

# *The role of the courts in a changing society*

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SINCE 1994 the complexion and character of the formal institutions of government in South Africa have changed dramatically. The legislative and executive arms of government have, through democratic elections, become representative of the majority of the people. In both the private and public sector affirmative action programmes are in operation to varying degrees. It would have been naive to expect that the judiciary and the courts would not be affected by these changes. They have, indeed, been affected to a great extent. This has led to much debate in the legal profession, to put it mildly.

This article is an attempt to contribute to this debate by examining the role of the courts and the judiciary in the context of the new and emerging democracy envisioned by the Constitution. (Constitution of the Republic of South Africa Act 108 of 1996). Particular attention will be given to the perception of the role of the courts in the past, and how the negative perception that may have existed in the past may be changed.

## **The courts and democracy**

Much has been said, and is still being said, of the "illegitimacy" of the courts in the past, as well as of those who presently preside in the courts and who also did so under the old constitutional system. This raises emotions on both sides and it is not really helpful for the purposes of a proper debate. A rational discussion on this topic can only take place if there is a clear understanding of why the courts and judicial officers should be clothed with "legitimacy" and how this can be achieved. The best place, in my view, to start looking for help in this regard is in the document which

now forms the fundamental legal basis of our society, namely the Constitution.

Three aspects of the Constitution are of particular relevance. The first is that the Constitution vests the judicial authority of the state in the courts and provides for their independence (section 165). The second is the supremacy of the Constitution and the courts' vital role upholding that supremacy (sections 2, 8 and 166-172). The third is the stated need for the judiciary "to reflect broadly the racial and gender composition of South Africa" when appointment of judicial officers is considered (section 174(2)). These three aspects cannot be isolated from one another and must, of course, also be considered in the context of the founding of a democratic state based on the values of human dignity, equality and human rights as articulated in section 1 of the Constitution.

Under previous constitutional systems in South Africa the independence of the judiciary was also guaranteed, but in a different context. The two most important distinguishing characteristics from the present were that the constitutional system was not a democratic one, representative of the population as whole, and that the judiciary operated within a system of parliamentary sovereignty. The first meant that justice was administered in a system not accepted, or consented to, by the majority of the population. The second meant that the judiciary had the right to review parliamentary legislation by testing it against fundamental principles, but had to apply legislation passed by a minority of the voteless majority of the country. One need not be a rocket scientist to see that this was a sure recipe for disaster as far as the acceptability of the judicial system for the vast

majority of the population was concerned. To say this does not impugn the integrity of those who formed part of the judiciary in that system: it merely states that the odds were heavily stacked against a widespread acceptance of the authority of the courts. This obvious truth was nevertheless not fully recognised within a large section of the white portion of our population.

The judicial system existing at the time of introduction of the interim Constitution Act 200 of 1993 was therefore severely handicapped, in the sense that it was not universally accepted as having the necessary inherent authority to administer justice in the country. Despite this the founding fathers and mothers of our new order still opted for a constitutional democracy, viz one where the courts have the power to review and set aside legislation and executive action where it is in conflict with the provisions of the constitution itself.

Once again it should be fairly obvious that this power makes it even more necessary for the judiciary to make itself acceptable to the population as a whole. Not only does the judiciary carry the historical baggage of unrepresentativeness, but it now has the power of nullifying actions of an elected and democratic government by judicial review. And it has to remain independent; a formidable task indeed. Some help was, formally needed to assist in the process of legitimisation. It came in the form of, inter alia, a Constitutional Court being created from outside the existing judicial system; a new process, and new criteria, for the appointment to the judiciary; and the requirement that those appointed under the old system had to swear a new oath of office to uphold the new constitution. >

These formal requirements have indeed helped. The Constitutional Court has in its short existence established its independence. New appointments from previously disadvantaged population groups have been made to the judiciary. And, almost without exception, the judges of the old order, took the oath to uphold the new constitutional order, a fact not always given the recognition it deserves. As far as I am aware of, only one judge refused and resigned.

But more than formal legitimisation is needed. In the end acceptance and respect for the courts and the judiciary in the minds of the people they serve is what essentially distinguishes a constitutional democracy from other kinds of societies. It is therefore truly important to realise that the ultimate goal is to establish that acceptance and respect as a basic feature of the new democratic society we strive for. As important, in my view, is to accept the fact we are far from having achieved that goal. This realisation is necessary to spur us on to a quest to seek the best means possible to arrive at this ideal.

