The need for the independence of the judiciary and of the legal profession

By Justice Edwin Cameron of the Supreme Court of Appeal

It is a great pleasure to be here. I commend the Bar for its initiative in undertaking to equip its young leaders with skills, and the Pretoria Bar in particular for shouldering the responsibility of arranging this year’s meeting.

How do I tackle a topic that is so familiar to us all? I’ll start by getting the question of the principle over as quickly as possible.

Everyone knows about the principle of the independence of the judiciary. It is-

• implicit in the very concept of the rule of law, which is one of the founding values of our Constitution and our democratic state (Constitution s 1(c));

• expressly enshrined in the Constitution, which vests the judicial authority of the Republic in the courts (s 165(1)), which are ‘independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice’ (s 165(2)), and with whose functioning no person or organ of state may interfere (s 165(3));

• reflected in the oath of office that judges take (Constitution Schedule 2, article 6 – ‘I swear that, as a judge, I will be faithful to the Republic of South Africa, will uphold and protect the Constitution and the human rights entrenched in it, and will administer justice to all persons alike without fear, favour or prejudice, in accordance with the Constitution and the law’);

• approved by the African Union and its predecessor, the Organisation of African Unity, and enshrined in the African Charter on Human and Peoples’ Rights, adopted at Banjul in June 1981; ¹

• endorsed by the Commonwealth heads of government at their meeting in Abuja, Nigeria in December 2003 (the ‘Latimer House principles’), and more specifically by the Pan African Forum on the Commonwealth (Latimer House) Principles²; Nairobi, Kenya, April 2005;

• expanded on in our constitutional jurisprudence over the last fourteen years.³

But I don’t want to talk about principles. We South Africans have had enough of principles. We’ve had principles in buckets-full, even principles in buckets with footnotes. What we need is a practical understanding of why those principles are essential if we are going to improve our living conditions as South Africans. So instead I want to ask three questions:

A What is the practical justification for the principle?
B What does it mean in practice?
C What do we have to do to secure it?

A: The practical justification for independent judges

Here I want to start by emphasising (as my colleague Nugent has observed) that the independence of the judiciary is not something judges insist on selfishly for themselves. It is not a perk or a benefit of service, like their cars or their pensions. It is a political principle that exists for the benefit of good governance in any complex modern state. In this sense judges are bound by the principle that they are independent as much as anyone else is: it is the profoundest tenet by which they are obliged to live their professional lives.

In trying to understand the imperative importance of the independence of the judiciary, we must go back to what I said earlier, namely that the principle is implicit in the very notion of the rule of law.
The law is a system of norms, values and rules that regulates the exercise of private and public power. It is intended to restrain abuses of power and to contain excesses of power, and to provide a framework for regulating disputes between people and groups of people about competing social claims.

This sounds very abstract, but our South African history illustrates the role of the legal system very clearly.

We as lawyers inhabit a paradox that comes from our apartheid past. Despite the fact that under apartheid the law was used an instrument used to subordinate the majority, to degrade their humanity and to deprive them systematically of civic dignity and basic rights, the negotiating parties, in founding our democracy in 1994, committed us to becoming a nation regulated by legal norms and values.

The negotiating parties had other choices. They could have chosen to perpetuate rule by parliamentary sovereignty. They could have chosen a system of rule by executive fiat, or by dictatorship of the proletariat, or even rule by communal committees, or power expressed through a one-party state. These options have been tried elsewhere. They have failed. But it is not only because they failed elsewhere that our negotiators chose democracy and the rule of law — it is also because democracy within a constitutional framework best gives expression to the value of human dignity. And the core public project after apartheid was to restore human dignity and enshrine it at the centre of our society. To the extent that our transition to democracy represented a revolution, that is what the revolution sought to attain.

So, the negotiators made a practical, and sensible, and visionary choice. They committed us all to living by the law, and to abiding by the norms and values that were expressed in a Constitution - one that was to be supreme, and to govern all law, and the exercise of all power. This had profound implications for governance: for the simple reason that a system of legal norms and principles, to be of any use, requires just enforcement, and just enforcement requires an independent and authoritative agency to determine the meaning and application of the norms.

The more complex governmental system our negotiators chose distributes state authority between three central pillars of state power. And the exercise of governmental power is mediated through a system of constitutional norms that independent courts enforce. This choice involved a conscious act of restraint, in the interests of good governance, by the party representing the majority of South Africans, the ANC. It was made for good reason, since judicial oversight legitimates government’s pursuit of ambitious constitutional norms.

