who were previously disenfranchised and ensure their more effective representation in the organs of judicial review.

A very real problem in a democratic South Africa will be the logistics of introducing a sufficient number of skilled and experienced black lawyers into the judiciary without in the process denuding the ranks of black practitioners. At the present moment there is little chance of providing judicial experience for black lawyers because by far the greater majority are, understandably enough, unwilling to accept judicial appointment.

But the difficulty of combining holistic planning with scientific methods is still more fundamental than has so far been indicated. The holistic planner overlooks the fact that it is easy to centralize power but impossible to centralize all that knowledge which is distributed over many individual minds, and whose centralization would be necessary for the wise, wielding of centralized power ... But this fact has far-reaching consequences. Unable to ascertain what it is in the minds of so many individuals, he must try to simplify his problems by eliminating individual differences: he must try to control and stereotype interests and beliefs by education and propaganda. ... Ultimately, it must destroy knowledge; and the greater the gain in power, the greater will be the loss of knowledge."

Ibid p. 316.

If one were to opt for an hierarchical system of judicial review, working with (say) a three or four-tier system, this would involve a large number of judicial positions and it might be difficult, for some time to effect meaningful black representation on the judiciary. The ablest black lawyers could, of course be concentrated in the highest court but if litigation has first to pass through two or three lower courts many constitutional issues will not reach this court, given the difficulties of comprehensive legal aid in South Africa.

On the other hand we could look for guidance to, for example, the West German system, which seems to have greater flexibility with its four stream approach to the Federal Constitutional Court (FCC).

1. Courts other than the FCC have only a limited jurisdiction to declare legislative acts invalid, namely in the case of subordinate legislation and statutes which were enacted before the coming into force of the Grundgesetz on May 23, 1949, provided such statutes have not been accepted ("in seinen Willem aufgenommen") by subsequent legislation. Such a decision is not binding on other parties or courts.

2. In all other cases where the constitutionality of a statute arises in the course of adversary proceedings a system of so-called "concrete judicial review" arises in terms of article 100 (1) of the Grundgesetz. If a judge is of the view that a statute is unconstitutional and that such unconstitutionality is relevant to the issue before him, he is obliged to suspend the proceedings and submit the question of constitutionality to the FCC. While the FCC only decides the issue of constitutionality, leaving it to the lower court to decide the remaining issues, the constitutional adjudication is likely to give pointers in this regard. The FCC is the only court which may declare a statute invalid and its ruling is universally binding.[33]

3. Article 93 (1) 2 of the Grundgesetz makes provision for "abstract" judicial review, unconnected with actual or pending litigation. Standing to petition the FCC for abstract judicial review is limited to the Federal Government, a Land Government and one third of the Bundestag members. The scope of abstract judicial review is limited to three areas, namely where there are differences of opinion or doubts as to the formal and material compatibility between federal law and the Grundgesetz, Land law and the Grundgesetz and Land law with other federal law. The right of an individual Land to petition is seen as strongly protective of the federal system.[34]

4. Review by the FCC on the petition of individuals in terms of Article 93 (1) 4a of the Grundgesetz. This only occurs with leave of the FCC and is limited to cases where the individual can establish a direct and present violation of the individuals' basic rights

33. Ipsen, note 9 above, 112-117.
34. Ipsen, note 9, 118.

guaranteed by the Grundgesetz brought about by administrative, judicial and (if special requirements are met) legislative acts.[35]

No-one coming from a system in which parliamentary sovereignty has stultified creative legal constitutional thinking can fail to be moved intellectually and otherwise by the unfolding history of the American Constitution; the saga of how fundamental concepts of human rights, postulated in the Declaration of Independence in order to justify the revolutionary breach with Britain, came to be enshrined in, and form the basis of, the independent State constitutions and of how they eventually found their way into the US constitution through the first ten amendments. The process of constitutional development has continued unabated through the institution of judicial review and has, inter alia, informed the values expressed in the international and regional human rights instruments since World War II. Yet I must confess, to more than a little perplexity when I try to scratch below the surface of judicial review in the United States. I struggle to understand John Ely's exposition[36] of the modern concepts of "interpretivism" and "non-interpretivism" although I have some sense of what he means when he says that a brand of non-interpretivism "with its appeal to some notion to be found neither in the Constitution nor, obviously, in the judgment of the political branches, seems especially vulnerable to a charge of inconsistency with democratic theory".[37] I read with great interest his exposition of "a participation-oriented, representation-reinforcing approach to judicial review".[38] Nevertheless I believe that future South African courts will need clearer guidelines from the norms and substantive values entrenched in its constitution in order to perform the task of judicial review successfully and acceptably. What is wrong with the idea of a "militant democracy" which underlies the West-German Grundgesetz?[39] Wolf[40] traces the dialectic of judicial review in the USA from what he calls the "Traditional Era", through the "Transitional Era" to the "Modern Era" and ends with two questions[41]: "Are the demonstrated and potential benefits of modern judicial review outweighed by its demonstrated and potential harms? Is a legislative form of judicial review, on the whole, an improvement over the founders' attempt to provide for both majority rule and minority rights, or is it indeed too 'precarious' a security?" I am neither competent nor anxious to answer this question for the USA in 1989. I do believe however that in a new South Africa we should recognise our lack of experience and follow the American lead in the traditional era. This reinforces the necessity for clear and entrenched constitutional norms and values.

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35. Ipsen, note 9, 125-128.
36. John Hart Ely Democracy and Distrust: A Theory of Judicial Review (1980).
37. Ely, 5.
38. Ibid, 87-88.
39. G. Durig, An Introduction to the Basic Law of the Federal Republic of Germany in The Constitution of the Federal Republic of Germany (ed. U. Karpen) (1988) 17-19 and K. Doehring The Special Character of the Constitution of the Federal Republic of Germany as a Free Democratic Basic Order in the same publication at 40-44.
40. C. Wolfe, The Rise of Modern Judicial Review (From Constitutional Interpretation to Judge-Made Law) (1986).
41. C. Wolfe (1986) 356-357.

I end with two quotations from constitutional scholars; the first German, the second American. The German, U. Karpen, states:

> "The Court at its best provides a symbol of reconciliation, open interpretation and an active fusion of idealism (as a continental heritage) and pragmatism (as a gift of the Anglo-Saxon-world of law). The court keeps in mind that it is called upon "to make the constitution", but it lacks arms and appropriations to enforce its decisions. It is dependant upon the general acceptance of its moral legitimacy."[42]

The American, L. Hand, warns:

> "A society so riven that the spirit of moderation is gone, no court can save; a society where the spirit flourishes, no court need save; and in a society which evades its responsibilities by thrusting upon the courts the nurture of that spirit that spirit in the end will perish."[43]

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42. U. Karpen, Rule of Law in The Constitution of the Federal Republic of Germany (ed. U. Karpen) (1988) at 181.
43. L. Hand, The Contribution of an Independent Judiciary to Civilization (1944) in I. Dilliard (ed.) The Spirit of Liberty 155, 164 (1960) as quoted in Stone, Seidman, Sunstein and Tushnet Constitutional Law (1986) at 64.