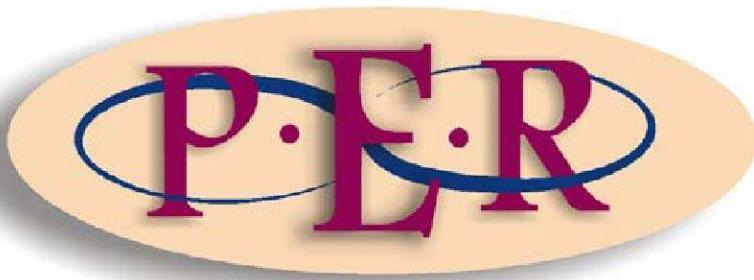


THE JUDICIARY AS A BASTION OF THE LEGAL ORDER IN CHALLENGING TIMES

FW DE KLERK LECTURE: 13 OCTOBER 2008

ISSN 1727-3781



2009 VOLUME 12 No 2

## THE JUDICIARY AS A BASTION OF THE LEGAL ORDER IN CHALLENGING TIMES

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D van Zyl\*

**[1]** In recent times the judiciary has been under almost constant fire as a result of certain controversial events involving the courts and individual judges. This has given rise to uncalled for, and frequently unwarranted, publicity of an extremely adverse and negative nature. Despite the fact that only a relatively small number of judges has been involved, the bench as a whole has been affected and even severely tainted by this activity. Public confidence in the courts has been eroded and the independence of the judiciary has come under serious threat.

**[2]** However tempted I may be to deal with specific cases and much publicised judgments, I shall refrain from doing so inasmuch as the matters to which they relate remain pending and may indeed not be finalised for some time. Furthermore they have played a pivotal role in the political uncertainty which has been taxing the country in recent times. I speak, of course, of the criminal proceedings between the National Director of Public Prosecutions and the President of the African National Congress, Mr JG Zuma, and the various proceedings between Judge President JM Hlophe and the Constitutional Court. Both cases are a cause of grave concern to lawyers and ordinary peace-loving South Africans who would dearly like to see an end to the bitter accusations and recriminations which have been an ongoing feature of such cases.

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**[3]** Like many of my colleagues in this country and elsewhere, I am deeply concerned that the bench, more particularly the Constitutional Court, has been subjected to virulent, if not positively defamatory attacks by politicians and other persons who should know better. It is quite abhorrent to describe a judge as "counter-revolutionary" if he holds against you and as "progressive" when he finds in your favour. This kind of vilification and vituperative conduct pollutes the bench as a whole, including all its constituent judicial officers.

**[4]** As might be expected, this unbridled criticism has elicited a strong reaction from a number of high-profile members of the legal profession, such as Chief Justice Pius Langa, former Chief Justice Arthur Chaskalson, Adv George Bizos SC, Dr Barney Pityana, Vice-Chancellor of the University of South Africa, the General Council of the Bar, the Law Society of South Africa, the South African Law Deans Association and, most recently, the newly appointed Minister of Justice, Mr Enver Surty, who has warned against eroding the integrity of the judiciary. In an article on "The Dispensable Judiciary" Brian Spilg SC<sup>1</sup> observes that there has not been such a sustained attack on the highest court since the "High Court of Parliament" case in the 1950s: it has the potential to destroy the integrity of the Constitutional Court and to undermine public confidence in the judiciary as an institution capable of dispensing justice impartially to all. He concludes:

The Judiciary is not some type of disposable nappy that can be regularly trashed and replaced. Our Judiciary stands for independence which is irreplaceable and any attack on the institution that succeeds or alters its makeup, undermines it for all time.<sup>2</sup>

**[5]** The purpose of my address to you this evening is to give you and other interested parties the assurance that, despite these unfortunate events involving important role players, the judiciary should continue to be a bastion or stronghold of the legal order, however challenging the times may be. I am

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1 Spilg 2008 *Advocate* 41-43.

2 *Ibid* 43.

strengthened in this view by the democratic principles and values enshrined in our Constitution<sup>3</sup> which provides, in section 165(1), that the judicial authority resides in the courts. These courts, we are told in section 165(2), are "independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice".

