

Judge Dennis Davis - Supreme Court Judge @ The Pavilion, Kelvin Grove Club

Speech Transcript - Cape Town Press Club

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THE JUDICIARY: IN THE POLITICAL STORM?

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I begin with three observations. A friend, who is a distinguished constitutional lawyer in USA, recently suggested to me that my country had become a true juristocracy in that it appeared to him, at any rate, that no dispute however political in nature was immune from the scrutiny of the courts.

My second observation concerns the case of Metrorail, in which I sat with my colleague, Belinda van Heerden, now of the Supreme Court of Appeal. The record ran to more than 10 000 pages and concerned the vexed question of the safety of commuters on the city's rail system run by Metrorail. When I initially read the case made out by the applicants, I thought that it raised a series of complex questions about the running of a rail system for which I was hardly qualified as a judge. This seemed to be the kind of case where the court has to say that the dispute required political resolution rather than determination by way of adjudication. Judge van Heerden, when I put these difficulties to her, firmly but quietly raised the following difficulty with me: If we were to go that route what answers would we have for litigants who referred to their constitutional rights of dignity and bodily and psychological integrity to name but two. In the result, we found for the commuters which decision was ultimately upheld by the Constitutional Court.

My third introductory observation comes from oral argument before the United States Supreme Court in *Briggs v Elliott*:

JUSTICE JACKSON: "I suppose that realistically the reason this case is here was that action couldn't be obtained from Congress. Certainly it would be here much stronger from your point of view if Congress did act, wouldn't it?"

MR. RANKIN: "That is true, but if the Court would delegate back to Congress from time to time the question of deciding what should be done about rights of the parties [before the Court] would be deprived by that procedure from getting their constitutional rights because of the present membership or approach of Congress to that particular question."

By now you have doubtless worked out that my essential theme is the following: South African courts have, particularly of late, been confronted with a series of challenges which turn on disputes, essentially of a political nature. The termination of the Scorpions and its replacement by the Hawks, the extension of the term office of the Chief Justice, the appointment of judges to the Cape High Court, the appointment of the National Director of Public Prosecutions, the challenge into the arms deal (which has finally ended with the appointment of a Commission of Enquiry), the inevitable litigation on the Secrecy Bill are some of the high profile matters which have or will reach our courts.

As the distinguished social anthropologists, John and Jean Comaroff have noted, politics itself is migrating to the courts. The question which arises is how sustainable is this process within the relatively fragile South African context? Expressed differently, to what extent can we rely on the courts to be agents of the kind of social change which may be mandated by our progressive constitution but which raises a plethora of political issues? As illustrative, one radio talk show host said of the Secrecy Bill, that the citizens could not possibly rely on Parliament to safeguard our rights. Only the Constitutional Court could be trusted.

This invariable recourse to courts poses potential challenges to the long term direction of the institution. For a second time in a

couple of months, President, Zuma has asserted the power of the executive not just over the judiciary but apparently over the legislature as well. This is what he said recently in Parliament:

"We respect the powers and role conferred by our Constitutional on the legislature and the judiciary. At the same time, we expect the same from these very important institutions of our democratic dispensation.

The Executive must be allowed to conduct its administration and policy making work as freely as it possibly can. The powers conferred on the courts cannot be regarded as superior to the powers resulting from a mandate given by the people in a popular vote."

Some commentators claim that within this statement is contained a dark hint that appointments of deferential judges is on the way. Others suggest that this statement may be seen as raising questions about the right of the courts to seek to deal with demands for significant social change, that is demands to trump policy, legislations or appointments by the executive; it is to this important question to which I now turn.

In an examination of the American experience Gerald Rosenberg, (*The Hollow Hope*) contends that there are three separate constraints built into the structure of the American political system which limit the role of courts being:

1. The limited nature of the Constitutional rights;
2. The lack of judicial independence; and
3. The judiciary's lack of power of implementation of orders of court.

He suggests that constraint 1 can be overcome if there is ample legal precedent for change; constraint 2 can be overcome where there is support for change among substantial numbers in the Congress and the executive. Constraint 3 can be overcome if there is either support from some citizens or only lower levels of opposition from all citizens and either there are positive incentives to induce compliance or costs are imposed to induce compliance, or court decisions allow for alternative forms of implementation.

Translated into the South African context, we do not have a problem with the breadth of our Constitution; that is constraint 1 is not an indigenous problem. It clearly mandates courts to promote and fulfil an extensive range of rights contained in our Constitution. Once we opt for a Constitution which included a substantive conception of equality, a range of social and economic rights, the protection of labour, we chase a constitutional system in which the judiciary was set to play a major role in insuring the substantive attainment of the vision of our future society which are set out so majestically within our constitutional text.

But what about constraints 2 and 3? As indicated in my reference to the *Metrorail* case, courts need to be careful as to when they invoke their powers under the Constitution. Courts are not omni competent nor do they have the expertise to make decisions which involve polycentric implications that is implications which go far wider than the right of the parties before the courts. It is for this reason that Judge O'Regan said the following in the *Mazibuko* case which said:

"Ordinarily it is institutionally inappropriate for a court to determine precisely what the achievement of any particular social and economic right entails and what steps government should take to insure the progressive realisation of the right. This is a matter, in the first place, for the legislature and the executive, the institutions of government best placed to investigate social conditions in the light of available budgets and to determine what targets are achievable in relation to social and economic rights. Indeed it is desirable as a matter of democratic accountability that they should do so for it is their programmes and promises that are subjected to democratic popular choice."

