

SOUTH AFRICAN CHIEF JUSTICES' FORUM CONFERENCE



Justicia Fiat

**SUSTAINING THE INDEPENDENCE
OF THE JUDICIARY**

“The Dangers of Politicizing the Judiciary”

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Introduction

- [1] In Africa today, many independent countries pride themselves on Constitutions that glow with hallowed provisions guaranteeing Bill of Rights, rule of law and justice. Prominent amongst these provisions are the provisions that guarantee the independence and impartiality of the judiciary. The democratic scenario of today is founded upon the well known UN Declaration of Human and Peoples Rights, AU Conventions and near home the SADC Protocols.¹

Definition and nature of “Politicization

- [2] **Oxford Dictionary** defines “...politicize...” as to “...*cause to become politically aware, ... to become interested in or active in politics.*” Politicization is however frequently used as a derogatory term to describe a process wherein a political label is ascribed to a person or to an issue e.g. to politicize an issue or to “*indoctrinate or brainwash*” a person so as to effect a radical transformation of principles held, his or her character, attitudes and beliefs. It is a psychological or dogmatic transformation into a given realm of politics. The question that immediately arises is : “Is judicial transformation a form of politization? That is a subject on its own! (see para [21] (infra)
- [3] In Lesotho, *section 118 (2)* of the **Constitution** solemnly declares:-

“118. (2) The courts shall, in the performance of their functions under this Constitution or any other law, be independent and free from interference and subject only to this Constitution and any other law.

(3) The Government shall accord such assistance as the courts may require to enable them to protect their independence, dignity and effectiveness, subject to this Constitution and any other law.”

¹ See also the **Limassol Conclusions – Cyprus – (25-27 June 2002)** and **Latimer House Guidelines (Abuja Nigeria – 2003)**, **UN Basic Principles on the Independence of the Judiciary.**

[4] In the Republic of South Africa, Section 165 (2) (3) and (4) of the Constitution provide that-

“(2) The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.

(3) No person or organ of state may interfere with the functioning of the courts.

(4) Organs of state, through legislature and other measures, must assist and protect the courts to ensure the independence, impartially, dignity, accessibility and effectiveness of the courts.”

[5] Indeed all our respective countries represented at this most august Conference have similar provisions though with differing wording and emphasis which guarantee the independence and impartiality of the judiciary. It is axiomatic that these virtues of independence and impartiality are accepted norms of all civilized egalitarian societies and are the main pillars of their democratic governance.

[6] It cannot be disputed that in Africa today, our judiciaries face many serious challenges and problems in varying magnitudes; problems of resources, training, court and case management have become more and more acute with rising populations in our respective communities.

[7] The most pernicious of the challenges facing judiciaries in Africa today is that of “*undue interference or influence*” in one form or another. Undue interference with or influence on the judiciary has been outlawed in most Constitutions; but that notwithstanding, there is in Africa a growing tendency and propensity on the part of the Executive to exert political leverage or control over the judiciary; this exercise can come about in diverse forms: threats, denigration, deprivation of necessary resources or marginalization etc.

- [8] In their hot pursuit to acquire and retain executive and legislative power politicians are often tempted to exert political leverage over the judiciary. To an unscrupulous politician, independence of the judiciary is a stumbling block that hinders their quest for power; this independence is something that needs to be whittled down so that it poses no threat or danger in the exercise of executive or administrative powers of government.
- [9] *Independence of the judiciary* – a concept often misunderstood and always misconceived by politicians – only means “*absence of undue influence, interference or control with the judicial function of the courts.*” It does not mean lack of accountability (unruliness) or irresponsibility; judicial independence is complemented by genuine accountability and by meaningful communication between the Judiciary and the Executive under law and under the Constitution.
- [10] Separation of powers as a doctrine originated by Montesquieu in his “*Spirit of the Law*” is not an absolute concept and in a modern democratic state today, the judiciary, an organ or institution established by the constitution, is accountable under the law and must function in unison with other organs of state.
- [11] In the post colonial Africa, the judiciaries as well as executive government are still in an embryonic stage of development as far as democracy is concerned and still have to evolve to dynamic institutions. Judiciaries often are at the cross roads and a crisis arises when the judiciary exercises power of review over executive and/or administrative acts or decisions or when the courts declare as unconstitutional acts of Parliament or *ultra vires* ministerial regulations. Judicial activism often encroaches in one way or another upon government policy and performance.
- [12] In our countries the role of the Attorney General is very crucial in ensuring that undue political interference or politicization of the judiciary does not occur. Both malpractices can occur openly or behind the scenes but once their occurrence become public knowledge, the Government must take active steps to condemn them as required by Section 118 (3) of the Constitution.

If in the trilateral relationship to other organs of state, a judiciary is weak or timid, or politicized, the Executive naturally gains supremacy and is likely to manipulate the judiciary for political ends.