**[6]** In this regard I respectfully associate myself with the following observation of Chief Justice Langa in his opening address at the recent conference of the Commonwealth Magistrates' and Judges' Association:

There are serious challenges still facing the country; they are being tackled. The great majority of our people have faith in the Constitution and its structures and institutions. The legislature still goes about its business, consulting its constituencies and making laws. The executive likewise carries on, making policy and running the governance of the country. The courts are still the interpreters of the Constitution and the law ... Storms come and storms pass. We can still claim that the constitutional guarantee of an independent judiciary is alive and well in South Africa ... The judiciary's place is firmly entrenched in the Constitution and any attempt to denigrate the judiciary excites great public alarm and attracts great adverse publicity for the person or institution who is so ill-advised as to do it.

The truth of course is that the victories we have achieved should never be taken for granted. Eternal vigilance is required because the principles that underlie our new democratic order are so precious, so valuable, that they should never be put at risk. Only those who have lived through, or observed the pain of the divisions, inequalities and conflicts inherent in a society based on injustice can imagine the importance of maintaining and strengthening the new democratic structures and institutions that we have gained through the adoption of our new Constitution. One such is an independent judiciary in a democratic state.

**[7]** This approach accords with the so-called Latimer House Principles endorsed by the Commonwealth Heads of Government meeting held in Abuja, Nigeria, in 2003. In terms thereof "[a]n independent, impartial, honest and competent judiciary is integral to upholding the rule of law, engendering public confidence and dispensing justice". To achieve this ideal judicial appointments should be made on merit and judges should have security of tenure. This will engender public confidence and support without which, as Langa CJ puts it, the judiciary cannot function at all.

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3 *Constitution of the Republic of South Africa 1996.*

**[8]** Appointment as a judge, of course, brings with it certain duties and responsibilities. Inasmuch as the curial and private activities of judges are generally open to public scrutiny, they cannot complain if their conduct on and off the Bench elicits criticism or even censure. Their integrity, honesty, impartiality and independence from external influences, be they corruptive or intimidating, should be above question. Their private lives should be exemplary. The community at large accepts that they are only human and may hence be victims of the errors of human nature, but the stature they enjoy in the community requires them to be extra vigilant in ensuring that they themselves comply with the demands of the law and with the ethical and moral rules of conduct adhering to their elevated office.

**[9]** The American Bar Association deals with judicial ethics in a Model Code of Judicial Conduct issued in February 2007. In the preamble thereto the following appears:

[1] An independent, fair and impartial judiciary is indispensable to our system of justice. The United States legal system is based upon the principle that an independent, impartial, and competent judiciary, composed of men and women of integrity, will interpret and apply the law that governs our society. Thus the judiciary plays a central role in preserving the principles of justice and the rule of law. Inherent in all the Rules contained in this Code are the precepts that judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to maintain and enhance confidence in the legal system.

[2] Judges should maintain the dignity of judicial office at all times, and avoid both impropriety and the appearance of impropriety in their professional and personal lives. They should aspire at all times to conduct that ensures the greatest possible public confidence in their independence, impartiality, integrity, and competence.

These principles are restated in Canon 1 and amplified in Canons 2, 3 and 4:

Canon 1: A judge shall uphold and promote the independence, integrity, and impartiality of the judiciary

Canon 2: A judge shall perform the duties of judicial office impartially, competently, and diligently.

Canon 3: A judge shall conduct the judge's personal and extrajudicial activities to minimize the risk of conflict with the obligations of judicial office.

Canon 4: A judge or candidate for judicial office shall not engage in political, or campaign activity that is inconsistent with the independence, integrity, or impartiality of the judiciary.

