Transitions to Constitutional Democracy: Lessons from the Egyptian Constitutional Crisis(*)?

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"Just as we told the people what we would do, I felt we must also tell them what we could not do. Many people felt life would change overnight after a free and democratic election, but that would be far from the case." Nelson Mandela, *Long Walk to Freedom* London: Abacus, 1994. p. 736

ABSTRACT

Egypt's constitutional crisis has lessons for those that seek to promote democracy, the rule of law and accountable, as well as responsible government. These lessons have global significance as political and constitutional systems of government are increasingly required to address overly powerful executives in the face of weak legislatures. Most problematic is the move from forms of military rule to limited and accountable democratic power. Effective and efficient legislatures are needed, both to act as a check on executive government and also, as a means of expressing democratic mandates. How is the challenge of balancing various branches of government to be achieved during a period of economic and political uncertainty? What are the transitions to democracy that are effective? It is clear that in many constitutional arrangements political sovereignty through a one party dominant state may challenge the rule of law and frustrate the operation of democracy by the usurpation or dominance of Parliamentary power. Factionalised politics whether because of religious or ethnic reasons have to be addressed in democratic solutions.The legislature may legislate in a way that impinges on natural justice or act in an authoritarian and unaccountable manner at variance with the rule of law or international norms of justice. It may occur in completely democratic countries as well as one-party states. How can the rule of law be upheld if an elected government is

dominated by one political party and misuses sovereign power or seeks to act in an authoritarian manner? One- party political dominance raises concern about accountability whenever there is a discernible tendency towards authoritarian decisions. This may take the form of "a majority tyranny" where the rights of minorities are ignored. The Executive may seek to abuse or misuse its powers; it may make decisions through administrative or executive discretion and may ultimately seek to use legislation to legalise its illegality or abuses. The Arab Spring brings to the fore many of the challenges and tensions in managing constitutional checks and balances in a period of economic austerity. The Egyptian example is examined in this case study following events after the recent military takeover in July 2013. The Egyptian Constituent Assembly approved a new democratic Constitutionin November 2012. It was ratified by referendum in December 2012 and in force until the military take-over in July 2013. Military rule signalled a failure of Egypt's experiment in democratic government that raises disturbing questions about whether there are any prospects for future democratic solutions. This paper argues that re-building the basis for democracy begins through recognising the rule of law and addressing the importance of opposition politics in understanding the art of governing.

Introduction

The post Arab Spring and the current concerns about the future of the Middle East has raised grave uncertainties about the future stability of the region. The role of law is inevitably questioned if it fails to address issues posed by social divisions and religious differences. Similarly military rule challenges the fundamentals of the rule of law and is contrary to its observance. The

Middle East is, at the time of writing engaged in a radical series of transformative events. The civil unrest and war in Syria, continued constitutional disputes in Egypt and instability in Iraq have all contributed to general instability in the region. More promising however are recent events whereby six world powers, including the USA have, together with Iran, reached an embryonic peace deal over Iran's nuclear capability. This is significant, as Iran is one of the most influential Shia Muslim countries in the region. Syria remains an important challenge to be met. Fears of Sunaiextremism creates uncertainty in the region as well as the potential for the USA and Western powers to consequences further afield than the Middle East. Stability in the region may not easily be taken for granted especially with the implications of the on-going constitutional crisis in Egypt. It is clear that the path to democracy is not going to be easy or short-term.

It is also clear that the Middle East is not alone in facing such challenges.The growth of one-party or faction dominance has almost been matched by the development of new Constitutions. It is noteworthy that in the past few decades in almost every country gaining independence, in the aftermath of war or after regime change, reforming their constitution is common either as the outcome linked to a peace process or to more general reform. In the past 40 years there have been at least 200 new Constitutions. The Egyptian Constitutionis one of the most recent and also interesting because of the military take-over.

A fundamental task of the new Constitution in many countries is to manage divided societies or societies in conflict.[1] Political scientists have readily grasped the challenges of one- party dominance. The question is whether constitutional lawyers are

1 See: Hanna Lerner, "Making Constitutions in Deeply Divided Societies" (2013) Public Law 201.

sufficiently alive to the issues and relate to the dangers of one–party dominance in the way a constitution might be interpreted by the judiciary or the judiciary's general educative role throughout emerging democratic countries[1]. It is also important to recognise that in that context Independent judges may be able to stand out against the backdrop of political corruption.

The Economist[2] has pointed to the prevalence of authoritarian states within Africa with a number of states either in transition or vulnerable to the authoritarian potential of one party government. This is a trend that may be reversible by changes in electoral choices. It may prove rather more intractable and become a systemic weakness in many African states. This may have far reaching consequences for economic growth[3], inward investment and the ability of governments to act as donors to alleviate poverty[4] and address disease[5]. One party governance is an important issue to be addressed at the time of drafting the Constitution or if not then fairly soon after. The available political science literature suggests that African countries have a high pre-disposition to one- party dominance but the phenomenon is also recognisable in Japan, Eastern European counties after the breakup of the Soviet Union and also in many states in the United States of America. It is fair to observe that even if a one party dominant state has not been arrived at in South Africa, a one-party dominant state is an ever present influence over the body politic of

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1 James Tully and Alain G. Gagnon eds. Multinational Democracies Cambridge: Cambridge University Press, 2001. Mark Tushnet, Taking the Constitution Away from the Court Princeton University Press, 1999. Stephen Tierney, Constitutional Law and National Pluralism Oxford: Oxford University Press, 2004.

2 The Economist March 2010 p.38-39, The Economist June 2010 p.54-57

3 Iwa Salami, "The financial crisis and a regional regulatory perspective for emerging econ - mies in Africa" (2010) 25(3) Journal of International Banking Law and Regulation 128-139.

4 Steven Radelet, Emerging AfricaLondon: Center for Global Development, 2010.

5 Jure Vidmar, "The rights of self-determination and multiparty democracy: two sides of the same coin?" (2010) Human Rights Law Review 239.

Africa as a whole. This is, despite a period in the early 1990s of a transition from authoritarian to democratic rule led by newly designed constitutions that attempted to make a break from the past era of authoritarian government. In theory such constitutions brought forward respect for the rule of law and democracy under the constitutionalism of the new constitutions[1]. Some examples of states with newly engineered constitutions[2] are South Africa (1996), Namibia (1990), Angola (1992), Mozambigue (1990), Uganda (1995) and Swaziland (2006). There are also examples in the case of Zimbawee (1976) and Cameroon (1972). These constitutions provide modern forms of constitutional protections. One of the critical aspects of the "remodelling" of Africa's constitutional arrangements is the role of an independent judiciary[3] and gives rise to considerable debate about the role of the judiciary. This is particularly important in the case of constitutional protections that are dependent on judicial discretion.

