The judiciary in a changing South Africa

The Honourable DH van Zyl, Judge of the Supreme Court of South Africa

This is an extract from an address by Judge DH van Zyl, the National President for South Africa of the World Jurist Association, delivered at the Biennial Conference of the Association held from 24-29 October 1993 at Manila, Philippines. Some 3 500 members of the Association, which is striving for world peace through law, attended the Conference. The indications are that South Africa will in the not too distant future be chosen as the venue of a similar Conference.

Introduction

The judiciary in general and judges in particular have provided fascinating, and frequently controversial, subject matter for discussion by lawyers and non-lawyers alike. From the earliest times judges have played a prominent role in community life. As dispensers of justice they have usually been held in high regard, despite their frequently insular life style and preferred low public profile.

The aura of respectability and dignity surrounding judges has been breached from time to time, particularly in view of the not so significant fact that they have proved themselves to be human and hence prone to error. This has given rise to volumes of studies on the judiciary, most of which have left the judicial reputations untarnished. Others, however, have been fiercely and unremittingly critical. Some of the criticism has undoubtedly been justified, but much of it has proved to be unfair and exaggerated. Their exposure to criticism is, of course, enormous, since, as David Pannick puts it in his recent work on judges:

"They repeatedly do what the rest of us seek to avoid: make decisions. They carry out this function in public."

In countries such as Canada judges have been subjected to attacks on their independence over a wide front. This has led Chief Justice Fraser of Alberta to urge that judges be sensitive to a legitimate public concern, failing which they may effectively lose control over the whole procedure. In South Africa "judge-bashing" has likewise become prevalent, as will be pointed out later. This is in stark contrast with the almost smug self-satisfaction expressed by certain judges themselves and likewise by politicians who, for their own purposes, rely on the generally accepted high standard of the South African bench. In an incisive article Marcus has deplored this smugness and has found support for his view, that a good many judges have been "political" appointees, in the Report of the Hoexter Commission. The Report indicates that individual merit has not always been a decisive factor, appointments sometimes betraying "an element of arbitrariness".

In this regard it should be pointed out that all judges of the Supreme Court of South Africa, including the chief justice, judges of appeal, judges-president and deputy judges-president, have hitherto been appointed by the State President. Appointments have usually been made from the ranks of senior advocates practising at the Bar of the division where a vacancy has occurred. In exceptional cases members of the public service have accepted appointments to the bench, the best-known being LC Steyn, a Chief Government Law advisor who became Chief Justice of South Africa on 4 April 1993.
judges have in fact been “political” and which can be remedied is by applying affirmative action programmes. Apart from the criticism, mentioned which may exist in judicial appointees appointment, save that they must be “fit and proper persons”.

Criticisms of judges

Apart from the criticism, mentioned above, that judges have not always been appointed on merit but that certain judges have in fact been “political” appointees, the main criticism has been that they, as representatives of a minority group constituting the population, have been unable to understand, let alone serve, the interests of the majority of the community. Until 1991, when Mr Justice I Mohamed became a judge, all South African judges were white. The perception was that the system of appointment favoured whites of particular political beliefs and was characterised by racial prejudice. The only way in which this can be remedied is by promoting adequate legal education for all potential lawyers and by applying affirmative action programmes.

This potential or real racial bias which may exist in judicial appointees under the present system of appointment goes hand in hand with the very real fear that such appointees will of necessity lean towards the executive rather than protect the rights and liberty of individuals. This has given rise to vociferous and strident criticism, one of the most prominent and widely respected critics being Professor Dugard in his pioneering works on human rights and liberties in the South African legal sphere. According to Dugard the positive approach of many judges has rendered them unable to mitigate the harshness of unjust and oppressive legislation.

Support for this criticism has come from Professor Dyzenhaus in his discussion of the failure of positivism in South Africa. He concludes:

“The positivists are like those unfortunate parachutists whose apparatus snags as they attempt to leave the ‘plane, and who find themselves neither in the ‘plane nor on the ground, but buffeted and dragged along in the slip-stream.”

The criticism of “executive-mindedness” of the judiciary, and more particularly of the Appellate Division, reached a high point when Professor Cameron released the results of his research on the aforesaid Chief Justice, LC Steyn. His conclusion was that Steyn CJ’s “impact on South African law has, as a whole, been regrettable”. Not only did the learned Chief Justice attempt to excise the English sources of our law, thereby impoverishing it, but he “did little to fortify fundamental rights and entitlements at a time when these were under increasing attack from executive encroachment”. In his judgments relating to racial discrimination “he revealed himself to be empathetic to the programme of legislative racialism that was being enacted.”