**[10]** A Code of Ethics for South African judges has been in circulation for some time, thanks to the endeavours of Judge LTC Harms of the Supreme Court of Appeal. To the best of my knowledge the judiciary as a whole has accepted it in its entirety, but there is still a question whether it will fit in with the series of draft judiciary bills which have been consistently rejected by the judiciary as attempts to control and inhibit the judiciary while impinging upon or even undermining judicial independence. This raises once again the question why the judiciary should not, as an independent third arm of government in terms of the Constitution and the age-old doctrine of separation of powers, be arranging its own affairs. Concurrent herewith is the question whether judges should not form their own association with a view to managing their own affairs. Up to now the members of the various divisions have been reliant on the good offices of their respective heads of court who meet a few times a year to consider and discuss judicial matters on behalf of their respective members. Some doubts have been raised, however, as to whether this procedure properly serves the best interests of the judges.

**[11]** In *S v Mamabolo*<sup>4</sup> Kriegler J adopted an innovative approach in considering the relatively weak position in which the judiciary finds itself as the third arm of government:

In our constitutional order the judiciary is an independent pillar of state, constitutionally mandated to exercise the judicial authority of the state fearlessly and impartially. Under the doctrine of separation of powers it stands on an equal footing with the executive and the legislative pillars of state; but in terms of political, financial or military power it cannot hope to compete. It is in these terms by far the weakest of the three pillars; yet its manifest independence and authority are essential. Having no constituency, no purse and no sword, the judiciary must rely on moral authority. Without such authority it cannot perform its vital function as the interpreter of the Constitution, the arbiter in disputes between organs of state and, ultimately, as the watchdog over the Constitution and its Bill of Rights – even against the state.

**[12]** By virtue of this moral authority it is incumbent upon the courts and their judicial officers to resist any form of pressure to make a decision or grant an

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4 *S v Mamabolo* 2001 3 SA 409 (CC) par 16.  
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order one way or another. This was unequivocally stated in *President of the Republic of South Africa v South African Rugby Football Union*,<sup>5</sup> (the so-called SARFU recusal case) in the following terms:

The nature of the judicial function involves the performance of difficult and at times unpleasant tasks. Judicial officers are nonetheless required to 'administer justice to all persons alike without fear, favour or prejudice, in accordance with the Constitution and the law. To this end they must resist all manner of pressure, regardless of where it comes from. This is the constitutional duty common to all judicial officers. If they deviate, the independence of the judiciary would be undermined, and in turn, the Constitution itself.

**[13]** By the same token a judicial officer is required to adjudicate a case in accordance with the facts and the law and not according to his or her personal views or opinions. In this regard a pragmatic approach appears from the SARFU case.<sup>6</sup>

That a judge may have engaged in political activity prior to appointment to the bench is not uncommon in most if not all democracies, including our own. Nor should it surprise anyone in this country. Upon appointment, judges are frequently obliged to adjudicate disputes which have political consequences. It has never been seriously suggested that judges do not have political preferences or views on law and society. Indeed, a judge who is remote from the world that she or he has no views would hardly be qualified to sit as a judge. What I require of judges is that they should decide cases that come before them without fear or favour according to the facts and the law, and not according to their subjective personal views. This is what the Constitution requires.

**[14]** The discussion of the separation of powers and the independence of the judiciary inevitably brings one to the question of judicial involvement in politics. Under the old dispensation much was written on the topic of executive-minded judges, some of whom had been so-called "political" appointees and were notorious for their regular findings in favour of the executive. One need only think of the well-researched works of Corder and Forsyth and any number of articles written by lawyers opposed to the old regime.

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5 *President of the Republic of South Africa v South African Rugby Football Union* 1999 4 SA 147 (CC) par 104.

6 *Ibid* par 70.

**[15]** An extremely useful study on "Judges, Politics and the Separation of Powers" has recently appeared from the pen of Professor Francois Venter.<sup>7</sup> Significantly the learned author referred to an unreported judgment of Nicholson J in *Treatment Action Campaign v Government of the Republic of South Africa*<sup>8</sup> where the learned judge said the following regarding a government instruction not to comply with a particular order of court:

If the Government of the Republic of South Africa has given such an instruction then we face a grave constitutional crisis involving a serious threat to the doctrine of the separation of powers. Should that continue the members of the judiciary will have to consider whether their oath of office requires them to continue on the bench.

