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In 1994 the negotiators at Kempton Park decided to leave the judiciary intact. Judges who had been appointed prior to April 1994 would remain in office until retirement.

This compromise meant that judges trained in South African Roman Dutch Law and the English Law as applied in South Africa, with its abundance of judicial precedent, remained in office. It meant that judges who were products of this great tradition of common and civil law were to form the bedrock of a future judiciary of South Africa. With this compromise came judges produced and schooled in the highest traditions of fairness and incorruptibility. The compromise was an acknowledgment and acceptance of judicial independence and an acceptance that our judges even in the dark days of apartheid had the honour and integrity to pronounce the law without fear or favour.

The culture and traditions of our judiciary are unique. There were political appointments to the judiciary before 1994. Some appointments were of people who had been politicians. Yet so strong were the traditions of independence and impartiality that, once appointed to the Bench, the appointees all without exception strove to pronounce the law without fear, favour, affection or prejudice.

Fourteen years into our democracy we can, with pride, write that our judges and the entire judiciary have adapted to the new dispensation. All pay allegiance to our Constitution. This is demonstrated not only by the oath of allegiance which they all have to take, but by the judgments which they deliver in resolving the hundreds of disputes which are brought before them. In making this remark, I dare remind everyone that most, if not all, the judges had been trained in a common law system, had grown up and studied in isolated South Africa and yet their judgments today as reflected in the law reports show how those judges in a short space of time have become experts in comparative constitutional law.

Our judiciary has always been guided by the principle that it is the duty of courts to decide concrete cases and where there is no common law or legislative provision, the judges should provide a rational solution. Because South Africa follows the English system of precedent, every decision by a court adds to the body of judge-made law. Judges in a precedent system are conscious of their law making power. They are conscious of the fact that while to philosophers law has limits, judges never reach the limits as they always have to provide solutions to every dispute presented to them by litigants. This role of judges is no better articulated than by Van den Heever JA in Sachs v Donges 1950 (2) SA 265 (A) at 312 when he said:

‘Judges, while purporting to expound and apply the law, sometimes make law in the process.’

For philosophers the law is made by the legislature and the courts simply implement it. For judges that is too simplistic because if an interpretation of the law is made today, another court, years later, could easily come to a different conclusion because the law is not static, but is a living system capable of growth. Schreiner JA in Daniels v Daniels 1958 (1) SA 513 (A) at 522 quoting Mr Justice Holmes in The Common Law said:

“The life of the law has not been logic; it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.”

The above position has been articulated by the Appellate Division in Kergeulen Sealing and Whaling Co., Ltd v Commissioner for Inland Revenue 1939 AD 487. The relevant passage reads:

‘We should bear in mind that law in its development is apt to proceed on practical in preference to philosophical lines. The practice of law, as a living system, is based rather on human necessities and experience of the actual affairs of men, than on notions of a purely philosophical kind. Lord Bacon reminds us that the thoughts of the philosophers may be likened to the stars: they are lofty but give very little light. I speak with every respect, and while I am conscious that we should at all times strive to be logical in our reasoning, and as philosophic and systematic as we can in our laying down of legal principles, I hold it to be a sound notion that it is not a false philosophy to inquire what method serves the best practical purpose. When, then, it comes to the question of election between various legal theories, which each in turn has the support of eminent jurists - and we are at present placed in this position - it certainly is a matter of importance carefully to consider which of these different theories has the balance of practical convenience on its side, although we may not be prepared to accept some of the arguments put forth in support of it. These considerations have brought me to the conclusion that upon the whole the second theory is the one we should adopt.’