Common to many of the new wave of African constitutions is a constitutional role for the judiciary to operate beyond judicial review of administration to include legislation. Previously parliamentary sovereignty modelled on the English common law and Westminster model had a long history in South Africa and was part of the first Constitution, the South Africa Act 1909. It is hard to escape this legacy and for understandable reasons judicial self–restraint rather than outright assertiveness is very much part of the present day judicial culture. As we shall discuss the

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1 Jonathan Klaaren, "Constitutional citizenship in South Africa" (2010) International Jou - nal of Constitutional Law 94

2 Charles Manga Fombad, "A Preliminary assessment of the prospects for judicial ind - pendence in post-1990 African Constitutions" (2007) Public Law 233. C. Larkins, " JudicialIndependence and Democratization: A Theoretical and Conceptual Analysis" (1996) 44(4) American Journal of Comparative Law 605.

3 P. Russell and D. O'Brien, Judicial Independence in the Age of Democracy: Critical Pe - spectives from Around the WorldUniversity of Virginia, 2001. Justice Nicholson, " Judicial Independence and Accountability: Can they Co-exist?" (1993) 67 A.L.J.404.

values that underpin constitutional protections including judicial intervention are ones that need to be reconciled with exploring concepts of democratic constitutionalism[1]. This includes forms of responsiveness, accountability and open government that may be found in the underlying values of the Constitution[2].Political barter and negotiation has a central role to play in creating many constitutional settlements .The recent agreementreached on 24th November 2013 between Iran and six world powers was the product of international co-operation and time-consuming talks between the various parties, often in secret as part of a multi-national discussion. The deal is to reduce Iran's capabilities to produce enriched uranium in return for a limited lifting of sanctions and access to funds. This may have longer term benefits but it has also dangers especially if Israel becomes more fearful of any regional insecurity. This may also apply to Saudi Arabia, Egypt and Turkey. It is also a difficult time for constitutional solutions as in Egypt a secular coalition of Generals overthrew the Brotherhood in July, even though it had been elected and had worked under a .newly drafted constitutional framework underpinning democratic elections. These events need to be considered in some detail as they point to underlying tensions within society but also systemic failures in constitutional drafting.

Since the Egyptian crisis first emerged there are signs of progress through political dialogue and forms of engagement through political barter and negotiation has a central role to play in creating many constitutional settlements .The recent agreementreached on 24th November 2013 between Iran and six world powers was the product of international co-operation and time-

1 A good example is to be found in Germany over the role of Eastern German Guards. See Adrian Kunzler, " Judiical legitimacy and the role of Courts: explaining the transitional context of the German border cases" (2012) Oxford Journal of Legal Studies 349.

2 See: sections 59(1) and 72(1).

consuming talks between the various parties, often in secret as part of a multi- national discussion. The deal is to reduce Iran's capabilities to produce enriched uranium in return for a limited lifting of sanctions and access to funds. This may have longer term benefits but it has also dangers especially if Israel becomes more fearful of any regional insecurity. This may also apply to Saudi Arabia, Egypt and Turkey. It is also a difficult time for constitutional solutions as in Egypt a secular coalition of Generals overthrew the Brotherhood in July, even though it had been elected and had worked under a newly drafted Constitutional framework underpinning and underpinned by democratic elections.

Setting the Scene: The Egyptian Constitution 2012

The overthrow of the Mubarak regime after the 25th January Revolution left a constitutional hiatus with hissurrender ofpower to the military in February 2011. Previous Egyptian constitutions in 1923 and 1971 had failed to address the challenge of authoritarian powers in the form of their extra-judicial exercise through Presidential powers. The hiatus at the end of the Mubarak regime was filled by a quasi-constitutional arrangement with the suspension of the 1971 Constitution. This set a bad precedent whereby Egyptian society allowed military rule to fill avoid while Egyptian societydithered over the chain of events and action that was required to be taken in the journey towards a new, more modern and democratic constitution. Inevitably differences of opinion emerged with international norms and influences coupled with national politics providing a heady mixture of high expectation and unrealisable goals. Prevailing culture and religious affiliations found rational expression and gave the impression that expectations might be managed and commonly accepted outcomes

negotiated. Elections are important instruments of democracy and fundamental to legitimacy but political parties and factions may not find it easy to accept or even appreciate the results.

Drafting constitutions is not easy and what is clear is that draftsmen cannot fill gaps that are left by political failures. Resolving political issues need to come first and their ultimate resolution is tested by the success of a constitution rather than the Constitution may offer solutions on their own and in isolation. Egypt is a powerful case study of that failure as Mubarak's successor Mohamed Morsi discovered when the Egyptian military took over on 3rd July 2013. There was a difference, however, the short-lived recently drafted 2012 Egyptian Constitution was far in advance of its predecessor constitutions and offered Egyptian's a real opportunity for democratic government. Its failures are undoubtedly a set- back but it is clear from the outset thatbehind the acceptance of the 2012 Constitution were weaknesses in the lack of engagement with the opposition. This was clear with a small turnout at the referendum in December 2012. While 64% voted in favour, the turnout was only 33% of the electorate. This left an enormous short comingand effectively a democratic deficit to the opposition. The Constitution contains core principles such as popular sovereignty, and various rights such as human dignity, freedom and equality under the law as well as a separation of powers doctrine. This is one of the most essential parts of the new Constitution under Article 6 that made explicit what the 1971 Constitution had failed to protect. The 2012 Constitution also contains under Article 132 express requirements that the President should respect separation of powers. This is also intended to provide judicial support to underpin the arrangements for constitutional governance. Related to Article 132 is an attempt to create a functional form of semi-presidential execu-

tive powers to be found between sharing powers between an elected Head of State and a Prime Minister and government accountable to an elected legislature. This is a tall order. Presidential and prime ministerial forms of government are not easy to operate especially when there is a cultural history of past accretion of authoritarian powers to successive Presidents under the previous 1923 and 1971 constitutions. The election of two separate constituencies at two separate elections also provides for different forms of legitimacy through different constituencies. This semi-presidential structure is also used to support a bicameral legislature, itself an innovation from the traditional form of unicameral People's Assembly under the 1971 Constitution. The Council of Representatives is directly elected with a membership of 350 and is the lower chamber. The Shura Council is the upper-chamber and is primarily directly elected (150 members) with at most one-tenth of its members appointed by the President. The bicameral model is familiar in many Western systems but the Shura Council is itself an attempt to embrace Arab culture and Islamic traditions.