These carefully couched expressions of respect for the role of the legislature and executive in a democratic society

notwithstanding, the courts in South Africa continue to face an avalanche of lawfare primarily owing to a manifest failure, perceived or real, of the political process. When politics fails, the last (and often only) avenue left to affected parties is to proceed to court. The courts in this country are thus faced with making decisions which may fly in the face of an executive commission or omission, or setting aside legislation which fails to pass constitutional muster or regarding appointments by the executive in where the requisite standards of accountability, rationality or transparency have not been followed. The more this trend continues, the more the courts are drawn into the political arena. When, as in recent times, the executive loses cases, the role of the courts is then scrutinised with ever increasing levels of criticism. On the Rosenberg argument, the courts will be unable to deliver over the long run. At the same time, erosion of the legitimacy of the institution takes place which then endangers the entire process of constitutional democracy. To be sure courts can temper the winds of opposition to this role by engaging in imaginative forms of relief (orders) which do not dispose but rather propose solutions based on dialogue between warring parties. The example of an order to engage meaningfully which was issued by the Constitutional Court in the Olivia Road case is a fine illustration of dialogical engagement where the courts engage the executive in a dialogue to produce the optimal constitutional result .

However, alone this stratagem is insufficient to fend off the danger. This cautionary remark may have to be strengthened in the light of an announcement by Cabinet (23 November 2011) that an assessment to ensure that the judiciary □ conforms to the transformation mandate as envisaged in the Constitution in terms of non-racialism, gender, disability and other transformative variables. □ Further, consideration should be given to □ promoting interdependence between the judiciary, executive and Parliament □. Further, it is suggested that a □ reputable research institution undertake research on how the court □ s decisions impact on the lives of ordinary citizens. The statement raises a series of questions which compel public debate:

1. Precisely what is meant by □ transformative variable □. Is this about demography of the courts alone? Or are we now moving to a more textured debate about making the constitution □ s vision of South Africa work for millions who live in desperately undignified conditions?
2. If government fails in its transformative obligations and the court vindicates rights of citizens, how does □ interdependence then work; is the court □ s role not then to trump the other arms of State □. Is the interdependence aspiration confined to exploring a dialogical model as encapsulated in the Olivia Road case or is it about courts having to give policy a wide berth , even if constitutional issues arise therefrom?
3. What is the exact reason for this institutes research role Examination and debate about the judicial function is essential to judicial accountability .However, what is the purpose of government commissioning this research ? Is it simply to promote greater public debate about the role of the judiciary Or is the rather unusual step by a government ,operating within a doctrine of separation of powers ,designed to police the Court by triggering off consequential steps if the government □ s conception of transformative jurisprudence is not met by the judiciary .And is non or inadequate compliance to be assessed by the standards of this □ reputable research institute as if research results , no matter the pedigree , are not contestable?

Courts are also not helped in their transformative tasks by the impoverished political and economic discourse that prevails in the country. Take for example the debate about our labour legislation. Since its introduction in 1995, the war cry has continued: Our laws are inflexible and they are responsible for our loss of jobs. This is then justified by an oft quoted report from the World Economic Forum. Suddenly feedback from some 50 employers becomes a scientific study as compared to a carefully constructed study by the OECD which commented favourably on the flexibility of South African labour legislation. Besides which how do these 50 know we are less flexible than another 100 countries? The sharp point is this: courts are caught in a discourse which often does not embrace what I would consider to be a social democratic content of the Constitution. The constitutional ambition, is undermined from both the shrill voices of a neo liberal right and a populist left. Courts are then caught in the middle of a sterile ideological battle as they seek to give content to a progressive, albeit nuanced text. When courts face the fire of a disgruntled executive which may lose a case in court, more significantly an ill-informed segments of the business community then reinforce the pressure from the one side and populist politicians from the other. The judiciary is weakened further by criticism, which turns not on the substance of adjudication or judicial performance but on personality, rather than principle. In similar fashion the □ when we □ attack on demographic transformation is truly counter productive, yet, sadly, it is granted excessive airtime. A one dog and computer organisation is lifted miraculously by the media into a representative voice of the essential volksgeist!

None of these criticisms should be understood as a protest to as open and vigorous public debate about the judiciary as is possible .For avoidance of any doubt that includes continuing the debate prompted by the President and the implications of the

cabinet statement.

Ultimately however, courts can only hold the line for a period and their role in bringing about the reality which is prefigured in the Constitution is limited. Even in this limited role, a progressive public discourse is critical. But in the long run, the future is limited to politics. In a perceptive commentary Achille Mbembe (forward to an Inconvenient Youth) writes of the current dangers South Africa faces:

"A gradual closing of life chances for many, an increasing polarisation of the racial structure, a structure of indecision of the heart of politics itself and a re-balkanisation of culture and society. These trends clearly undermine the fragile forms of mutuality that could have painstakingly built in South Africa over a decade in half and further weaken the prospects of too non-racialism □ Stuck in a field of blighted possibilities (young black youth) scavenge to live or simply to get through the day □ so many bad jobs available to so few in one of the most racially unequally countries on earth so much rage and almost in the near future."

Mbembe makes the critical point that, if a democratic project is to have any future in South Africa, we will need to reconstruct the politics which breaks with □the depressive realisms that has characterised post-apartheid life□ and construct a new project which reopens the future for all. The courts can assist in this process but cannot reconstruct the project. However without the project being reconstructed to address the social question and thereby the political deficit, ultimately the very foundations upon which the power of courts rests, namely the legitimacy of the constitutional project will be destroyed. That in short, represents both the possibility and the dangers of the future for South African constitutional democracy.

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