This passage prompted Prof Venter to inquire whether Nicholson J had in fact traversed "the boundary between politics and adjudication". On the other hand the concern of the learned judge was probably justified in view of the clear meaning of section 165(5) of the Constitution, which provides that organs of state are also bound by orders and decisions of the courts.

**[16]** It is, of course, nothing new that judges do, on occasion, direct vociferous comment and criticism at an act or inaction of a government organ. If this is deemed to be a judicial transgression I must confess that I too have been guilty thereof, particularly in regard to sloppy police investigations and magistrates who postpone matters all too easily without enquiring whether the further incarceration of an awaiting-trial accused is in the least justified. Judicial emotion, and even anger, may be comprehensible under such circumstances, but politically loaded comments and opinions not required for purposes of making a finding or coming to a conclusion, should be avoided at all costs. There is frequently a fine line that distinguishes unnecessary political comment from observations setting forth the reasoning of the court in coming to a particular conclusion. Criticism of minimum sentence legislation, which has the effect of removing a court's discretion to impose an appropriate sentence, is a

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7 Venter 2007 *Speculum Juris* 60-72.

8 Case No 4575/06 D&CLD 28 August 2006 par 33.

far cry from suggesting that the death penalty should be revived as a deterrent to serious crime.

**[17]** When considering judges and politics it is difficult to escape a reference to the appointment of judges. In the *SARFU* case<sup>9</sup> it is made clear that involvement in struggle or activist politics prior to 1994 would not disqualify a candidate for appointment to the bench. On the contrary it appears to have been elevated to a qualification, if not a prerequisite, for appointment. Because of this approach the judiciary has probably lost eminently qualified candidates for appointment to the various courts in South Africa. When their nominations for appointment to the Constitutional Court were unsuccessful, brilliant academics like Prof John Dugard and Prof Johan van der Vyver were lost not only to the judiciary, but to the country. Prof Dugard accepted a prestigious appointment as professor of international law at the University of Leyden and Prof van der Vyver was appointed to an equally prestigious chair of human rights law at the University of Emory in Atlanta, Georgia.

**[18]** It must not, of course, be lost from sight that South Africa is in a transformational phase of its development as a young democracy. A candidate for appointment to the bench must hence not only be "a fit and proper person" to be so appointed as a judge, but his or her appointment must also be consonant with the need for the judiciary "to reflect broadly the racial and gender composition of South Africa".<sup>10</sup> In this regard Chief Justice Langa points out, in his aforementioned address,<sup>11</sup> that there has been significant improvement since 1994, when there was only one black judge on the Bench, namely Judge (later Chief Justice) Ismail Mohamed. As matters now stand 106 of the 204 permanently appointed judges are black and 40 are women.

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9 *Supra* n 5 par 72-76.

10 S 174(1) and (2) of the Constitution.

11 Par [6] *supra*.

**[19]** It bears mentioning that a number of the initial judicial appointments reflecting the needs of a representative judiciary were not always successful, mainly because of a lack of experience and, in some cases, an emphasis on political considerations rather than ability. This situation may, at least partly, be attributable to the fact that, in terms of section 178 of the Constitution, the Judicial Service Commission (JSC) is "politically loaded" in the sense that, of its twenty-three members, only three are judges (the Chief Justice, the President of the Supreme Court of Appeal and one Judge President), four are practising lawyers (two advocates and two attorneys) and one is a legal academic. The remaining fifteen are so-called "political appointees", with the Minister of Justice in the forefront. Now that we are almost fifteen years into the new democratic dispensation, the time may be ripe to consider amending the Constitution to provide for a JSC consisting substantially, if not exclusively of judges, practising advocates and attorneys, and legal academics. They would, in my respectful view, be best qualified to carry out this extremely important function.