The Constitution raises questions about how best to ensure both good governance as well as accountability. The 2012 Constitution provided a clear set of powers for the Shura Council as well as for the Council of Representatives. The latter is critical to the government's functions as both Prime Minister and the government are dependent on its support in order to govern. There is a major difficulty. The members of the government are not members of the legislature and cannot vote in either the Shura Council or the Council of Representatives and once a member of the government have to resign their seat in either chamber if they are already members. Only the Council of Representatives has a role in the legislative process and that role is circumscribed

by the role of the President. The initiative to form a government comes from the President who nominates a candidate for Prime Minister. The latter has to propose policies and present a programme of government to the Council of Representatives and secure the confidence of the Council. The Council may withdraw its confidence in the Prime Minister and if after a number of unsuccessful nominees there is no satisfactory candidate this may trigger an election within 60 days of dissolution. The Council of Representatives, however, may be dissolved by the President though there are some " safety locks" in place. There is a restriction that safeguards the Council for the first year and successive councils cannot be dissolved for the same reason. If the President issues a decision to suspend sittings of the Council of Representatives there must be a referendum to seek approval for the dissolution and if the proposal to dissolve is defeated in a referendum, the President must resign. The balance of the Constitution is in favour of using the referendum but only as a last resort and rarely when the President struggles with the Council of Representatives on a single issue. The use of a referendum is also a rather blunt instrument as it may not be easy to set the most appropriate question or rely on electorate turn-out.

Legislative roles and powers are also addressed but not in any precise way. Retrospective laws are restricted and may only be made by two thirds majority by the Council of Representatives (the Shura Council is not mentioned) and this is further restricted by an absolute exemption that cannot impose criminal or tax liability. The legislative powers are addressed in detailed rules about the role of the Chamber, its privileges and procedures.

There is also under the 2012 Constitution an overarching role for the courts. Judicial review is a means of oversight and consti-

tutional propriety through the Supreme Constitutional Court under Article 175 of the Constitution. There is one exception under Article 177 which does not permit the Court to review electoral legislation and on legislation the President may only refer " presidential, legislative or local elections" to the court to review their constitutionality. The legal effects of a declaration of unconstitutionality are left to ordinary legislation under Article 178. Despite these limitations, judicial oversight is still seen as a check on powers and responsibilities of both legislature and executive. Ideally in mature democracies this will work alongside political forms of accountability. In divided communities this is challenging and demanding. The State Council under Article 174 has some adjudicatory powers over administrative disputes. The combination of the two is ideally intended to support the rule of law. Despite the sophistication of the Constitution and the good will of its supporters there were underlying values and issues that require attention. The creation of the Egyptian Shura Council that is both appointed and elected is a good example of a missed opportunity. As a second Chamber it might have been given the role to provide inclusivity for opposition politics and values. This would have afforded much needed representation and served to redress the balance of one party dominance in the State Council. Minority political groupings might have been expected to have become focused on this potential. The previous government had failed in this major aspect. The serious shortcoming is that the opportunity for an appropriate second chamber was largely missed as it might have provided a means to achieve consensus and representative governing. The 2012 Shura Council failed to achieve that quality of engagement that is so necessary for democratic governance.

The 2012 Constitution also failed to address problems with the legislative role of the State Council and its relationship to the Shura Council. Details of procedure and process to act as part of the legislative processare not clearly set out for the Shura Council. Such vagueness left little constitutional guidance on what was to be expected and when. Article 102 suggests for example that there should be some discussion of draft law passed by either Chamber. The exact sequence of events is not clear and although there are envisaged to be three stages of scrutiny the time-tabling of each is imprecise. The exact role of the Shura Council may not have been as clear as it should have beenand this may be partly a reflection of the absence of clarity in procedure. There is an uneasy relationship between a Presidential based Constitution and one that is like the 2012 Egyptian Constitution a semi-presidential constitution that seeks to combine elements of legislative law making by an elected State Council with the authority of President. The power to override the President is by two thirds majority- probably not easy to achieve. The initiative under the President to " issue" legislation remains and this may give the impression that legislation is a decision of the President.

Finally, the role of oversight under the 2012 Constitution is an important pre-requisite for constitutional governance. The legislature should not only be seen as a means of passing legislation but also to hold to account all the elements of scrutiny and oversight that are fundamental to a democratic constitution. Historically previous Egyptian constitutions had failed to develop an adequate culture for scrutiny as scrutiny of the military and executive was severely curtailed. Article 115 provides a discrete aspect of oversight which is achieved through periodic elections and it is hoped that between elections political power is held in

check. The use of elections is regarded as the ultimate sanction against an abusive President through the decision of the legislature to require an election.

Significantly there is no mention of the role of the Shura Council. Day to day oversight may take place through ministerial statements , a procedure known asan interrogation process, and also through ministerial questions. Ministers are under a duty to respond and any Member of the Council of Representatives may request a briefing or statement from the Prime Minister or other minister on any urgent matter. Supplementing these procedures are committees that provide oversight. The working of such committees includes special investigative committees. However these are all ad hoc bodies rather than a regular and permanent feature of the working of Parliament. This is a considerable weakness in the structure. Also unclear is the role of collective responsibility once a no confidence vote is agreed should the entire government resign or not? The impeachment process of the President is similarly poorly defined and it is not clear as to what may be includedas serious offences resulting in impeachment.

AsangaWelikala summarises some of the failures of the Constitution while recognising that it is an improvement on its predecessors.

… the Constitution also reveals a number of shortcomings of drafting, reflecting in considerable areas of textual imprecision, disorganized arrangement, a failure to closely consider the relationships between different parts and provisions of the Constitution and a willingness to leave a significant number of matters that ought to be dealt with in the Constitution to ordinary legislation, all of which impact on the overall coherence of the system

of government established by it[1].

The main challenge is how to adopt and benefit from a Constitution that is a break from the authoritarian past but requires all parties to learn how to operate under it. This proved a daunting task that relates to the struggle in achieving consistency in applying democratic principles beyond elections to the art of governing. One problem was an over reliance on elections as a means of achieving good governance.

Egypt's Constitutional Transitions to Democracy

Elections were held in Egypt in the midst of competing claims and rivalries between opposition and government. Resolving these disputes was often left too late in the process and therefore proved ineffective. What was the alternative to elections? The alternative to using elections appeared unpromising as secret deals and potentially corrupt arrangements offered little prospect of achieving a consensus or addressing popular opinion. Street supported popular constitutional change is always difficult to achieve as the outcomes are often well below the expectations of popular demands. As Nathan Brown explained:

Without general consensus on the rules, spoilers would cover the landscape; without popular participation, there might be a stable outcome but it would not be democratic[2].