### Attitudes and perceptions

What follows is a highly personal account of the present state of play with regard to the status of the judiciary and courts in our new democracy. It is an anecdotal, intuitive account of how some of the main participants perceive the present situation. Even if it is only partly correct it shows that we have a long way to go in building our new democracy, and establishing the courts and judiciary as a fundamental part of it.

I asked a black colleague of mine for his views on black peoples' perception of the courts. His views were, in many ways, uncompromising. Courts in this country, he wrote in a note, have always been illegitimate in the eyes of the black community. They were seen as white institutions ("izinkantolo zabelungu"), because blacks had no say in how they were created, what powers they had, and how they were run. Many black people's first contact with the courts was when they were treated as criminals under the pass laws. The magistrates and prosecutors were white and had no understanding of the socio-economic background from which most black

accused came. Blacks would associate the entire judicial system with the criminal justice system. Political trials directly and indirectly affected many black people whose family, friends and associates were prosecuted, or, because they associated themselves with the cause these persons espoused. Many had the perception that the courts allowed themselves to be used by the apartheid government, thereby becoming tools of oppression. This oppression denied blacks proper political and economic opportunities. The courts were seen as part of this, white, oppression of black people. As against that, the power of *iziduna* or *amakhosi* in African communities to resolve disputes between members of the community is accepted because these institutions are regarded by the people as part of themselves. Where these structures did not exist in townships "people's courts" were established in their place. Despite excesses in these courts, the concept of a community setting up a dispute resolution structure that is acceptable to them and appointing people acceptable to the community to help resolve disputes among members of the community is a good one. Because disputants are more likely to accept rulings of an institution that they accept, rather than one they have no say on, there is a bigger obligation to pursue the objective of a representative judiciary or Bench in order to legitimise these courts.

### The Bar

Next in turn is the attitude of the legal profession. I shall restrict my comments to the Bar, because it is part of the profession where I come from and which I know something about (although I was recently told in no uncertain terms by some of my friends at the Bar that things have changed so much that I should rather refrain from attempting to make suggestions about the future of the Bar). The record of the Bar with regard to changes to the profession to assist the transformation of our society is patchy. The, in my view, positive development on the part of some Bars (most notably Natal and the Cape) to allow the rational extension of the right of audience in the then Supreme Court to suitably qualified attorneys was effectively blocked by the Johannesburg Bar. The eventual

outcome of this shortsightedness is the present, rather unsatisfactory, position. Many at the Bar regarded the right to judicial appointment as the property of seniors at the Bar without attempting to give a coherent defence of that position in the context of our divided society. Despite this, many seniors regarded it as below their dignity to accept permanent appointments (acting appointments seem to be in order, perhaps because they only temporarily affect the pocket). The new process of appointment via the Judicial Services Commission has provided an even better excuse for not presenting experienced and senior counsel for appointment: the odds are now said to be stacked against white males in that process. The insidious effect of all this has been a sometimes barely disguised disdain for those who accepted appointments to the Bench ("they were not successful enough in practice") which has progressively worsened in recent years when appointments have been made to make the Bench more representative. The extent of this can be seen in the increasing failure of the Bar Councils to nominate their own senior members for appointments to the High Courts.

### The Bench

The persistent refrain of the illegitimacy of the old system also had its effect on the judges themselves. I think it is fair to say that a certain initial tension existed between the Supreme Court (now the High Court and the Supreme Court of Appeal) and the Constitutional Court. Some of the new appointments to the High Court did not gain the unqualified acceptance of their older colleagues. The effect of the new constitution on the existing law and practice was met with widely varying degrees of enthusiasm. The need for a more representative Bench was met with widely varying degrees of enthusiasm. The need for a more representative Bench was accepted in most cases as a practical necessity, but not always from an inner conviction about the underlying reasons for pursuing that goal. My impression is that the degree of happiness or unhappiness with the new system was to a fairly large extent influenced by the quality of leadership in the various provincial and local divisions.

Section 165(4) of the Constitution provides that the independence, impartiality, dignity, accessibility and effectiveness of the courts should be assisted and protected by organs of the state. Continuous reminders from the highest level of government involved in the administration of justice that those who served under the old system need to be "re-educated"; that preferential treatment should be given to those who committed crimes on the liberation side of the struggle; and the use of the political majority on the Judicial Services Commission to appoint the politically correct, however, hardly give concrete expression to this constitutional injunction.