How politicization can occur

[13] *Appointment Process*

In many of our Constitutions, the Executive plays an important role in the appointment of judges especially of the Chief Justices. In Lesotho, for example, section 120 (1) of the Constitution reads:-

“(1) The Chief Justice shall be appointed by the King acting in accordance with the advice of the Prime Minister.

(2) The puisne judges shall be appointed by the King, acting in accordance with the advice of the Judicial Service Commission.” (my underline)

[14] That the Prime Minister (being head of the Executive and leader of the ruling political party) advises the King as to who is to be appointed Chief Justice may smack of party politics and may become a contentious issue in certain circumstances. But at the end of the day, it is not the manner or “*modus*” of appointment that tends or is likely to politicize the office of Chief Justice but what counts in the long run is the integrity, probity, honesty and other virtues of independence and impartiality of the appointee.²

[15] Politicization can rear its ugly head in many devious forms; the following are some:

(a) marginalization of the judiciary by throttling its resource base – rendering it compliant and beggarly (mendicant).

² President Eisenhower of USA once stated that the worst appointment he ever made was of Chief Justice Warren who soon after appointment hastened to hand down judgments biting the hand that had appointed him!

- (b) Overt attacks or denigratory statements over judgments of the courts.
- (c) Other mischievous overt or subtle corrupt influences.
- (d) Gratuitous labeling of judges as “*anti-government*”, or as “*executive – minded*”, *reactionary*, *counter revolutionary*,” or as “*timid*”, “*corrupt*”, or as “*incompetent*” etc.
- (e) Transformation process which seeks to oblige the court to adopt a certain political agenda.

All these may qualify as undue interference and as antithetical to the spirit of the Constitution, whether they emanate from government circles or from opposition or other pressure groups.

[16] Politicization of the judiciary can never be justified regardless of the popularity or goodness of motive because the main objective of party politics is gain executive and legislative power under the constitution; and to seek to manipulate and draw the judiciary into the murky puddle of politicking is both unconstitutional and immoral; this is so because the function of the judiciary is not to gain executive or legislative power but to administer justice according to law under the constitution impartially, without fear, favour or prejudice.

[17] Justice and politics are often not in harmonical consonance or unison. Judges are trained in the law, politicians need no training; it is often “*dog-eat-dog*” scenario; whereas political power has a life span of only five years; justice lasts forever and judges enjoy security of tenure. Justice is based on fairness, politics are sometimes motivated by pure self-interest and popular expediency.

[18] Whereas modern life cannot be divorced from politics of the day and indeed the right to participate in government is to be enjoyed by every citizen, politics of a country must be characterized by a culture of respect, decency and national interest.

- [19] It is often the high profile political cases that come before the judges that leave them in “*no-win*” quandary. If the decision of the judges favour the ruling government, the judges are castigated as “*executive – minded*” and biased; if the decision favours the opposition, the judge is labeled by the state officials as being “*anti-government*” or in either case “*incompetent*”. It is the gratuitous and often disrespectful statements that are uttered by certain unruly politicians and by press that certainly call for censure.

Judicial courage

- [20] An independent and impartial judge must be courageous, daring and not timid; he or she must not be stamped into giving a decision to appease anyone regardless of how high in rank or how powerful or bow to political pressure e.g. demonstrations or press statements.
- [21] A judge can demonstrate his worth not by pious declarations of being independent and impartial but through clear analysis and assessment of facts and of the applicable law and clarity of judgment as true exercise of judicial power.
- [22] Above all, politicians and officials of government must cultivate a culture of respect and restraint. To bring a judge into a political quagmire is akin to a boxer giving fisticuffs to a referee! Judges are often labelled political protégés by those whose cases are weak and devoid of merit. For their part, judges must by all means shun involvement in political partisanship or controversy. Once appended, labels are hard to remove. Involvement may begin with simple and genuine sympathy to outright support of a political dogma.
- [23] The polarization in our respective political landscapes is often a cruel one and it is unashamedly either “*you are with us or against us – finish and klaar!*”
- [24] It is when the judiciary is embattled or under siege that the pivotal but protective and defensive function of the Chief Justice (as head of the judiciary) comes to the fore. Individual judge should not be left to his or her own devices against scurrilous attacks for performance of his or her functions.

State/National Policy

- [25] The formulation of a national policy (which could include administration of justice in the country) is the primary function of the Executive which can be practicalised through the laws passed by the Legislature. The courts are generally loath to question matters of national policy unless the latter is inconsistent with the spirit of the provisions of the Constitution or principles of international law or of natural justice. Clear lines of demarcation must be drawn between national policy and party policy.

- [26] In judicial corridors today we often hear about “*transformation of the judiciary*” and “*judicial activism*”. A transformation – well handled as a reform tool – can truly adapt the judiciary to modern democratic notions of socio-economic needs of society. Transformation should however not be used as an excuse or a political tool to politicize and hijack the judiciary by (a) packing the judiciary with political protégés who are forever beholden to their patrons and (b) rendering the judiciary into an “*extended arm of the executive*” and manipulating its functions for nefarious political motives.