The position was further explained and expanded by Stradford CJ in Jajbhay v Cassim 1939 AD 537 at p 542. The relevant passage reads as follows:

‘Now the Roman-Dutch law, which we must apply, is a living system capable of growth and development to allow adaptation to the increasing complexities and activities of modern civilised life. The instruments of that development are our own Courts of law. In saying that, of course, I do not mean that it is permissible for a Court of law to alter the law; its function is to elucidate, expound and apply the law. But it would be idle to deny that in the process of the exercise of those functions rules of law are slowly and beneficially evolved. That evolution, to be proper, must come from, and be in harmony with, sound first principles which are binding upon us. In relation to the present problem, I do not regard the law to be well settled.’
These passages from our Appellate Division capture the experience, traditions and role of that court and how our courts have always seen their role in society. These traditions form the back-bone of our entire judiciary. Any further development of the judiciary must rest on them, otherwise we compel our judiciary to start from scratch and that could render it vulnerable. In reality there is nothing new that the courts do today. What they do today is what they have always done and what they have always done is well captured in these decisions of our Appellate Division.

One of the most important characteristics of our judiciary has been its attempt always jealously to preserve its independence. Our judges have always sought to place themselves beyond the reach of every possible direct or indirect influence of the executive and at all times been its attempt always jealously to preserve its independence. Our judges have always done and what they have always done is well captured in new that the courts do today. What they do today is what they have scratched and that could render it vulnerable. In reality there is nothing must rest on them, otherwise we compel our judiciary to start from the Constitution with a certain degree of measurement. There are many times when one wonders if judges understand whether judges think it is permissible for a court of law to alter the Constitution with a certain degree of measurement. There are many times when one wonders if judges think it is permissible for a court of law to alter the Constitution.

The Constitution gives the courts extraordinary powers. Section 172(2) in particular gives courts powers to make orders which are ‘just and equitable’. These are extraordinary powers empowering our courts to take political decisions if they find it ‘just and equitable.’ It is the exercise of this power and how our courts lean towards the traditional concepts of judicial restraint that will determine the future place and role of the judiciary and the respect our courts will have from society. In this sense judicial independence is in the hands of the judiciary and the profession. What the profession does, how it does it, what we say and how we say it are crucial for our democracy.

Just recently, I read a response to a statement by a politician. The response read:

‘None of the eleven Judges of the Court held judicial office under apartheid. Eight of them are black. All have strong credentials in the struggle against apartheid and for human rights and freedom, all have a deep concern for improving access to the law for the poor and the vulnerable.’

The difficulty with this response is that it does not promote the unity and the integrity of a single judiciary. It divides judges into those who were appointed under apartheid and those who were appointed after. Indirectly and unconsciously, it supports the notion that courts whose judges were appointed pre-1994 are not transformed. It promotes the notion in the minds of the public that until litigants reach the Constitutional Court (which is a post-1994 court consisting of judges predominantly who were not active under apartheid), they cannot have justice because this is the only real post-1994 institution. The response allows the division of judges into blacks and whites, into those who struggled and those who did not struggle. It is dangerous because once you do that, the politicians will start dividing black judges (and or judges appointed post-1994) into ANC and non-ANC inclined judges. For centuries lawyers have been divided into those who support the notion of natural law and those who are described as positivists. Natural law lawyers have always believed that law is law only if it has a certain content. Positivist lawyers on the other hand are those who have always believed that the law is law if it has been passed according to certain procedures. We also know that that division is not a crucial division determining whether or not lawyers ought to be or not to be respected. Therefore, whether or not lawyers have a concern for access to justice by the poor, is not relevant to the question whether judges are good or bad. Judges should not be respected only if they share particular beliefs or hold certain ideologies about the law.

We ought to promote the spirit that our judges have one thing in common: that judges are all products of the culture of independence of the judiciary, a culture that fights against all attempts to influence judges, especially by other arms of government, a culture that judges jealousely guard their independence and at all times pronounce the law without fear or favour. Judges ought not to prefer poor people to rich people. Judges only pronounce what the law is, what the constitution says.

Lastly, the difference between common and civil law systems is that a civil law system can always trace a decision of a court to some statute. Consequently, court decisions have no pre-emience or importance of their own. Judicial precedent is by and large unknown in civil systems. Under the common law on the other hand, there are no statutes and judges take decisions based on common law principles or judicial precedence.