His conclusion is that elections did not solve Egypt's crisis it only served to deepen it, rather than ease or resolve the differences. The rush to holding elections in Egypt, whileregarded

1 See: AsangaWelikala, The Legislature under the Egyptian Constitution of 2012 IDEA, Working Paper no 8, June, 2013.

2 Nathan Brown, " Tracking the Arab Spring", Egypt's Failed Transition" (2013) Vol. 24.no.4., Journal of Democracy pps. 45- 58 p.46.

asnecessary was not well timed,nor were the impact of holding elections understood in terms of the implications for the opposition. Both the holding of elections and the 2012 Constitution failed to address the underlying political crisis. The victory of one group is not accepted by the losing group. The crisis has not diminished over the two and half years until July 2013 leading to the establishment of military rule, suspension of the Constitution, and the removal of a President that had been elected barely a year before. This was a reflection of an Islamist majority that elected an Islamist government and led by an Islamist President. It is not surprising that non Islamists boycotted the process and that this led to the military intervention.

There are other factors that need to be considered. The election of the Morsi presidency came with major challenges that were not addressed. These may be traced back to Egypt's history rooted in Egypt's cultural and ethnic divisions reinforced by authoritarian tendencies. Engaging with opposition policies and politics are integral to learning how to govern wisely. The ruling Brotherhood emulated past forms of government and failed to engage with modern forms of governance. Good rules of government were hard to find and training in the art of governing sadly lacking. In reality a form of coalition politics were necessary although not required. Even the choice of non-partisan members of the government, a device intended to bridge the gap between traditions ,with an Islamist inclination that was interpreted as conforming to the ruling group. Street politics also had a part to play with organised public protest each time the Supreme Court met to make important constitutional rulings. This was amidst partisan loyalties amongst the security forces.

The courts were used especially by non-Islamists but equally was reliance on the military who were invited to intervene when there appeared to be no other redress. Street protest were not handled well leaving a sense of alienation that was hard to counteract and the Government struggled to act in a well- balanced manner. There are a number of identifiable reasons for failure to adopt suitable forms of constitutional governance. The Egyptian military were an ever present feature. Their role had been a determinant factor in the ending of Mubarak's Presidency and the civilian government under Morsi had to accommodate the military rather than limit the military's tacit engagement with governing. This was a particularly important element in the successful governing of Egypt as the threat of street violence especially amongst Egyptian youth provided an impression of society in turmoil. An equally important difference between Islamists and non-Islamists is that the former were favoured by elections whereas the latter were not. Authoritarian systems tend to make political engagement difficult and this may leave sections of society feeling excluded, and fail to impress the opposition or give confidence in government. Helping to create organisations that assist opposition is also necessary as a means of good governance. Failure to set in place institutional frameworks for trials and prosecutions meant that pre-existing authoritarian tendencies had become cultural norms with the result that little could be achieved to prevent authoritarian decisions being linked to the Government. In many cases judicial autonomy prevailed and often ignored the democratic credentials of government.

All these factors including inexperience and lack of judgement over government decision making contributed to the general lack of support and popular legitimacy of the government. Suspicion replaced any degree of trust; rivals received little acknowledge-

ment or support; authoritarian politics favouring divide and rule triumphed over consensus and motives were imputed rather than intentions being understood.

Finally, time-lines of elections, drafting the constitution and its implementation did not favour desirable outcomes. Events on the street seem to take precedent over government decisions. The Constitution failed adequately to grasp the problems that military rule might bring or the divisions between Islamic and Non-Islamic principles. Egypt faces a challenge of re-calibrating power and moving away from authoritarian government. How might this be achieved? Lessons from the recent experience of a failed attempt at democracy must be clearly understood and considered in any future strategy. Nathan Brown argues:

For those interested in transitions from authoritarian rule, Egypt's experience providesa stark lesson: Not only do decisions about timing, sequence and rules have a large impact on political outcome, but those decisions are the outcomes of deeply political processes[1].

There are also seriouslessons to learn about the role of the military. Their ability to " represent" the public interest of Egypt and also popular public opinion gave them a disproportionate role in setting pre-conditions for democracy. The appropriate role for the military was not addressed in the 2012 Constitution and mechanisms for appropriate civilian oversight and control proved to be weak. Too much political control by one group proved decisive and this provided a basis for military power. There are lessons for future constitutional drafters.

Equally important are the lessons for Islamists from the Morsi

1 Nathan Brown op cit. p. 56.

presidency. This may prove the most challenging and difficult. Islamic success was defined by participation in the democratic process and also in the main organs of government including major public office. Participation was seen and perceived to be a successful mechanism that secured power as a means of pursuing a strongly Islamizing agenda. This is both a mistaken view of participation as well as a misunderstanding of governing but this cannot detract from its success. The Muslim Brotherhood set its agenda over three years to achieve dominance through participation and it proved successful winning the Presidency, influencing the 2012 Constitution and winning parliamentary elections. In contrast the non-Islamists began to try to catch up and the consequences proved decisive.

There are two important lessons. First, it was not a miscalculation that caused the collapse of the Government – it was a more catastrophic failure to misunderstand the nature of governing. Creating broad based political parties that balance differing shades of Islamic opinion and dilutes fanatical views would have secured a longer period of government, amore tolerant acceptance and necessary consensus. The means of winning elections proved not to be the same as the means of effectively governing. This will take some time to recognise and manage the consequences. Successful electoral politics is not the same as successful governing.

Second, the lessons for constitutional drafting are no less important or lacking in significance. Democracy is not a single or multiple use of the ballot box. It requires a constant and sustained attempt at governing. Constitutional provisions do not guarantee outcomes – they set procedures and processes in place. The 2012 Constitution failed to provide adequate protec-

tions against authoritarian government or ensure that opposition governed alongside the government. It did not build a robust set of principles that addressed militarism and its role in the ultimate authority of the government itself.

The Rule of Law: Re- Balancing Judicial, Executive and Legislative forms of Government.