Those same interests that propelled the original choice continue to require a measure of willing restraint on the part of those who bear legislative and executive authority. It is for this reason that the Constitution provides very expansively for judicial independence and for the separation of governmental powers, between the executive, legislature and the judiciary.

The rule of law and its handmaiden, an independent judiciary, are therefore the opposite of dictatorship. They are the foe of authoritarianism. They are the enemy of totalitarianism. They are inimical to simplistic and linear notions of human nature and of humans in their social and organisational behaviour. They recognise the lack of simple linearity in human society. They recognise our own complexity as human and social beings.

The rule of law and an independent judiciary are essential to genuine democracy, and genuine democracy is indispensable to human development and freedom. This gives judges a great deal of responsibility in a democracy, and a good deal of power. This is not because judges are better than other people. Give me power without checks and I must sadly admit that very soon I will be tempted to abuse it. It is because the institutional mechanisms for exercising power differ, and need to be counter-balanced.

As a first-instance judge, I had the power of appeal sitting over me. As an appeal court judge, I have the wisdom and insights of colleagues sitting with me to check my fancies and inclinations. And above all we have the restraining values and principles of the law itself.

To sum up — an independent judiciary is a precondition for a decent human society. If we want decency and good governance in South Africa, we must nurture and cherish the independence of our judiciary.

B: What does having independent judges mean in practice?
It means two things mainly:
- Judges must be individually and personally free to decide the cases before them impartially on the basis of the facts before them and the applicable legal norms and principles, without outside influence or interference (decisional independence); and
- they must work in an institutional environment that makes it possible for them to give impartial, legally-sound decisions (institutional independence).

But before we consider outside sources of influence on decisions, let us start with the judges themselves. To have judges who can give independent decisions, you must have judges who are independent. In practice, if judges individually are to be free to give sound decisions, they must be free themselves - free of prejudice, partiality, improper ties and corrupt motives. A judge who is taking under-the-counter payments from a litigant or potential litigant in his or her court defies the notion of judicial independence. A judge who approaches another judge on behalf of, or in the interests of, a litigant with a pending case violates the most basic tenets of judicial independence. In short, a corrupt judge is the antithesis of an independent judge.

The need for decisional independence is also the reason why the employment benefits of judges must be secure, and why they must have job security. But judges must also work within an institution that secures their ability to be free, impartial and independent.

The restraint our constitutional compact evidenced entails more than the obvious principle that judges should be free in their decision-making from actual control by or influence from other branches of government. It requires that —
- the courts as an institution should be independent of control by legislative and executive regulation;
- judges should have a secure area of autonomy in performing their constitutional function, which entails that, in exercising judicial authority, the judiciary must be self-regulating.

Institutional independence covers ‘matters that related directly to the exercise of the judicial function, as well as judicial control over administrative functions ‘that bear directly and immediately on the exercise of judicial function’.4

All this will be seriously put at risk if the current constitutional amendment - the Constitution 14th Amendment Bill5 - is adopted. In 2005 the government published a Bill to amend the Constitution [Government Gazette General Notice 2023 of 2005]. The Bill was part of a package of measures to rationalise and transform the Judiciary and to improve its accountability and efficacy. But the constitutional amendment had serious implications. It provides for the addition of two extra sub-sections to s 165:

(6) The Chief Justice is the head of the judicial authority and exercises responsibility over the establishment and monitoring of
norms and standards for the exercise of the judicial functions of all courts, other than the adjudication of any matter before a court of law.

(7) The Cabinet member responsible for the administration of justice exercises authority over the administration and budget of all courts.

The bite of the amendment is in s 165(7). It proposes to vest vast powers in the Minister of Justice. No convincing attempt has been made to justify this amendment. The main argument against it is that ‘the administration … of all courts’ is a vast area, and that entrusting constitutional power to the Minister of Justice to exercise authority over it will necessarily open the way to interference in ordinary matters of court administration such as case allocation, judicial management, court sittings, composition of appellate Benches. This is what is sinister and troubling about the proposed amendment.

One of the resolutions adopted at the Polokwane conference of the African National Congress in December 2007 required the adoption of the constitutional amendment. However, according to a report in Business Day, 17 July 2008, a visiting delegation of the International Bar Association was recently assured by members of Parliament and government officials ‘that this was unlikely.’ This is an important reassurance.

We continue to have choices in our country. If we choose the dignity, risks and rewards of democracy, we must have a genuinely independent judiciary to mediate and apply its laws.

C: How do we secure the independence of the judiciary?

This requires struggle in the political spheres for which judges themselves are ill-equipped. It requires proponents of complex democracy - the opposite of linear government - in the media and in all political parties.