Cameron’s views are supported by Professor Corder in his research on the Appellate Division in the period ranging from the commencement of its activities in 1910, when political union in South Africa was achieved and the Court of Appeal was established in Bloemfontein. He observes:

“But there can be little argument that the picture of the appellate judiciary, as a body of fearless fighters for the less-privileged and unrepresented majority, is a myth whose perpetuation serves the cause of inequity. In truth, the members of the AD, while formally independent from political influence, manifestly corrupt, and consciously impartial where integral parts of the very structure which had created and now maintained injustice, from which they made little effort to extricate themselves.”

In similar vein Forsyth researched the next thirty years of the Appellate Division’s activities and likewise came to a negative conclusion. He says:

“Although the courts have seldom associated themselves directly with government policy, their decisions reveal that since the appointment of LC Steyn as Chief Justice the implementation of government policy has been substantially facilitated by a failure to keep the executive within the law ... In case after case where they had a choice judges have chosen the harsher and more pro-executive interpretation of a statute with little protest and little sign of regret.”

A radical approach to the moral dilemma in which some judges found themselves vis-à-vis their obligation to apply and interpret unjust laws was that they should resign. This was propounded by Professor Wacks who saw the judge as “the prototypical legal institution” and “the very apotheosis of fairness”. His eloquent rationale for this approach bears quotation:

“[T]he law is inevitably employed in pursuit of legitimacy. A government that can point to an apparently independent judiciary which, though it may occasionally utter its disquiet in respect of certain encroachments, acquiesces in the promulgation of blatantly unjust laws and Draconian assaults upon some of the most sacred principles of justice, is readily able to legitimise itself. A repressive legal system that can depend on almost unqualified acquiescence from its judges may preserve the appearance of its legality intact. It is therefore self-evident that a judge
Wacks sees a mass judicial resignation as "a clarion call" and "a statement of judicial despair and outrage" which would constitute "an assertion of the judge's absolute fidelity to justice, a protest against the abuse of law" and "an act of faith in the face of unconscionable legislation". 17

Needless to say the "Wacksian solution" was rejected outright by more reasonable and realistic lawyers who realised that a mass resignation of judges would furnish no solution to the problem of unjust legislation. No judge was compelled to accept an appointment in the first place but, if he chose to do so, he could do his best to mitigate the harshness of oppressive legislation by applying the flexible principles of our common law.

This was stated clearly by Dugard, who saw Wacks as creating the impression that "the racist and repressive statutes that comprise the law of apartheid as having totally replaced the common law". The common law still exists and should be applied in interpreting repressive legislation by virtue of its proven values, traditions, principles and spirit and likewise with reference to established rules of positive law which have entrenched principles of equality, liberty, reasonableness and natural justice. 18

Marcus likewise appreciates the constraints placed on judges under an unjust legal dispensation. Although judges should not adopt a neutral position and should attempt to mitigate harsh laws which violate human liberty, their power to do so is limited. 21

A positive approach is also adopted by Chaskalson in his review of law in a changing South Africa. He observes that, although judicial criticism has in the past been justified, it is not all bad. We should not lament the past, but direct our energy to what lies ahead:

"What is important is the future, and it is here that I believe that we will come to appreciate that we owe much to our judges, and a great deal to some of them. For despite all the paradoxes they have somehow held to the infrastructure and have kept alive the principles of freedom and justice which permeate the common law. True, at times, no more than lip service has been paid to these principles, and there have been landmark cases where opportunities to have substance to and uphold fundamental rights have been allowed to pass without even an expectation of discomfort, let alone a vindication of the right. Yet the notion that freedom and fairness are inherent qualities of law lives on, and if not reflected in all the decisions, is nonetheless acknowledged and reinforced in numerous judgments of the courts. That is an important legacy and one which deserves neither to be diminished nor squandered." 22

In a work intended to counter the negative conclusions reached by Corder, Forsyth and other critics of the judiciary, Professor Van Blerk directs her attention to criticising the critics for what she sees as frequently unfair and unjustified criticism which has succeeded only in injuring judicial credibility. She scrutinises the role of the judiciary in such sensitive matters as security cases and sentencing where race is a factor. She also attempts to place judicial appointments of the past in a more balanced perspective than some of the critics have done. Whether she has succeeded in creating a more favourable image of the South African bench is, of course, debatable. The message which comes across, however, is clear: be fair in your criticism and refrain from generalisations which can do more harm than good. 23

In this regard Van Blerk makes the following concluding assessment:

"It is undoubtedly true that judicial conservatism can be established; that judges - here or elsewhere - tend to support the status quo, operating as they must do within the established order. The crux of the problem is thus not the judicial tendency to conservatism. When the courts are urged to display a greater commitment to individual liberties they are inevitably, in the South African climate of polarization and conflict, expected to adjudicate on political grounds (dexterously labelled liberal natural law elements of Roman-Dutch law, or the like) to curb the executive. The problem here is that the judiciary functions within the constitutional system of legislative sovereignty which characteristically gives 'precarious' scope to the rule of law and within which, also, questions of democracy militate against the legitimacy of an overly activist unelected judiciary - and without a Bill of Rights. Cursing the judiciary then for a failure to restrain the authorities politically when, within their limited framework, they can only do so within the limits of the law - deflects attention from these strictures; so, too, from the efforts of the court to ameliorate, while waiting the reversal of undemocratic laws and procedures or the introduction of a testing right in the form of a Bill of Rights."

It is abundantly clear from this resume of criticisms directed against judges and the judiciary that there are vastly differing opinions on the subject. That much of the criticism has been fully justified is beyond question, but to attribute the grounds of criticism to the bench as a whole is unfair and unjustified. Many, if not the majority, of the judges have never had occasion to consider unjust or oppressive legislation for the simple reason that they have not had the opportunity to preside in important matters concerning such legislation. Matters of this nature make up a small percentage of the workload of South African judges. I have little doubt that at least some of those judges, who have not been called upon to apply their minds to controversial matters arising from the said legislation, would have been able to make positive and constructive contributions to mitigating the harshness of repressive laws. They would perhaps not have been able to neutralise the harmful effects thereof, owing to the limitations and curbs placed on their judicial function, but they would certainly have been able to ameliorate the situation within the said parameters.

That this is so appears from the fact that there have been generations of extremely able judges who have indeed been able to exercise their judicial functions in such a way that at least certain repressive statutory provisions have been ineffective or have not achieved what the legislature intended. This implies, of course, that judges who are dedicated to truth, fairness and justice should be prepared to adopt a more activist stance when circumstances require it, albeit subject to the constraints of the judicial function. That increased activism is called for requires serious consideration, as appears from the next section of the present discussion.

**Judicial activism**

It is not unjustifiable to say that the judiciary has, in the past, been notoriously conservative and extremely reluctant to effect changes to established legal principles or to venture beyond the strict bounds of judicial precedent. This has been attributed to the negative influence of the English judiciary in the sense of an "unwillingness to engage in an interest or policy analysis of legal conflicts", as Professor Mathews has succinctly put it. 24 He blames also the negative influence of legal positivism and the defective legal education.
of lawyers who have not been exposed adequately to thought provoking jurisprudence or legal philosophy.

It is true that judges have always, traditionally, been required to declare the law and not make it (judicis est ius dicere non dare).

This positivistic approach stems from our English heritage. As Professor De Vos remarks, however, there are indications of “a new bolder judicial approach taking root”. Once a bill of rights is introduced, which is anticipated as a certain event, the judiciary will have the means to assert its role fully as the protector of individual rights and liberties.2nd

Elsewhere De Vos and co-author Van Loggerenberg describe judicial activism as relative and incapable of being precisely defined. In general it refers to a judiciary which plays an active role vis-à-vis other branches of government generally and in resolving disputes between individual parties specifically. They see as forms of such activism the function of pronouncing, interpreting, finding and creating law, involvement in mediation and “social engineering” and, ultimately, an active searching for the truth.3rd

Some of these concepts are somewhat foreign to the South African lawyer. Institutions such as “mediation” and “alternative dispute resolution”, as less expensive and less time consuming ways in which to resolve disputes between parties, do not usually require judicial involvement. The introduction of the Family Advocate, however, to assist in the mediation of divorce matters, particularly where the well-being and best interests of minor children are concerned, has brought the judiciary into contact with a most useful and effective form of mediation.4th This form of involvement may, in time, create wholly new judicial functions which are not purely legal but also have socio-economic connotations, thereby making the judge a form of “social engineer”. That which falls strange upon the ear today may be quite commonplace tomorrow.