There are general questions that arise that confront any constitutional arrangement or democratic government.How can the rule of law be upheld if an elected government is dominated by one political party misuses power or seeks to act in an authoritarian manner? It is equally an important question for Egyptian society how is the rule of law to be effective under military rule even if the case for a military take-over is said to be based on popular demand or it is representative of popular opinion. At what stage should military power Eventually transferring from military rule there has to be some form of elected government formed out of one political party or as the result of a coalition[1]. In either case one- party dominance is a term generally used to describe the phenomenon of repeated electoral victories of one political party or grouping either because of ethnic or religious allegiances. It may simply occur as a result of the culture of party politics of the country[2]. The phenomenon of a dominant party system is also based on expectations that only one party will win and this influences the way in which that one party governs[3]. The

1 This is a revised version of a paper see: J.F. McEldowney, " One-party dominance and democratic constitutionalism in South Africa" (2013) Journal of South African Law 269-292.

2 Japan is a good example where the Liberal Democratic Party managed to take power for the majority of the time since 1946 because of factional allegiances and political agreements.

3 See: T.J. Pempel ed. Uncommon Democracies: The One-Party Dominant Regimes Ithaca: Cornell University Press, 1990.,ArendLijphart, Democracies: Patterns of Majoritarian and Consensus Government in Twenty One Countries New Haven: Yale University Press, 1984.

phenomenon of one-party dominance occurs in otherwise completely democratic countries where it is not expected to happen and is seen as an anomaly to the way democracy is expected to work[1]. One-party political dominance raises concerns about accountability whenever there is a discernible tendency towards authoritarian decisions. This may take the form of "a majority tyranny" where the majority may not listen to or take account of minorities and rights. The Executive may seek to abuse or misuse its powers; it may make decisions through administrative or executive discretion and may ultimately seek to use legislation to legalise its illegality or abuses. Settling the balance of power between the different levels of government is essentialOne way the balance may be adjusted is to take account of upholding the rule of law as fundamental.

Debating the Judicial Role

Locating a role for the judiciary under the rule of law is essential ofThe role of the judiciary under one- party dominance goes to the essence of judicial power, namely judicial independence and impartiality, the maintenance of public confidence in the judiciary and the ability of judges to act as a check on abuse of powers[2]. The context of the discussion is how one party dominance may become an overriding mandate to govern against any constitutional checks and balances. There is much to be gained by drawing some lessons from Africa. In many cases post-colonial systems have had to address similar issues[3]. An educated

1 Jean Blondel, " Party Systems and patterns of Government in Western democracies" (1968) Canadian Journal of Political Science Vol. 1 No. 2 pp. 180-203.

2 Generally see: H. Ebrahim, The Soul of a Nation: Constitution-Making in South Africa Cape Town: Oxford University Press, 1998

3 See: James Feuille, " Reforming Egypt's Constitution: Hope for Egyptian Democracy? (2011)Texas International Law Journal Vol. 47 issue 1 pps, 237-259.

and self- confident judiciary might also ensure that constitutional tensions are settled and sorted out.In the South African context Choudhry notes[1] how there are instances where one party has the final say in the way the South African National Assembly operates and the pressure of party discipline has weakened scrutiny[2].The list of weak accountability[3] includes, the marginalisation of opposition groups in the National Assembly; a reduction in the role of MPs in the legislative process; the ineffectiveness of the Standing Committee on Public Accounts because of government party pressure, and various examples of poor policy making because of unresolved conflicts within the ruling political party.[4] The seriousness of the examples will determine whether South Africa is considered as having a weak or strong dominant party. There are also various ways of interpreting the examples. Weak opposition can be seen as mainly responsible for one party dominance because of a fragmented, poorly organised and articulated framework for agenda setting and strategic thinking. Poorly organised voting within the National Assembly and a perceived lack of effectiveness at electoral polls also serves to dent the moral of the opposition giving it only a responsive role. Sceptics of how far South Africa is inevitably heading to a strong form of one party dominance point to there being no guarantee that the dominant party will always be popular. Also within the government there are many critical voices fostering internal debate and

1 Choudryop.cit. p.11

2 Choudryop cit. p.12

3 See: A Handley, C. Murray and R. Simeon, "Learning to Lose, Learning to Win: Gover - ment and Opposition on South Africa's Transition to Democracy in E. Friedman and J. Wong, ed., Political Transitions in Dominant Party Systems: Learning to Lose (2008 191.

4 T. Lodge, " The ANC and development of party politics" (2004) 42 Journal of Modern African Studies 189

dissent that should not be underestimated[1]. Strong one- party dominance is not inevitable and should not be assumed to be inevitable. Finally with one- party dominance there is a significant effect on the role of the civil service. Over time civil servants appear to be no longer from being politically neutral but employed by the government of the day to do its bidding.

In Choudhry's analysis weaknesses in accountability systems that ignore the political realities of one party dominance inevitably lead to the Constitutional Court becoming a means of filling the gap in accountability. In arguing for the Constitutional Court taking a proactive approach, Choudhry cites the challenges that one- party dominance brings:

Dominant party democracies display a characteristic set of pathologies: the use of public resources by dominant political parties as political to distort electoral competition; deliberate attempts by dominant parties to change the rules of electoral competition to fragment opposition parties and diminish their ability to offer a credible alternative; the erosion of federalism to undermine the ability of opposition parties to form governments at the sub national level and deploy the political resources provided by incumbency to enhance their competitiveness at the national level, the subordination of the parliamentary wing of a dominant political party to its non-parliamentary wing, thereby shifting politics into the party and out of the legislature, diminishing the cen-

1 " Cry, the beloved country", The Economist 20th October 2012 p 36, Lydia Polgreen and Jill Kelly, New York Times 7th December 2012 details of political dissension within the ANC. Martin Plaut and Paul Holden, Who Rules South Africa? Jonathan Ball, Johannesburg and Cape Town, 2012, See: G. Heyden, Political Accountability in Africa: is the Glass Half-full or Half-empty? Africa Power and Politics Working Paper No. 6 , 2010. Andrew Feinstein, After the Party London: Verso, 2010 pps.281-283., Andrew Nash, " Post-apartheid accountability: the transformation of a political idea" in D.M Chirwa and L.Nijzink, Accountable Government UCT, 2012.pps. 20-21.

tral role of the legislature in national political life[1].

Choudhry further explains that the response of the South African Constitutional Court should be:

In discharging its constitutional function as the ultimate interpreter of the Constitution, the Court should draw upon a set of background assumptions about the nature of South African politics, derive its constitutional role from the broader understanding and craft constitutional doctrine to give effect to that role[2].

The Constitution is certainly relevant as it provides key socio-economic rights as part of constitutional protection. We have seen that this also includes upholding the primacy of the rule of law values underpinning the Constitution. However does it follow that such socio-economic rights provide the Court with what Choudhry terms " the legal opening to review an array of government policy- including government inaction – that would also serve as substance of electoral politics"? In his recent 27th Sultan Azlan Shah Lecture delivered, Lord Sumption of the UK Supreme Court posed the question on what were *The Limits of Law*?and suggested that there were limits to judicial power that sat uneasily with elected government.