Judicial independence also means securing a space for the courts to function, free from hectoring public rhetoric that degrades their role in securing our democracy. To call courts ‘counter-revolutionary,’ when they are honestly exercising their ordinary functions of giving decisions according to the law, without fear or favour, is to misunderstand the nature of the revolution that those who founded our democracy chose.

They chose a complex system of governance with checks and balances for which judicial independence and integrity are indispensable.

And demeaning rhetoric sullying them in performing their task threatens the independence of the courts.

In this, our political heritage offers us reason for optimism, for the trade unions and civil society organisations who form an important part of the governing party themselves experienced the importance of having independent judges (even though the concept was severely constrained by the supremacy of Parliament and the fact that not all judges before 1994 were committed to the rule of law and equal human dignity).

Importantly, too, an independent judiciary requires an independent legal profession. Such a profession is indispensable to an independent judiciary in two ways:

First, it serves as a civil society buttress to independent judges. A well-informed, independent profession serves as a bulwark against political tampering with the judiciary. In Pakistan, we have seen how the determination and aggressive public actions of lawyers - who demonstrated for the release from prison, and then the reinstatement, of the Chief Justice - have played a decisive role in the momentous constitutional events there, including the restoration of the constitution and the rule of law.

Second, it provides the essential training ground from which judges imbued with a commitment to and understanding of an independent institution with integrity can come.

Some background in legal practice is therefore a nearly-indispensable enhancement of the capacity for judicial office. Without saying that academics do not understand the need for judicial independence - I was an academic myself, and have always propounded the virtue of academic appointments to the Bench - I do positively assert that exposure to legal practice is a perhaps indispensable reinforcement and useful training in the values essential to an independent judiciary.

Lastly, let me emphasise our functional and practical connection to this fractured society around us. It is an obvious but important truth that the law does not exist independently of and above society - it is a reflection of how power is exercised in society. And it is an important means by which power is exercised in society.

But if the legal system is to be effective as a mechanism of power it must be just. And to have a just legal system, we must have just lawyers. A legal profession whose principal objective is self-enrichment cannot play an adequate role in the search for social justice. We need lawyers, and especially advocates, who are committed to using the law and the legal system as a means to secure social justice. Judges need such lawyers in their quest for justice, and the country needs such lawyers.

Our Constitution not only offers us the means to do this, it suggests that a commitment to social justice should be an indispensable part of legal practice.

That is your role, and your future.

Endnotes


2 Latimer House principles, Principle IV (available at http://www.thecommonwealth.org/shared_asp_files/uploadedfiles%7E87AC9270A-E929-4-AE0-4AEF9-4AAFE3847C9-%C0%FC%20ml)\n

4 Van Rooyen v The State para 29.

There appear to be many factors that conspire to threaten the Young Bar:

- The economic downturn that must affect the number of briefs that are available.
- The repeated attempts to regulate the Bar from the outside, or terminate its separate identity; by legislation if needs be.
- The fact that almost one-and-a-half decades after the advent of democracy the legal professions are still not united in single structures representing common ideals and shared visions.
- The continued imbalances of gender and representivity in its numbers.
- The continuing challenge to achieve equitable briefing patterns.
- The challenges that face the independence of the judiciary and the alarming manner in which our courts are drawn into the existing political turmoils.
- The consequent damage done to the respect in which the entire legal system is held by the public at large.
- The huge systemic challenges that stand in the way of access to justice, particularly for those that need it most: the poor, the disadvantaged, the young, the victims of crime.
- The overcrowding of court rolls, delays in the finalisation of trials, in particular, criminal trials.
- The crime wave that engulfs our country.
- The general lack of service delivery to the most vulnerable members of our society.
- The overcrowding of correctional institutions.
- The aggression that has become part of the national discourse - the last time that the term ‘elimination’ was used in a political context, it was by the hit squads of the apartheid state who called themselves the ‘Civil Cooperation Bureau.’

While there may deep cause for concern, we should take heart from the fact that felines have nine lives and are one of the most durable species in creation. They are resourceful and have a mind of their own.

The Bar is indeed no stranger to both internal and external challenges and divisions. In the days shortly after the Boer War, the Boer General JBM Hertzog and a number of other Boer campaigners were members of the Bar - and so were many who had fought on the side of the Bnts. Members of the Bar joined the 1914 rebellion against the Botha government’s entry into the First World War while many others supported the authorities. The Bar suffered the afflictions of the Rinderpest and the Depression with the entire nation in the twenties and thirties. Some members of the Bar were jailed for sabotage shortly before and during the Second World War, including at least one later prominent judge of the High Court; while others were interned as security risks, among them John Vorster, a later prime minister - while at the same time many other members distinguished themselves in uniform in the battles against Nazi Germany;

After the war, many members became National Party MPs and MPCs, others were advanced as members of the Broederbond while at the same time the Arthur Chaskalsons, the Bram Fischers and the Johann Krieglers courageously raised the standards of liberty, equality and human rights.