What the constitutional era has done to our country is to bring South Africa, a predominantly common law county, very close to civil law traditions. This combination may be deadly for the position of the judiciary. Precedent means law making by judges while constitu-
Ctional law jurisprudence is supposed to mean that judges pronounce what the Constitution says is the law. This combination of pronouncing what the Constitution says is the law, on the one hand and the precedent on the other hand, catapults the judiciary and makes it to occupy a position it has never occupied and empowers it to occupy space normally reserved for the policy and political decision-makers. It is a new space attracting friction. The response to these challenges demands creativity and patience. It requires vision, wisdom and no panic reactions.

No matter how difficult it has been in recent months, no matter how difficult it can be in future, the judiciary and legal profession must deepen the commitment to the value that the courts should be independent and that once that value is destroyed, our democracy will equally have fallen. It is our job and our duty to rally our people around the concept and values of judicial independence and the need to protect our courts against any forms of influence from any quarter. But it is equally our duty to make sure that the judiciary plays the role that it is supposed to play in terms of the Constitution, namely, expounding and applying the law. Law making by judges is a by-product, something that in the words of Van den Heever ‘sometimes’ takes place. It is not a norm.

In many ways it was the best of times and the worst of times. The fury with which the Apartheid state still clung to its precarious power position in that latter half of the decade of the eighties, was matched only by the delirium of the hope that, perhaps finally, change was coming.

We, the class of ‘85, were already aware of the little cracks in the edifice of the old regime even as, in other ways, life was carrying on as before. This made for an eclectic mix of characters at the Johannesburg Bar who were as different from each other as they were entertaining. My co-pupils included Arnold Subel (currently a silk at the Johannesburg Bar), Jonathan Watt-Pringle whose master was Johnny Myburgh, Alistair Franklin (then predictably nicknamed ‘Blen,’ and now a silk at the Johannesburg Bar), Reenen Potgieter (now a silk at the Cape Bar), Gerhard van Tonder and Sean Naidoo (both of whom, like Jonathan Watt-Pringle, later moved to the London Bar).

Perhaps a sign of the changing times was our first meeting at pupils, when Max Labe SC welcomed everyone and remarked that Sean Naidoo was not able to attend the meeting through a prior commitment. ‘But don’t worry,’ Max re-assured us, ‘You will easily recognise Sean … He is the gentleman who is, well, always very well dressed …’

Like all groups of newly admitted advocates, we had one thing
available in abundance: spare time. No wonder then, that we spent our time - apart from agonisingly rearranging the two or three blue brief covers on our sparse desks, over and over - finding ways to entertain ourselves. And of course, like all newly-admitted advocates, we were deeply under the impression of our own learned importance. In those days the Bar was still housed in Innes Chambers and Schreiner Chambers in Pritchard Street. In the building just behind Innes Chambers was the Dawson Hotel. At that stage it was still a fairly smart institution, desperately clinging to a fading glamour that was threatened by the socio-economic changes through which the centre of Johannesburg was going even then. One of the stratagems employed by the Dawson at this time was to provide a very generous buffet lunch for the princely sum of about R30. As befitted important advocates, we liked to spend lavishly not only on the buffet, but also on the drinks to accompany it. On one such occasion, while drinks were ordered to round off the sumptuous meal, I grandly asked for some Calvados apple brandy, which I had ordered there before. A minute later Reenen Potgieter came across and reported back from the barman: 'Calvados c’est fini.' Not one to display my ignorance without good reason, I quickly responded: ‘Whatever, I’ll have one …’

Work consisted of the odd pro deo murder (R75 a piece), and soon afterward bail applications and postponements of public violence trials (R150 each) for attorney Priscilla Jana in such far-flung and exotic venues as Nylostroom, Koppies, Heilbron, Wolmaransstad and Welkom. This soon led to the step-up to fully fledged ‘kip-gooier’ and terrorism trials. This was also the heyday of labour law disputes, hard-fought between tough adversaries like Hans van der Riet, Willem le Roux of the attorneys’ profession and Pieter Pauw,once described by Bulbullia DP of the Industrial Court as ‘one of the leading luminaries of labour law.’

