Impeaching the judges – South Africa's copybook

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A hallmark of our judicial system is the emphasis that it places on the independence of the judiciary, especially judges of the High Court, from the legislative and executive arms of government.

Mahomed CJ explains in "The Role of the Judiciary in a Constitutional State" 1998 *SALJ* 111 at 112 that: "What judicial independence means in principle is simply the right and the duty of judges to perform the function of judicial adjudication, through an application of their own integrity and the law, without any actual or perceived, direct or indirect interference from or dependence on any other person or institution". The independence of the judiciary is underscored by conferring on a judge tenure during good behaviour. Judges who deviate from the norm are liable to impeachment.

Lifetime tenure and impeachment

Constitutional developments in English constitutional law led to English and Irish judges enjoying a right to office during good behaviour. This principle was formulated expressly in the Act of Settlement, 1700. The principle of tenure during good behaviour was first introduced to South Africa by letters patent in the Cape Colony, "The First Charter of Justice," of 24 August 1827. (See H R Hahlo and E Kahn in G W Keeton *The British Commonwealth – The Development of its Laws and Constitution* vol 5 (South Africa) 205.)

Inherent in tenure on good behaviour is the power of the political authorities to dismiss and remove a judge from office on the grounds of misbehaviour. English law provided the machinery for removing a misbehaving judge. A judge could be impeached upon the address of both Houses of Parliament. This process was designed as much to protect the judiciary from the Crown as it was for Parliament to exercise control over deviant judges. The first judge to be impeached before Parliament was Mr Justice Fox of the Court of Common Pleas in Ireland. (See R E Megarry *Miscella-ny~at~Law* 15.) The impeachment of Fox J was followed by a handful of other impeachments. No English judge has been impeached the last century. The House of Commons, however, debated in 1906 the impeachment of Grantham J but the motion was withdrawn.

At the time of union of the four colonies, section 101 of the South Africa Act of 1909 provided for the impeachment of a judge by an address of both Houses of Parliament. It seems that the same result could have been achieved by passing an Act. (See the observations in G W Keeton *The British Commonwealth – The Development of its Laws and Constitution* 264 on this aspect.)

The Supreme Court Act 59 of 1959 was subsequently enacted. The powers of impeachment were relocated to this Act (section 10(7)). The Supreme Court Act also conferred on acting judges the same protection as was accorded to permanently appointed judges and provided that acting judges could only be removed from office in the same way. No change was made to the tenure or the procedure for removing judges when the Union became a Republic in 1961. (See HR Hahlo and E Kahn *The New Constitution* 32.)

The Constitution of the Republic of South Africa of 1993 (the Interim Constitution) provided that a judge may only be removed from office by the President on the grounds of misbehaviour, incapacity or incompetence established by the Judicial Service Commission (the JSC) and upon receipt of an address from both the National Assembly and the Senate praying for the judge's removal (section 104(4)).

The wording, but probably not the substance, was altered when the Constitution of the Republic of South Africa of 1996 was enacted. The current constitutional position is that a judge may only be removed from office if - (a) the JSC finds that the judge suffers from an incapacity, is grossly incompetent or is guilty of gross misconduct, and – (b) the National Assembly calls for the judge to be removed by a resolution adopted with a supporting vote of at least two thirds of its members (section 177(1)). The President must remove the judge when the resolution is adopted (section 177(2). The President on advice of the JSC may suspend a judge who is the subject of an investigation (section 177(3)). It would seem that these provisions also apply to the removal of an acting judge.

The Supreme Court Act of 1959 has not specifically been amended but it is clear that the Constitution enjoys priority and it has impliedly repealed section 10(7) to the extent that it conflicts with the Constitution.

The JSC consists of 23 persons. At least eight of the members will be eminent judges and lawyers. The remainder will be Members of Parliament and the National Council of Provinces. The JSC must form a quorum and it takes its decision by way of a simple majority (section 178(6). Gross misconduct probably means the same or something more than misbehaviour. W R Anson *The Law and Custom of the Constitution* 214 suggests that: "Misbehaviour appears to mean misconduct in the performance of official duties, refusal or neglect to attend to them, or, it would seem, conviction for such an offence as would make the convicted person unfit to hold public office". (See also the views of Prof John C Harrison in his address to the Subcommittee On the Constitution, Committee on the Judiciary of the United States (www.house. gov/judiciary/22395.htm).)

The USA Constitution provides for the impeachment of judges for "treason, bribery, or other high crimes and misdemeanours". Some 23 Federal judges have been indicted in the USA (as well as several presidents) but only seven have been impeached and removed from office. However, it seems that there is a move afoot in the USA to attempt to impeach federal judges who are described as judicial activists and whose rulings are regarded as controversial.

A South African judge would probably be liable for impeachment if the judge breaks the oath of office "to be faithful to the Republic of South Africa... uphold and protect the Constitution and human rights entrenched in it... and administer justice to all persons alike without fear, favour or prejudice, in accordance

with the Constitution and the law". (See item 6 of the 2nd Schedule to the Constitution.)

It is theoretically possible for the decision of the JSC to be taken on review to the High Court. Moreover if Parliament adopts a resolution recommending the removal of a judge this resolution, if unprocedural, could probably be challenged in the High Court.

A judges who suffers from mental incapacity could be impeached. A judge in this condition would most likely be unable to formulate the intention to resign. However, this indignity is usually spared a judge by the expedient of appointing a curator who resigns on behalf of the judge.