Thus far, I have referred only to the downside. It does not, however, tell the whole story. Despite the old system's alleged illegitimacy, the courts were used (and sometimes successfully in significant ways) to gain advantages for the poor and oppressed. The General Council of the Bar is the body that most assiduously makes enquiries into the suitability of the candidates appearing before the Judicial Services Commission and it prepares helpful reports for the JSC in this regard. Many blacks are assisted in entering the legal profession. NADEL, the BLA and the Association of Law Societies seem to have agreed on the way forward to a unified legal profession. The judiciary is becoming more representative and the quality of appointees is carefully considered before appointment. So-called "old style" judges have significantly advanced the values underlying the Constitution in their judgments. Wise heads at the helm of the Appellate Division (now the Supreme Court of Appeal) and the Constitutional Court have ensured that the transition to the new hierarchical structure of the courts was relatively accident free. And the government accepted the integrity and independence of the courts in those cases where court decisions were decided against it.

The conclusion to be drawn, however, is that there is, as yet, no common culture of acceptance and respect for the courts as defenders of the Constitution and the people of the country. The tendency among different sections of the community is, it seems, to concentrate on the present imperfections. There is no express concomitant commitment to use those imperfections

as an inspiration to attain the eventual ideal of a democratic society where the courts are accepted as an indispensable and integral part of that democracy.

### **The role of the courts in our new and emerging society**

From what has already been stated it should be clear that the courts and judiciary cannot, on their own, ensure that they become accepted, respected and "legitimate". For that to happen an education process involving the population as a whole, but also particularly those who form part of the legal profession, is a necessity.

We have so much to learn from the black tradition of, and respect for, community based and accepted adjudicative structures. But African communities may also still, with the rest of us, have to come to grips with the fundamental importance of the independence of the courts. If making the judiciary more representative means that it may lose its excellence and independence, the whole exercise carries the seeds of its own demise.

The established legal profession will have to learn, in so far as it may not have done so, to come to grips with the demands of a society of which it was not really, in the past, part. This means finding a way forward for an integrated legal profession. It also means active participation in ensuring that the quality and independence of the appointments to the judiciary is maintained. That may sometimes be a thankless task where deserving individuals are denied what they should get, but a withdrawal into the enclave of successful practice, although financially rewarding, is ultimately self-defeating. Sniping criticism from that privileged position about the incompetence and quality of the judiciary may simply become a self-fulfilling prophecy. What happens then? Not everybody can emigrate to Perth.

Politicians need to accept that the established component of the judiciary has played and will continue to play as important a role in the administration of justice in this country as the new incumbents. The Constitution for all the people in the country, also for those privileged by the past. If there is substance to any alleged irregularities on the part of

individuals, there are mechanisms provided by the Constitution to deal with them. They should be used instead of contributing to a perception that undermines the judiciary by a continued harping on the perceived deficiencies of the past.

The judiciary itself needs to realise that it has to "sell" itself to the public. I have been in the fortunate position in the past year of being involved in the establishment of the new Labour Court and Labour Appeal Court. Largely at the initiative of Myburgh JP, the judges in these courts have travelled the country, explaining the functioning of the new courts to its users: business and labour. The response was encouraging and also, in a sense, disturbing. So often a comment was made at our efforts were greatly appreciated, because "judges have never before done anything like this". Whether our exercise will ultimately succeed is by no means assured, but I have little doubt that without it the task of establishing the legitimacy of these courts would have been made much more difficult.

The suggestion, therefore, is that the judiciary has no reason for complacency. We are not yet an established democracy and cannot expect the acceptance and respect accorded to say, the US Supreme Court and the English Courts. That respect needs to be earned. There are various ways of doing this and in the end the quality of justice administered in the courts will be the final determinant. But there is also a responsibility on the courts to make themselves available in the educative process of creating the kind of culture where constitutionalism and respect for the rule of law becomes embedded in society. That can be done in many imaginative ways, but it means climbing down from the formal high chairs on the bench. That should not be a demeaning, but rather an enriching experience. Why can judges not play an active role in going to institutions such as schools, technikons and universities to explain the functioning of the courts and the importance of the Constitution? Why can judges not themselves initiate "open" days at courts where the public or groups of public are invited to see the workings

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new judges. The committee functioned as a sub-committee of the Judicial Service Commission ("JSC"). The representative of the JSC on the committee was the President of the Constitutional Court, Justice Arthur Chaskalson. The other members of the committee were Navsa J (WLD), Nicholson J (NPD) and myself. Mahomed CJ, who has a keen interest in judicial education, attended the meetings of the committee in an advisory capacity on a regular basis.