Even in mature democracies setting the balance is not easy. The question of the legitimacy of constitutional review by courts is one of long standing in the English common law.[3] Pre-eminence is given to legal and parliamentary sovereignty. The role of the courts is important but generally stops short of overruling parliament. In recent times, since the UK's membership of the

1- Choudhry p.37.

2- Ibid.,

3- In the eighteenth century in Entick v Carrington (1765) 19 St Tr. 1030 established principles, that in the absence of express statutory powers or judicial authority, the executive could not use a general warrant to achieve legal authority which the warrant in itself lacked.

European Union, the UK courts are bound by the decisions of the European Court of Justice in Luxemburg which take precedence over a UK Act of Parliament[1]. EU law has also been influential more generally in setting precedence over national law and in many instances this has led to some rethinking of the law. It has also had an effect of bringing the common law and civil law systems closer together. Over the years the UK courts developed principles and values to prevent any potentially abusive law making, including principles of proportionality as a ground for review. Dicey[2] writing in 1885, defined many of the judicial review principles and values in his explanation of the rule of law which contained a prohibition against any misuse of power. Dicey objected to arbitrary discretion in government decision-making; he proclaimed equality and fairness through, controversially, the use of ordinary courts, as opposed to a specialist administrative tribunal. He acknowledged that much of the rule of law rested on judicial interpretation. The role of parliament and institutions was also mentioned in the broader context of parliamentary power, which he reconciled with the rule of law through an informal self-restraint on any attempt by parliament to usurp the rule of law through the ultimate exercise of sovereign power[3]. Dicey's account of the constitutional struggles of the seventeenth century led him to value the role of judges[4] and as Collini has observed contrary to many of his critics to see their importance:

Furthermore, Dicey was at pains to insist that judges were still the chief upholders of English liberties: they are in truth, though

1- See: Francovich v Italian Republic, Bonifaci v Italian Republic C-6 and 9/90 [1991] ECR I-5357. Factortame (No.2) [1991] 1 AC 603.39

2- Albert Venn Dicey (1835-1922) English jurist and author of Law and the Constitution (1885).

3- Article 7(2) TEU and the commitment under Article 49 TEU.

4- See Mark D. Walters, " Dicey on writing the " Law of the Constitution". (2012 Oxford Journal of Legal Studies 21.

not in name, invested with the means of hampering or supervising the whole administrative action of the government and of at once putting a veto upon any proceeding not authorised by the letter of the law[1].

This has philosophical importance. It is accepted that the legitimate exercise of government powers has to promote basic values and that the rights of citizens require appropriate and fair procedures. There are two aspects to the role of constitutional review. The first is where judicial review is concerned with constitutional review, prevalent in jurisdictions with written constitutions such as South Africa and the United States. Courts are empowered to decline to apply legislation found not to be in conformity with the constitution. This is likely to be controversial since it is based on a pro-active role by the courts and their interpretation of underlying rights based values. The second form of judicial review applies to the decisions of the executive or general administrative decision-making. This is less controversial than the first, but still raises issues about the scope of judicial power and the legitimacy of judicial review powers especially when applied to political decisions.

Democracy through the electoral mandate has to be reconciled with the need for judicial oversight. Jeremy Waldron[2] argues that respecting electoral wishes through a majority vote that allows citizen participation sets boundaries on judicial decision. In this context he argues that unelected judges should give way to majoritarian decision-making. The second form of judicial review is accepted by Waldron as a procedural form of ensuring that administrative decisions are in accordance with the rule of

1- S. Collini, Public Moralists: Political Thought and Intellectual Life in Britain 1850-1930 Oxford: Clarendon Press, 2011.p.295.

2- Jeremy Waldron, Law and Disagreements Oxford University Press, 1999 pps 88-118.

law. This stops short of merits or policy review for which there are democratic checks and balances. According to this view the adequacy or effectiveness of policy is ultimately a matter for electoral choice. Waldron is strongly opposed to unelected judges overriding electoral choices and so is opposed to the first aspect of constitutional review which has that potential[1]. Waldron also believes that rights are important and this suggests that such moral values should be embedded in good governance[2]. However, are there circumstances where such democratic rights might form the basis of an opposing perspective that entitles judges to offer constitutional review that, on occasions can override majoritarian decision-making? This question is the subject of much academic debate and is difficult to resolve[3].

Dworkin argues for fundamental rights to be given importance and in his view rights ought to be considered in defining majority decision making.[4]Dworkin's argument is that applying and respecting underlying human rights and values ought to inform all decision makers. The appropriateness of rights and value in the debate about how governmental power can be controlled suggests that such rights must be given a substantive content[5]. Widening the concept of the rule of law provides a means of extending the review of discretionary executive powers by developing intensive standards of judicial review. It may also be further

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1- See: Richard Stacey," Democratic jurisprudence and judicial review: Waldron's contr - bution to political positivism" (2010) Oxford Journal of Legal Studies 749.

2- See the discussion about Waldron's views in Mark Tushnet, " How different are Wa - dron's and Fallon's core cases for and against judicial review?" (2010) Oxford Journal of legal Studies 49

3- See: Richard Fallon Jnr. " The core of an Uneasy case for Judicial Review " (2008) 121 Harvard Law Review 1693-736.

4- R. Dworkin, Justice in RobesCambridgeMA: Harvard Belknap Press, 2006

5- Sigrn I. Skogly, Global responsibility for human rights" (2009) Oxford Journal of Lega - Studies 827.

extended to a " constitutional conception" of democracy.[1]Dworkin suggests testing the outcome of majoritarian decision-making through a rights based evaluation. Decisions that offend fundamental rights are questionable, even if confirmed by a majority decision and may lead to the right to override legislation. Thus some offer judicial scope for substantive constitutional review, even including the legislation itself is possible.

Dworkin is cautious, however, he readily accepts that conflicts over rights *may* lead to the triumph of judicial power but this is not inevitable. He respects democracy and recognises that legislatures can educate and inform society about rights just as surely as judges. As Kyritsis has pointed out Dworkin does not support constitutional review by judges as having "the last word, neither does he accept that it shouldn't"[2]. Dworkin's position is understandable in terms of an overarching respect for human rights and the implication that judicial intervention should not be inevitable because the other branches of government should uphold rights.