Black members were officially excluded from membership by at least one Bar that amended its constitution only after a long struggle in the seventies - without the GCB ever taking steps against that Bar. Legislation prevented a later Chief Justice from taking chambers with his colleagues. Women were excluded from the professions for many years and their eventual admission was more than just a little reluc-
The first official rebel Bar was established - at the latest - in the sixties by, inter alia, an advocate who was to become one the most respected of South Africa’s Appeal Court judges.

From the fifties until the eighties, human rights lawyers suffered the unwelcome attentions of the apartheid security police, were interrogated, arrested and jailed - and some of them are now among our leading judicial lights.

The Bar has always needed to be vigilant to protect itself from those among its ranks who fail to meet its high standards - today there are uncomfortable rumours about some members who allegedly fail to prepare for their appearance; and others who take multiple first-day briefs at first-day fees on the same roll knowing that the matters are not ripe for hearing.

The Bar survived all these rogue elements and cataclysmic events, clashes of personalities and political persuasions as well as direct assaults upon the independence of the courts - such as when President Paul Kruger attempted to fire the Transvaal High Court or the Nats introduced the High Court of Parliament.

The Bar survived because of its unique ability to accommodate individuals from widely divergent backgrounds who share the common dedication to practise as independent individuals, free from the constraints of being tied to big corporate clients and beholden to nobody but the law and the pursuit of justice. The majority of these individuals are, and will always be, members of the Junior Bar. They share the privilege of belonging to a unique brotherhood of practitioners who share an ethos that allows any one to seek guidance and advice from any other member, however senior, to oppose each other in serious argument and debate in court and yet to remain colleagues.

Above all, the fearless application of the cab rank service to any client, whoever he or she may be, however prominent, decadent, irritable, admirable or horrible, distinguishes the Bar from any other pursuit of the law.

This year we celebrate the birthday of the world’s best-known human rights lawyer, Mr Nelson Rolihlahla Mandela. His example is a shining guideline of the true lawyer’s practice:

1. A complete absence of self-interest.
2. Dedication to an ideal that is greater than oneself - the pursuit of justice.
3. Uncompromising moral and intellectual independence.
4. Fearless advancement of the truth.
5. Disregard for any personal consequences.
6. Placing the interest of the client above other considerations.
7. Placing the public interest above money or similar rewards.

These characteristics must define the service rendered by the Bar, and especially the Junior Bar, because the juniors handle most appearances in our courts.

While I trust that you still believe that you cannot do without the High Court and its judges, I know that the High Court and its judges cannot do without you. The Bench depends in these turbulent times more than ever upon the Junior Bar for guidance and assistance by their:

1. Thorough research of fact and law.
2. Proper analysis of the problem at hand.
3. Full and comprehensive preparation.
4. Absolute honesty.
5. Development of new ideas.
6. Incorporation of new tools such as IT and recordings made by cell phones.
7. Integration of traditional law.
8. Fearless defence of the client’s rights.
9. Standing up to irrational, obtuse, difficult and irascible judges - and patience with those of us whose hearing and insight are not what they used to be.
10. Dedication to the values of the Constitution.
11. Pro bono services to the poor.
12. Maintenance of ethical standards and, by doing all of this.
13. Maintaining the unique character of the Bar.

In this way, we meet our joint calling - to be custodians of the Constitution.

Cats can be a nuisance at times - when they are noisy at night or sometimes catch a garden bird - but they are indispensable: Without them, the rats take over. A vibrant, boisterous, courageous Young Bar is indispensable to the continued existence of our democracy.

May you find value and meaning in your deliberations in the knowledge that our country cannot do without you. I thank you for the privilege of allowing me to address you.

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Legal Crossword Number 6: Answers

- Across:
  1. Your place or mine for the formalities? (PRETRIAL)
  2. What you deliver your address with (APPLOMB)
  3. What you try to do with your address (PERSUADE)
  4. When you divide the liability (APPORTION)
  5. Application (MOTION)
  6. What to do when in doubt (DENY)

- Down:
  1. You are one of mine for the formalities? (PRETRIAL)
  2. What you deliver your address with (APPLOMB)
  3. Where Terror Lekota is headed (OPPOSITION)
  4. Can be used to avoid the fighting (MEDIATION)
  5. Application (MOTION)
  6. What you do when in doubt (DENY)