We also appeared in civil trials in the Magistrate’s Court. In his first such matter Jonathan Watt-Pringle had to defend the driver in a ‘crash and bash’ action. The Plaintiff’s counsel called his first witness, first such matter Jonathan Watt-Pringle had to defend the driver in a ‘crash and bash’ action. The Plaintiff’s counsel called his first witness, once described by Bulbullia DP of the Industrial Court as ‘one of the leading luminaries of labour law.’

One of my contemporaries at the Bar at the time was Jan-Hendrik Munnik, son of the former Judge President of the Cape Provincial Division. I knew Jan from Stellenbosch days, where as a student he had earned the nickname the ‘Voice of America’ (VOA for short), by reason of his booming baritone voice, which according to Gerhard van Tonder rendered not only the telephone system obsolete, but also enabled him to move for a default judgment in the court across the road without leaving his chambers in Pritchard Street. On one occasion Jan was to prove not only that his voice was strong in terms of volume, but also in terms of endurance. Levison J was presiding in the opposed motion court, and Jan was lucky enough to get on his feet first. Some of us who had matters in the same court, occasionally popped into court to see how the argument was progressing, in the hope that we too would have an opportunity to be heard. But Jan was not going to lose his case for reasons of unnecessary brevity. The result was that by 3 o’clock that afternoon, he was still on his feet, booming away.

All of which would have been quite remarkable, but for the fact that Johannesburg and the Supreme Court (as it then was) had a sudden, unexpected power failure, which caused the entire courtroom to be plunged in darkness. Almost simultaneously Jan-Hendrik stopped talking, which led to a few seconds of complete silence in court, followed by His Lordship’s remark from the Bench: ‘I must say, I thought your voice was electronically activated, Mr Munnik …’

A larger than life character who graced the Johannesburg Bar in those years, was George Bizos SC. I recall a case arising from a fight between two factions of a church, in which my master at the time, Louis Serrurier SC, acted for the one faction and George Bizos for the other. Because it was an urgent application (and George had not expected to go to court on that day) or simply because George was George, he was dressed in the most magnificent Mediterranean, cream-white suit. George will forgive me for saying that in those days he was not as slim and trim as he is today. The result was that when we finally set off for court, each leader with his team in tow, George was right in front with his wide and very stylish cream-white trousers, his black silk’s waistcoat and his gown flapping behind him in the wind - a picture not unlike that of a Greek battle-ship under full sail.

Contrary to George, who did not receive any reprimand for his dress on the day, the somewhat corpulent René Kruger SC, who often appeared for the State Attorney in political matters, was once taken to task for the fact that he had not buttoned his waistcoat. This was not because he wouldn’t, but simply that on the day in question, he couldn’t. This prompted the judge to remark, as Kruger SC rose to his feet to address the court: ‘I cannot see you, Mr Kruger …’ To which counsel was quick to reply: ‘Ah, but your Lordship is flattering me …’

Occasionally we were rudely reminded that we were not living and working in a normal society, after all. One such occasion was when I invited Sean Naidoo, during the salad days of leisure following our pupillage, to go to the movies in the Carlton Centre, which at the time was not only one of the smartest shopping centres in Johannesburg, but also housed a flourishing Ster Kinekor complex. Sean declined my invitation, and when I stupidly persisted in asking why, he just sighed deeply and said: ‘Res ipsa loquitur …’

The best of times, the worst of times. But change was on the doorstep, and on 2 February 1990 at last it happened. The NP government announced the unbanning of the ANC and other political parties, and plans to free Nelson Mandela and other political leaders. For reasons which I cannot now remember, I happened to be in the chambers of George Bizos at the time. Perhaps it was simply because George had a television set in his chambers. The fact is that a number of us were watching FW de Klerk’s speech in Parliament on that day. What I recall most clearly, besides the obvious elation about the political changes announced, was George’s reaction when F W de Klerk announced a moratorium on the death penalty. He stood up from where he had been sitting, and started pacing the floor. ‘Now that is remarkable. That is really something, isn’t it?’

Remarkable times, indeed. Something to behold.