Judicial policy

“Judicial policy” is a concept coined by C Hoextor in a thought provoking article on what she calls the public policy of judges which enables them to choose between repressive and liberal values. The choice, she observes, is “political” and distinct from executive policy.5th

Elsewhere, Hoextor points out, judicial policy is known as legal ideology or ethos. Associated with this ethos is the moral value of justice to which are linked the liberal values of fairness, reasonableness, equality, dignity and human freedom. Judges hence have a means of redressing imbalances, so that a so-called “liberal” judge need not resign from the bench but may become a participant in a new legal culture.6th

Judicial accountability

“Accountability” of the judiciary is used not in the sense of “liability” or even “responsibility” but, as Cameron puts it, in the sense of being subject to certain constraints such as precedents, persuasive authority and justifiable criticism.7th He refers to the judiciary as “a curious institution” arising from a combination of historical, constitutional and methodological premises.8th Features of the heritage are what he calls professionalism, formal neutrality, observance of rules and hierarchy and subordination to legislature. Cameron’s scenario for a future South Africa, with reference to judicial accountability, is described in graphic terms:

“In South Africa the next years will see a severe testing of the law. The central question will be whether its mechanisms can operate as an instrument of social change instead of a bulwark for the protection of vested interests.

As far as accountability is concerned, what is needed is an institution which can give us the certainty or predictability as well as the ability to contain executive excess which is the essence of the rule of law; one which can give us constancy without rigidity; sensitivity to the needs of public development and social rights without sacrificing private entitlement; one which is receptive to public mores and public opinions without abandoning the individual who may be aberrant from both; one which shows concordancy with the ideals of the majority as expressed in the constitution of a democratically elected legislature, but without servility to it or subjugation of the principles of law: an institution in other words which recognizes the specific merits of legal forms of reasoning and the necessary continuity they can bring without uncritically subjecting itself to them. These are high ideals. The question is whether they are but another part of the South African dream.”9th

Corder suggests that judges can be prepared for a life of service and accountability by providing training for newly appointed judges and thereafter exposing them to continuing legal education by way of seminars and regular judicial conferences.10th

Judicial flexibility and common law principles

Concepts such as judicial activism, judicial policy and judicial accountability are not as idealistic and unrealistic as they may sound. The reason for this is that South African common law, with its roots in the Roman-Dutch and English legal tradition, has proved itself to be dynamic, flexible and adaptable to changing circumstances. Judges, and lawyers in general, have at their disposal a wealth of principle and precedent which provides answers to many a legal problem. The issue is not simply one of interpretation and, in the case of legislation, establishing the stark intention of the legislator, but how and by what means to determine the truth and to achieve the ideal of justice and fairness.

The principles to which I refer, and which are deeply embedded in our common law, are those of justice, equity, reasonableness, good faith and “good morals” (boni mores) or, as it has come to be known, “public policy”. Soon the last vestiges of the oppressive and obnoxious legislation which has plagued the South African scene for so many years will be a part of history. In any future legal dispensation judges will be able to rely on those basic principles to an even greater extent than in the past. This will allow for greater judicial flexibility in the search for truth and justice and in the protection of individual rights and freedom.11th

Judicial adaptability and the new legal dispensation

The inevitable and imminent introduction of a bill of rights in South Africa will have an undoubted effect on existing courts and court structures. For present purposes I shall refer only to the Supreme Court since this is the court which is manned by judges.
The most far-reaching change will be the introduction of a Constitutional Court to cater for the adjudication of matters arising from the new human rights culture and dispensation and to oversee the protection of the Constitution as the highest law of the land. Its role and function will have to be finalised by the various parties presently negotiating a new political dispensation for South Africa, but it would appear that it may have original and appellate jurisdiction and be ranked on a par with the present Appellate Division of the Supreme Court.

In his discussion of a Constitutional Court for South Africa, Professor Kruger points out that the matters coming before this court will be "of a highly politicised nature", making it more a "political" court as opposed to "regular" courts. His suggestion is that the "regular" courts should maintain their traditional role and not become embroiled in matters which may have the effect of "their losing their traditional apolitical stance and reputation".1

The introduction of a bill of rights and its concomitant, a Constitutional Court, will of necessity affect both the existing judiciary and new appointments to the Bench.

Judges presently in office will, for the most part, have to adapt to a hitherto untested human rights dispensation. There may be a certain amount of recalcitrance initially but I have no doubt that the vast majority of judges will have no difficulty whatever in adapting to and becoming actively involved in such dispensation. It may be advisable, however, that they be invited to attend relevant seminars or conferences of an informative and elucidating nature.