There is also an important distinction between procedure and substance. Testing substantive outcomes against a human rights standard also impacts on the procedures to be adopted and their role. There is considerable debate in the UK on the precise scope of review in terms of proportionality and human rights, since the Human Rights Act 1998. This is especially so when asked to adopt a judicial deference to administrative decision makers[3]. The creation of a modern UK Supreme Court in

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1- R. Dworkin, Sovereign Virtue; The Theory and Practice of Equality Harvard: Harvard University Press, 2000, chapter 5..

2 Dimitrios Kyritsis, " Constitutional Review in Representative Democracy" (2012) Oxford Journal of Legal Studies Vol. 32 no.2 pps. 297-324.

3 See; Paul Craig, Administrative Law 7th edition, London: Sweet and Maxwell, 2012, pps 628-636. G. Huscroft " Constitutionalism from the Top Down" (2007) 45 Osgoode Hall L.J. 91

2009 and debates about a written constitution[1] have enlivened discussion about the role of the judiciary[2]. Some writers, notably TRS Allan[3], reject any idea of deference, but accept some sphere of decision-making being protected from judicial review determined by the circumstances of the case and Parliament's role as the primary decision maker. Jowell accepts that there are circumstances that are right for the court to defer to the legislature or the executive on grounds of institutional competence. He argues, however, that this should not be done on the basis that the courts are mistaken into believing that they lack constitutional competence. Jowell's distinction between institutional rather than constitutional competence is helpful. Institutional competence is about the capacity of the decision maker to make the relevant decision. This engages with the court's structures and procedures and its capability to decide the matter in a better way than the body being reviewed. This approach offers a valuable analysis because almost invariably the form of accountability or review offered by the courts is *ex post* and only rarely *ex ante*. The expertise of the courts might be a limitation[4]. Jowell argues[5] that this is a better way to advance the scope of review rather than constitutional competence, which is about the authority of the body to determine the matter under consideration. The value of constitutional competence is the acceptance of individual rights that have to be considered in the context of majority rule. The

1 John Gardner, Can there be a written Constitution? Legal Research Papers Series P - per no 17/2009 (May, 2009) University of Oxford.

2 Kate Malleson, " The evolving role of the Supreme Court" (2011) Public Law 754.

3 T.R.S. Allan, " Common Law reason and the Limits of Judicial Deference" in D. Dyze - haus ed., The Unity of Public Law London, 2004 p. 7. T.R,S Allan, " Human Rights and Judicial Review: A Critique of " Due Deference" [2006] C.L.J. 671.

4 See the useful discussion Jo Eric KhushaiMurkens, " The quest for constitutionalism in UK public law discourse" (2009) Oxford Journal of Legal Studies 427

5 J. Jowell, " Judicial Deference and Human Rights: A Question of Competence" in P. Craig and R. Rawlings eds. Law and Administration in Europe: Essays in Honour of Carol Harlow London, 2003.

courts are there to delineate the boundaries of review based on this principle. Jowell is content to allow some recognition of the constitutional context but what matters most is the underlying values that should be upheld.

There is no definitive outcome in the debate as to where to place boundaries on the courts and in many cases the issue is about the intensity of review rather than the absence of any judicial oversight. There is also a great deal of overlap and common agreement between opposing points of view. There are also many different perspectives on how best to define rights and values[1]. In some cases these are more credible if provided by the relevant executive or administrative body. In other cases a judicial dialogue about the scope, meaning and intent in their interpretation may make an essential contribution. There are a number of comments that can be usefully made about the arguments. First, the various opinions may be explained by differing perspectives on political power and concerns about the usurpation of democratic powers by the courts. Waldron's analysis may be explicable by his New Zealand experience where, like the UK, constitutional arrangements do not envisage judicial review extending to the legality of Acts of Parliament or the merits of policy making. In contrast, constitutional review experienced in the USA is considered to reflect a dynamic and reasonably well functioning liberal democracy[2]. Common to any differences of opinion are concerns about the judiciary being seen as acting in an overtly political way. Second, there is no overall consensus and wider questions about the complexity of decision-making and the

1 See: R. Clayton, " Principles for Judicial Deference" [2006] J.R. 109 and also M. Hunt, " Sovereignty's Blight: Why Contemporary Public Law Needs the concept of " Due deference"" in Bamforth and Leyland eds., Public Law in a Multi-layered Constitution London, 2003.

2 Mark Tushnet, " How different are Waldron's and Fallon's core cases for and against judicial review?" (2010) Oxford Journal of legal Studies 49

prioritises that should accompany good decisions that are not easily facilitated by legal principles or judicial oversight, that may be overlooked. Third, the assumption that underpin much of the discussion is that democratic accountability through political processes is effective. This is certainly premised on the assumption that majority rule commands respect. It is assumed that there are workable political parties and that elections will see regular changes in political power. In contrast, South Africa presents an interesting dynamic where the judiciary is more likely to regulate the executive rather than the electorate or Parliament. The value of the UK discussion serves as a reminder of how important it is to respect the democratic process and as a common rationale for that respect some degree of judicial deference has to be accorded. Setting the balance and adjusting the level of judicial scrutiny is not an exact science. The determinative quality of any decision is not that the legislature has made a determination but that the intrinsic quality of the decision is consistent with fundamental values and principles. Setting the balance is also a matter of culture and determined by the role the judiciary may have in governance.

Kyritsis[1] argues that there are some tasks such as governing "that are best performed together." A solution that is focused on institutional design that draws together the legislature, executive and the judiciary in a common enterprise makes good sense. This is an attractive and well- argued solution based on a compromise between different perspectives. It accepts Dworkin's idea of fundamental human rights and places responsibilities on the legislature and the executive. It values both forms of judicial review that includes constitutional values underpinning human rights. Kyrit-

1 Dimitrios Kyritsis, " Constitutional Review in Representative Democracy" (2012) Oxford Journal of Legal Studies Vol. 32 no.2 pps. 297-324.

sis suggests that the importance of political morality is critical as is the value of judicial participation as part of the process of governing. He recognises the legislature's primary responsibility for the achievement of constitutional principles and that courts have a subsidiary role to the legislature. He also recognises that setting parameters on the judicial role in favour of constitutional review has to be balanced by the underlying political morality that is to be found in fundamental constitutional values. This takes judicial review beyond the scope of review set out by Waldron. It also provides a means of considering constitutional review in different legal systems where it may be suboptimal or limited in the Constitution.

The operation of self-restraint to accommodate the political climate and public opinion underlines many cases where Parliament has itself restrained government. The value of scrutiny where legislation is evaluated, subjected to public debate that relates to the underlying rule of law culture.