**[20]** Just as the judiciary should be accorded full recognition and respect as an independent third arm of government, so also is it incumbent on judges to recognise and accord the necessary respect to the other arms of government, namely the executive and legislature. As Justice Kate O'Regan points out in her 2005 FW de Klerk Lecture<sup>12</sup> "Checks and Balances: Reflections on the Development of the Doctrine of Separation of Powers under the South African Constitution", however, this does not render the executive and legislature immune from constitutional challenges based on fundamental constitutional rights. The principle of non-intrusion in the affairs of another branch of government must give way to judicial intervention when it is required to protect individual rights. Although non-intrusion is thus an important principle in the doctrine of separation of powers, it is not absolute. The Constitutional Court in fact has exclusive jurisdiction in certain matters affecting other branches of government (section 167(4)).

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12 O'Regan 2005 [www.puk.ac.za/](http://www.puk.ac.za/) 13-14.

**[21]** In his aforesaid article Prof Venter<sup>13</sup> discusses these aspects of separation of powers under the heading "The Determination of the Boundaries between the *Trias Politica*"<sup>14</sup> and comes to the following conclusion<sup>15</sup> which I wholeheartedly endorse:

The courts of the fresh South African democracy, torn between the drive to reform the system on the one hand, and frustration on the other by the lack of political will and capacity to improve and maintain the functions and procedures characteristic of a modern constitutional state, are increasingly hard put to find the balance between political engagement and judicial detachment.

To find such balance, it is necessary, ironically, that it should be acknowledged by all judicial officers that they cannot escape politics. Such recognition is a precondition for a judge to engage with political material while keeping an open mind. A judge suppressing or ostensibly disowning his or her political inclinations in the belief, or on the pretext that, adjudication is merely an abstract, neutral activity, is prone to produce findings consciously or subconsciously tainted by those same inclinations. The detached and well-considered style of judicial language traditionally associated with the bench is, however, a precious aid to finding the right balance, because without it, either political frustration pours forth in inappropriate language, or real political prejudice is concealed behind verbosity...

**[22]** It is expected of all judicial officers, regardless of the court in which they serve, to accord courtesy and respect not only towards the other branches of government, but also to one another. My own experience has been that High Court judges have little or no difficulty in treating their peers or colleagues serving on a higher Bench, such as the Constitutional Court or the Supreme Court of Appeal, with courtesy and respect. In the case of lower courts, such as the Regional or District Magistrates' courts, however, such treatment is frequently singularly lacking. I have found this somewhat disturbing since it is my view that all judicial officers are in service of the community and their relationship with one another should not be influenced by seniority or lack thereof.

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13 Par [15] *supra*.

14 Venter 2007 *Speculum Juris* 69-74.

15 *Ibid* at 74.

**[23]** The essence of courtesy or respect, when disagreeing with or criticising the judgments or orders of any court or judicial officer, is to exercise restraint and to remain objective and detached at all times. It goes without saying that sarcastic comments or snide personal remarks should be avoided at all costs. Judges should refrain from abusing their position by indulging in inappropriate posturing or ego-driven "grandstanding". The individual judge is not important – the judicial office and function are. The greatest judges have frequently also been the greatest gentlemen who will be remembered for their sense of justice and fairness rather than their conduct.

**[24]** Let me conclude on a historical note. Justice and fairness and the values occurring in the Constitution are as old as the hills. The wisdom and insight of great Greek and Roman lawyers and philosophers such as Socrates, Plato, Aristotle, Cicero, Gaius and Ulpian, nurtured and developed these values over centuries and they remain guidelines for us in modern times. The cardinal virtues of wisdom and prudence, courage, moderation and justice still underlie law and legal practice. Such virtues, and their many concomitant values, still constitute the instruments with which judges make their manifold decisions, however complex the case with which they are dealing. It is these virtues and values which prompt them to dedicate their lives and careers to achieving justice, fairness and reasonableness in all they say and do. And it is what they say and do in good faith and with reference to the moral values of the community they serve, that stimulates public confidence in the judiciary as a bastion of the legal order, however challenging the times may be.

I thank you.

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2009]

## **List of abbreviations**

JSC        Judicial Service Commission

s        section(s)

SARFU    South African Rugby Football Union