

opening remarks from 24 Nov , as corrected
(note paras on terrorism and on torture- personal views)

**Opening remarks by EU Ambassador Lodewijk Briët's
On 24/11/2005 at the Symposium entitled:**

'A DELICATE BALANCE': THE PLACE OF THE JUDICIARY IN A CONSTITUTIONAL DEMOCRACY

Good evening ...
Former Chief Justice Arthur Chaskalson,
Chief Justice Pius Langa
Honourable chief justices, justices, delegates and guests, ...

To start on a lighter note.

There was once a pompous judge who glared sternly over his spectacles at the tattered prisoner who had been dragged before the bar of justice on a charge of vagrancy.

“Have you ever earned a dollar in your life?” he asked in fine scorn.
“Yes your honour,” was the response, “I voted for you at the last election.”

Now, we all know that this could not happen in South Africa, or the Netherlands for that matter, where justices and judges are appointed rather than elected.

It gives me great pleasure to say a few words at the opening of this symposium tonight. This symposium, in addition to being a fitting acknowledgment of an eminent judge and colleague to many of you, is well timed, as South Africa embarks on its second decade of democracy.

The provisions of the South African Constitution and the formidable corpus of institutions charged with its enforcement, its protection and its realisation have served as an inspiration to many countries in transformation. From the Constitutional Court to the state institutions created under Chapter 9, the South African system is coveted by many newly emerging democracies and feared by those who benefit/ed from previously abusive and corrupt regimes in these countries.

Through the European Programme for Reconstruction and Development in South Africa, the EU has been able, in a modest way, to contribute to tackling the challenges faced in consolidating democracy that sees well over €100 million in grants flow into the country annually [and another €100m from the EU Member States, and another €100m but in the form of loans from the European Investment Bank (EIB)]. More specifically, in relation to supporting constitutional democracy, the EU co-funded Foundation for Human Rights (FHR) has done superb work in making the rights guaranteed under the Constitution accessible to many of the country's most impoverished and marginalised communities.

During a recent visit by the European Commission President Mr. Barroso, I had the privilege of seeing a paralegal advice office, funded by FHR in Orange Farm, helping extremely vulnerable people to access justice and rights guaranteed by the Constitution. Fittingly, on the same day President Barroso also met with the new Chief Justice Pius Langa who impressed upon us both the importance of the rule of law and of high quality decisions, particularly in the context of socio-economic rights.

I have also had the privilege to come into close contact with the Human Rights Commission, the Public Prosecutor's Office and the Commission on Gender Equality, facilitated, I am sure, by the EU's €10 million support programme to these Chapter 9 institutions; and I recently had the privilege to visit the Independent Electoral Commission and its formidable chairwoman.

Growing access to rights guaranteed in the Constitution brings with it in turn great challenges for delivery. Judgements, despite being in line with both the Judiciary's mandate and jurisprudence, that run contrary to majority will (e.g. CC: Makwanyane - death penalty) or that highlight the state's, albeit temporary,

inability to meet the needs of communities (e.g. CC: Grootboom – evictions) are likely to increase pressure on the Judiciary and thus on Constitutional Democracy during the consolidation stage.

Popular mobilisation and action around issues such as HIV/Aids, access to land, high unemployment, and around crime, [and other issues,] ensure that the judiciary's counter-majoritarian dilemma remains in full public view.

Tomorrow you will address the issue of judicial review in the light of global terrorism. I can tell you that we in the EU take this issue most seriously. Balancing the tension between the protection, or should I say the loss, of fundamental individual freedoms with increased collective security is a difficult task at best – one that European Legislators and Judiciaries are currently also grappling with. Chief Justice Chaskalson, in his farewell speech, alluded to the fact that there is a delicate balance between the judiciary and the other branches of government. [The fact that parts of the current EU Treaties are not subject to judicial review serves to illustrate that we in Europe still have a long way to go.]

On Terrorism and Torture, allow me to stress my deeply held view that we [we in Europe, we in Africa, and we in the Americas] should not give in to the temptation to go down this slippery road. Senator John Mc Cain argued this point convincingly last week in his letter to Newsweek: not only does torture not give one better intelligence, it also erodes the moral authority we are striving to uphold inside and outside of our borders.

The European Union is at present embroiled in its own constitutional development. The consultative and participative constitutional process undertaken by South Africa has been emulated in Europe, in our case complicated by that the fact that we are trying to get the agreement of the now twenty five member states, all with different concerns, agendas and priorities. The recent “no” votes in France and the Netherlands imply that our Constitutional development is currently on hold – when we once again pursue the development of an European Constitution I sincerely hope that it may serve members of the Union as well as the South African constitution serves and protects those in this country.

In closing let me illustrate the old dictum that Size Matters: This is the Treaty Establishing a Constitution for Europe – and this is the Constitution of the republic of South Africa! The draft EU Constitution stuck in the water, at least for now, and the SA Constitution flourishing. The conclusion is simple: small is beautiful!

Allow me to end off by thanking the School of Law (University of the Witwatersrand), the South African Journal on Human Rights and the Conference, Workshop and Cultural Initiative Fund for their involvement. May this symposium provide you with a forum for fruitful deliberation.

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