Conclusions

Constitutional building requires elaboration of working checks and balances that provide protections for all citizens especially against Governments that may have developed permanent electoral majorities. The Egyptian Constitution 2012 faced serious obstacles if it was to be successful. *The Economist* claimed that the Muslim Brotherhood " never intended to share power or relinquish it in an election[1]" Equally problematic was the role of the military and their intervention on 3rd July 2013. Bad precedents have been made, not least that military power as a legitimate last resort for democratic failings. Too easily overlooked are the

1 The Economist 17th August 2013.

underlying questions of constitutional building that need to be addressed for any new democratic constitution, especially one that may seek to divert military power from civilian rule. There are also lessons about building principles of the rule of law and related to these are issues about political and judicial sovereignty. Setting balances between opposition and government correctly is an essential of good constitutional drafting. Jeremy Waldron's caution[1] about expanding judicial review at the expense of democratic government, should be remembered[2] as also should Dworkin's moral considerations[3] beyond institutional protections that are necessary for social peace and a thriving economy. At the same time it is argued that there should be recognition of the limitations on judicial power and the constitution itself as well as the importance of political and parliamentary controls and the educative value of the culture that should underpin their observance. While there is always a need for a sceptical stance to be taken on the limits of constitutional power the challenges of a one party dominant state or authoritarian militarism to the rule of law should be recognised and grasped. This is likely to be a delicate balance. Setting effective and transparent legal boundaries and limits on political power acquired through democratic means may have far reaching consequences for economic growth[4], inward investment and the ability of governments to act as donors to al-

1 J. Waldron, The Dignity of Legislation Cambridge: Cambridge University Press, 1999, Jeremy Waldron, " The Core of the Case Against Judicial Review" (2006) 115 Yale LJ 1346-406 and also see: Richard H Fallon, "The Core of an Uneasy Case ForJudicial Review" (2008) 121 Harvard LR 1693-736.M. Tushnet, Taking the Constitution away from the courts Princeton: Princeton University Press, 1999.

2 HLA Hart, The Concept of Law OxfordUniversity Press: 1961.

3 R. Dworkin, Taking Rights Seriously Harvard University Press, Cambridge MA 1977.

4 Iwa Salami, "The financial crisis and a regional regulatory perspective for emerging economies in Africa" (2010) 25(3) Journal of International Banking Law and Regulation 128-139.

leviate poverty[1] and address disease[2]. More generally, the value of exploring the political and legal dimensions of sovereignty under the strain of a one party dominance or authoritarian rule has valuable lessons for comparative constitutional lawyers[3] and will contribute understanding the normative meaning of law in political and historical perspectives.[4]

There is also a need[5] for finding reconciliation between the apparently mutually contradictory morality of constitutional rule and political sovereignty. More generally, the drafting of new constitutions as a reform or design process and as part of democratisation requires greater attention to the respective roles of courts, politics and legislatures and their interaction. Choudhry's suggestions have considerable merit in that they value strengthening judicial interpretation and upholding the values of the rule of law. He makes clear that this is the root of the assumptions that support extending judicial review but also that go to the heart of democratic governance. Building parliamentary forms of scrutiny and debate as well as citizen participation is an important means to strengthen democracy and ultimately the rule of law. To ignore the arguments in favour of this approach is to risk alienating political decision-making, may give rise to increased politicisation of the judiciary and weaken judicial independence. There is the added dimension of ensuring that the legitimacy of judicial power

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1- Steven Radelet, Emerging AfricaLondon: Center for Global Development, 2010.

2- Jure Vidmar, "The rights of self-determination and multiparty democracy: two sides of the same coin?" (2010) Human Rights Law Review 239.

3- P. Russell and D. O'Brien, Judicial Independence in the Age of Democracy: Critical Perspectives from Around the WorldUniversity of Virginia, 2001. Justice Nicholson, " Judicial Independence and Accountability: Can they Co-exist?" (1993) 67 A.L.J.404. H. Jacob, E. Blankenburg and others eds., Courts, Law and Politics in Comparative Perspective Yale: Yale University Press, 1996.

4- Paul Craig, "Political Constitutionalism and Judicial Review" in C. Forsyth and others editors, Effective Judicial review Oxford: Oxford University Press, 2010 pps.19-42.

5- N. MacCormick, and Z. Bankowski, eds. Enlightenment, Rights and Revolution A - erdeen: AberdeenUniversity Press, 1989.

is not always in direct conflict with the authority of democratic government. The signs are not always consistent. Jowell asks the question what decisions should judges not take? His analysis provides some useful clues as to how to address the debate over the desirability of judicial review including constitutional review of legislation. He argues that respect should be given to certain overriding principles:

Due weight must be given to the constitutional status of an elected body, as well as the superior institutional capacity of elected representatives to pronounce upon matters of public interest in areas such as housing, taxation and so on. Allocative decisions should not lightly be interfered with. Expertise should always be respected[1].

Judges always possess the capacity to probe the evidence and assess whether the reasons and motives for decisions rationally relate to their aims. Their tasks are central to judicial expertise and do not require undue deference or political approval for their legitimacy, and are indeed what judges do best[2].

A more sceptical view of the value of courts is used to justify judicial self-restraint. This view does not reject the value of rights or the role of courts. It suggests some caution about extending the scope of judicial review to encourage the review of legislation or policy making by the government of the day. Such sceptics do not object to judicial review in the form of reviewing administrative or executive decision-making. Rather they are concerned about a potential conflict between judicial decision-making and political choices agreed by the electorate. A good example of the

1- Ibid. p.135.

2- J. Jowell, " What Decisions Should Judges Not Take?" in MadsAndrenas and Duncan Fairgrieve editors, Tom Bingham and the Transformation of the LawOxford: Oxford University Press, 2009. 129-136 p. 135.

compromise that can be adopted is the UK Human Rights Act 1998 which stops short of allowing the courts to disapply a statute because it violates the ECHR but permits a declaration of incompatibility that automatically brings Parliament and the use of fast –track legislation to remedy any rights deficiency found by the courts. The arguments in favour of judicial self -restraint are based around the admission that there are potential limits on the scope of judicial oversight. Controversial issues such as abortion, financing political parties, the levels of taxation of goods and services are all potent reminders of the need for political choices made both privately and publicly to be resolved in the midst of public debate and parliamentary decision-making. In many instances the self -restraint favoured by court sceptics is easier under a constitutional settlement that does not formally provide for courts to invalidate legislation. In constitutional arrangements where this is possible, the sceptics insist that such powers should be sparingly used if at all. As Justice Kentridge suggested"… the Constitution does not mean whatever we might wish it to mean[1]"

1- S v Zuma (1995) (2) SA 642 (CC) 17.

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