The pilot orientation course was held over three days during July 1997. All Judges President and all judges who had been appointed during the last three years were invited. Four Judges President, two Deputy Judges President and 25 "new" judges from the High Court, the Land Claims Court and the Labour Court were able to attend.

Those attending the conference had the rare privilege of listening to the present Chief Justice and the immediate past Chief Justice on two consecutive days. Mahomed CJ delivered the welcoming address. The subject of his address was the importance of judicial education. Later the same day, he spoke on "The role of the judiciary in a Constitutional State". The next day, Corbett ex-CJ delivered a paper on "Judgment writing". The members of the organising committee are of the view that these three papers deserve a much wider audience than the one to which it was primarily addressed. Consequently, we are hoping to persuade the two Chief Justices to make their papers available for publication.

Kumleben JA who was very much involved with the new Correctional Services Bill, spoke on "Sentencing options". I am sure that quite a number of the issues addressed by Kumleben JA would be new to many experienced judges as well.

Melamet J and Zulman JA - both formerly of the WLD Bench - delivered papers on "Practical hints for new judges" and "Motion court practice" respectively. From these papers it was quite apparent why these two senior judges were chosen through a process of natural selection by the new judges in the WLD as mentor judges.


A panel discussion was held amongst new judges on the practical problems they experienced when they first took up their appointments to the Bench. The panel consisted of judges from different legal backgrounds. One member of the panel was previously an attorney, while others were former academics and members of the Bar. It was quite significant to note that the problems they initially encountered were not as dramatically different as one might have thought.

The last day of the course was attended by Judge Dolores Hansen and Ms Georgina Pickett who are both from Canada. Judge Hansen is the executive director of the Canadian Judicial Institute, situated in Ottawa, Ontario. This Institute was established in 1988 to coordinate judicial education in Canada. About thirty programmes are presented yearly by the Institute to over one thousand members of the Canadian Judiciary. Judge Hansen was, therefore,

eminently qualified to speak on Judicial Education in an International Context.

Ms Georgina Pickett is the Canadian Project Manager of the Canada-South Africa Linkage project. She asked all participants to complete an evaluation questionnaire. Ms Pickett then prepared a compilation of the information obtained from the answers to the questionnaire. From the compilation, which she made available to the organising committee, it appears that the evaluation of the course by the participants was overwhelmingly positive. The participants were also unanimous in their view that there is a need for judicial education and, more particularly, that both orientation programmes as well as reinforcement programmes should be made available to the South African Judiciary. These views will be conveyed to the Judicial Service Commission with the recommendation that the first reinforcement course for judges who have served on the Bench for some time, be held early in 1998.

I believe it will be constructive to quote the words with which the Chief Justice ended his welcoming address: "[I] think it is important to conclude by understanding what judicial education is about and what it is not.

It is about self-education in collective discourse among colleagues, who all receive as much as they give. It is *not* about instructions from superiors and inferiors. It is about discovering problems as much as seeking solutions. It is not about prescribing solutions. It is about process and journey. Not about results and destiny." 

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of the court? If not the public at large, why can the various formally organised professional organisations not be asked to become involved in popularising the courts and the Constitution? Why can arrangements not be made by the courts themselves to make judgments of the courts available (summarised in ordinary language) to the media without having to rely on mostly inaccurate reporting? Why are there no campaigns from judi-

cial quarters to convince business that the courts can still provide the best services in commercial litigation? Perhaps these examples sound impractical to some, but then the challenge lies in finding better ways of instilling the common culture referred to earlier.

If this sounds like a plea to the profession, the judiciary, the Judge President and others to become actively involved to making our society aware

of the importance of the Constitution and the courts' role in upholding its values, it certainly is. Successful democracies are established by commitment and perseverance; by looking at the long term establishment and maintenance of democratic values. No doubt there are presently many imperfections in our emerging society: I believe we owe it to future generations to overcome them and not be overcome by them. 