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In the 19th century one judge could be considered to have been impeached, at a pinch, if the term is used liberally to include a delegated power to dismiss. Another was probably considered a candidate for this treatment. Hendrik Cloete J, the Recorder of Natal, was suspended from office in 1853 but reinstated by the Privy Council in 1854. (See Peter Spiller *A History of the District and Supreme Courts of Natal 1846-1910* 25-26.) An inquiry seems to have been held about the affairs of Benedictus de Korte J of the Transvaal High Court but nothing seems to have come of it. (See AA Roberts *A Southb African Legal Bibliography* 355.)

Judge J C Fitzpatrick (judge in British Kaffraria, ECD and CPD), father of Sir Percy Fitzpatrick of "Jock of the Bushveld" fame, was described by FW Reitz (Chief Justice and later President of the Orange Free State) as an honest and good humoured Irishman with little knowledge of the law, a cheerful disposition and definitely not a teetotaller ("afskaffer"). (See FW Reitz *Outobiografie* 1978 at 23.)

Judge Fitzpatrick was probably considered a possible candidate for impeachment in 1878. He was charged by Jacobus Sauer (later a minister of the cabinet) and A F S Maasdorp (later Sir Maasdorp, Chief Justice of the Orange River Colony, JP of the CPD and Judge of Appeal) in Parliament with being intoxicated on the Bench ("bo sy teewater"). The judge was in fact charged with neglect of and absence from duty, insobriety, physical disability and mental incapacity.(See A A Roberts *A South African Legal Bibliography* 360.) A parliamentary select committee under Upington, attorney-general, after hearing evidence reported to the house that the charges were either not established or there was no evidence to support them. The report, however, mentioned that as regards the charge of physical disability there was evidence that the judge "did for a time in consequence of illness suffer from weakness to such an extent as to render it difficult to perform the duties required from a judge "(Roberts at 361, Ellison Kahn 1958 *SALJ* 428 and G Randall *Bench and Bar* 9-10).

The second judge was John Gilbert Kotzé, a judge and later Chief Justice of the Zuid-Afrikaansche Republiek, who was dismissed by President Paul Kruger on 16 February 1898. A long wrangle between the Volksraad and the Bench, which was heavily influenced by decisions of the Supreme Court of the United States, ensued about the right of the judges to test republican legislation against its constitution, the Grondwet.

The Volksraad was dismayed with this approach. Law 1 of 1897 was passed which stated that the judiciary did not have, and never had, the competency to arrogate itself a testing right. It also empowered the president to put to the judges the question, inter alia, whether they renounced their claim to a testing right. The President was charged with the duty of dismissing any judge who gave a negative answer or an insufficient answer or no answer. The judges provided an answer which was linked to legislative amendments. The answer was regarded as satisfactory but a further controversy arose. Paul Kruger regarded a communication on the subject by Kotzé CJ as a renunciation of his undertaking and dismissed him.

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The Chief Justice complained that the had been appointed as a judge for life and that, if he had committed misconduct of office, he should be charged before a specially constituted court. This did not meet with favour and the Chief Justice departed from the Republic. Happily he was soon able to resume a distinguished judicial career ending in his appointment to the Appellate Division of the Supreme Court of the Union of South Africa. (For an account of the controversy see G W Keeton *The British Commonwealth - The Development of its Laws and Constitution* 109 and JG Kotzé *Memoirs and Reminiscences* Vol 2 and especially the introduction by BA Tindall.)

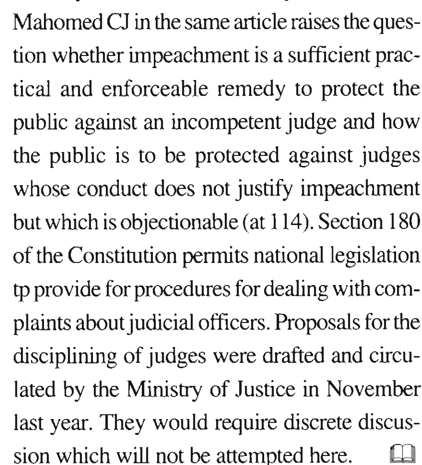
No South African judge has been dismissed in the 20th century. If there were, in the past, grounds for impeachment of any judge, none have become public knowledge, which probably points to their absence or the deployment of extra-parliamentary pressure.

One of the ways of holding the judiciary in check is by the right, within limits, to comment publicly on the proceedings in the courts which invariably take place in public, and on decisions which are supported by reasons. Sometime the criticisms and comment have been excessive and these utterances have been disapproved of by leaders of the judiciary and the Constitutional Court. Given the level of public vigilance and the strains between the judiciary and the segments of civil society in the post-1994 development of our country, it may be reasonably inferred that there have been no grounds to initiate any impeachment proceedings of any South African judge.

Constructive removal

Labour law recognises the reality that an employee may be compelled to resign or agree to the mutual termination of the employment relationship because the employer has made it intolerable for the employee to continue serving the employer (see section 186(e) of the Labour Relations Act 66 of 1995). This is known as constructive dismissal. It is possible that pressure could be placed on a judge (and has certainly been placed on a few English judges) to resign from office. Mahomed CJ correctly asks the question "Are judges adequately protected against victimization by the state or reprisals by disgruntled litigants?" (1998 *SALJ* 111 at 113). Victimisation could lead to a judge resigning, with attendant lack of a pension.

Discipline: short of impeachment



Mahomed CJ in the same article raises the question whether impeachment is a sufficient practical and enforceable remedy to protect the public against an incompetent judge and how the public is to be protected against judges whose conduct does not justify impeachment but which is objectionable (at 114). Section 180 of the Constitution permits national legislation tp provide for procedures for dealing with complaints about judicial officers. Proposals for the disciplining of judges were drafted and circulated by the Ministry of Justice in November last year. They would require discrete discussion which will not be attempted here.