Concluding remarks

The judiciary in a new South Africa will undoubtedly have a different image from that presently in existence. In ideal circumstances it will be more representative and more amenable to functioning as a body dedicated to upholding the rights and liberties of the community which it serves. With the assistance of those entrenched principles of our common law, which ensures that justice is not only done but also seen to be done, it should be in the forefront of legal reform. It can be anticipated that more opportunities than at present will arise for judges to become activist- and reform-oriented. After all, the ultimate ideal of every lover of law and justice is to experience the creation and growth of a community in which justice, equity, reasonableness, good morals and good faith are pre-eminent. This is the message conveyed in my recent inaugural lecture2 and is likewise the message of hope, optimism and idealism which I wish to convey to this conference on Law in a Changing World. Fiat Instinctus!

Footnotes

2 C Schmitz "Judges under Attack ... What will they do to fight what they see as threats to their independence?" in (1995) 6 Consultus 41.
3 In the (1970) 87 South African Law Journal 25 Claassen of the Transvaal Bench remarked: "I am told on good authority that the English judges, who are undoubtedly the most eminent judges in the world, consider only the South African judges as their equals". A previous State President, PW Botha, likewise observed (in House of Assembly Debates 27 March 1985 col 2827): "In this regard the courts of no other country surpass our courts and very, very few equal them."
6 Sec 10(1)(a) of the Supreme Court Act 59 of 1959.
7 DD Mokgatle "The Exclusion of Blacks from the South African Judicial System" in (1987) 3 SAJHR 44-51 states that there is also inadequate training of black lawyers. These factors serve to ensure that blacks are excluded from the bench.
8 Mokgatle (supra) at 51. See also CRM Dlamini "The Influence of Race on the Administration of Justice in South Africa" in (1988) 4 SAJHR 37-54.
10 A criticism of Dugard's approach to positivism appears in the article of C Forsyth and J Schiller "The Judicial Process, Positivism and Civil Liberty II" in (1981) 98 SAJL 218-230. The authors suggest that positivism should not be rejected as a "jurisprudential guide" (p 219) since (p 220) it "does not deny law-making powers to the judge, nor does it

absolute judges from the moral consequences of applying unjust laws". In fact, they say, positivism, "properly understood, will reveal rather than obscure the deficiencies of the judiciary". See the response of J Dugard "Some Realism about the Judicial Process and Positivism – A Reply" in (1981) 98 SAJL 372-387, where he points out that he has not attempted to do in-depth research on positivism but has simply attributed "a form of positivism" to the judges.
11 D Dyzenhaus "Positivism and Validity" in (1983) 100 SAJL 454-467 at 467. See also DM Davis "Positivism and the Judicial Function" in (1985) 102 SAJL 103-119. He describes positivism as (at 103) "an inadequate method for legal analysis" and observes (at 115-116): "Positivist explanations either ignore the problems inherent in the meaning of words or accept that words describing a legal norm have only one meaning (...) In ascertaining the validity of legal norms and the nature of the rule of recognition it is essential to understand the deeper social and psychological promises upon which the decisions of judges are predicated." He hence urges the judiciary (at 118) "to transcend the limitations of a positivist epistemology.
14 CF Forsyth In Danger for their Talents: A Study of the Appellate Division of the Supreme Court of South Africa from 1950-80 (1985) at 236.
16 Wacks op cit 290.
17 Wacks op cit 284.
19 G Marcus "Respect for the Courts: Myth and Reality" in (1985) 1 SAJHR 236-244 at 244: "But even if our judges were imbued with a sense of fairness and equity, the degree to which they would be able to reflect this in their judgments would be limited. The attempts to clothe the
judiciary with the qualities of independence and excellence obscure the nature of the statutorily repressive network within which it is forced to operate. Whilst judges could undoubtedly do a great deal to express their distaste for those statutes which violate human dignity and liberty, their powers are ultimately limited. High-sounding phrases which are bandied about by politicians such as 'sanctity of law' and 'independence of the judiciary' can only acquire meaning in a society which truly respects those values.

21 AE van Blerk Judge and Be Judged (1988).
22 Van Blerk op cit 163.
27 By virtue of the Mediation in Certain Divorce Matters Act, 24 of 1987.
29 Hoexter op cit 446.
30 E Cameron "Judicial Accountability in South Africa" in (1990) 6 SAJHR 251-265.
31 Cameron op cit 255.
32 Cameron op cit 265.
33 H Corder "Judicial Service and Accountability; Some Questions and Suggestions" in (1992) 7 SA Public Law 181-195 at 186.
35 TJ Kruger "A Constitutional Court for South Africa?" in (1993) 6 Consultus 11-18. See also his article, "The Judge and the New South Africa" in (1991) Stellenbosch Law Review 325-369, in which he discusses the role of the judiciary in a "new South Africa" on the premise that drastic socio-political changes are bound to have an effect on the administration of justice and the judiciary will be able to facilitate such changes.