- [27] Executive supremacy despite its popular base can sometimes become antithetical to the independence and impartiality of the judiciary. A cultured politician exercises restraint in wielding his executive power under the law. He admires judicial independence because it adorns and legitimizes his political governance. To embrace Judicial independence is not to harbour a venomous serpent but to reinforce a supportive pillar in his democratic governance.

National/State Policy

- [28] It is the theme of this paper that national or state policy must be founded on national and not party interests. The latter are sectarian and the former founded on general good. Were it based on party interest, discrimination would soon set in to the exclusion of other

vital interests. Socio-economic good of humanity should not be premised on political party interests. Principles of State policy as declared under chapter III of Lesotho Constitution, though not enforceable in courts of law, are for the common good; they are aspirations for the general public.

- [29] A good judicial policy should exercise restraint in matters of national policy and recognize that it is the prerogative of the executive to formulate state policy in accordance with the provisions of Chapter III of the Constitution. We talk here about equality of people before the law, opportunities for-education, health clean environment, etc.
- [30] In the case of **Minister of Health vs Treatment Action Campaign – (No.2)**³.

“[98] This Court has made it clear on more than one occasion that, although there are no bright lines that separate the roles of the Legislature, the Executive and the Courts from one another, there are certain matters that are pre-eminently within the domain of one or other of the arms of government and not the others. All arms of government should be sensitive to and respect this separation. This does not mean, however, that Courts cannot or should not make orders that have an impact on policy.

[99] The primary duty of Courts is to the Constitution and the law, ‘which they must apply impartially and without fear, favour or prejudice’.”

How can politicization of the Judiciary be tackled

- [31] This important task needs resolve and commitment. It requires courage, honesty and integrity. It requires a combined effort of all members of the judiciary who should all be sensitized about their functions as judicial officers. A true ethical foundation is important in galvanizing the institution of the judiciary. The judicial oath of office

³ 2002 (5) SA 721 at 755.

should be a ringing bell emboldening and fortifying the members of the judiciary in the discharge of their functions.

[32] The Judicial Service Commission – an important organ under the constitution – must always be vigilant in the appointment process so that only fit and proper persons receive the Commission’s recommendation to the King. A full interview on important aspects of judicial life must take place for each and every appointment. No secrecy should be countenanced nor should political nepotism or patronage allowed.

[33] The Executive should also be sensitized about the true importance of judicial independence and of judicial impartiality in a democratic governance. Indeed many politicians just “*loathe*” the idea of judicial independence out of sheer ignorance, stereotype or other misconceptions e.g. fear, jealousy, impunity or self righteousness. The politicians whether in or out of government must be sensitized that the courts are the bulwark of human rights and indeed even of their executive power; and that no judge should ever be “*their man or woman*” but a peoples judge at all times.

Dangers

[34] If our judiciaries treasure their independence under the constitution then they must guard it jealously and not squander it by diluting it with politics. A political carrot once swallowed is difficult to disgorge; once chained to a political master, judicial enslavement is complete. Once a single judge is labeled a political protégé or stooge, the label spreads over the whole judiciary.

[35] The judiciary can maintain its independence and impartiality without sanctimonious assumptions of “*holiness*” or “*overweening-self righteousness*”. No one can be totally impartial in the world of the living. A Judge can only make a human endeavour to be impartial and to be fair; no absolute impartiality can be achieved but in trying to do so, no political interference or influence should be brooked to intervene whether officially or gratuitously.

- [36] In our subcontinent we should never shy away from our sacred duty to “*advise and warn*” against political interference in a neighbourly fashion. In Sesotho we quip “...*matlo ho cha mabapi...*” – “...*it is the neighbourly house that catches the fire*”. Political interference is another form of judicial or political corruption. It is infectious and can spread throughout the region like a wild fire if not timeously contained. Political oppression of the colonial times should not be replaced by a modern political despotism. Sad experiences in Africa and elsewhere need not here be cited because of the horrific consequences that litter their trail and are but part of a sad history.
- [37] Political interference in any given situation varies from one country to another and from one regime to another. It may be quite intense, persistent or it may be quite subtle and subterranean. Its sinister motive is clear in all cases : subjugation of the judiciary.

Prevention

- [38] The judiciary can counter this menace by proactively and consciously “*depoliticizing*” itself by rejecting all overtures with a political flavour and by ethically avoiding embroilment in political quagmires and other controversies. Of course, this cannot be an easy task because “*politics come to court*” and not vice versa!
- [39] To tackle politicization, a positive climate of integrity must prevail both in the judiciary and the executive. This is essential, if not critical, in order to forestall all sinister attempts to corrupt the judiciary politically. This is imperative because the oft vulgar and vitriolic party dynamics and polarity can adversely affect the judiciary’s independence and impartiality.
- [40] All should be aware that any endeavour to politicize the judiciary, is clearly unconstitutional and such sinister overtures are a clear admission that the government lacks legitimate authority in its governance.
- [41] Furthermore it is to be frowned upon that discussion involving the judiciary can ever be placed as “*an item for debate*” at a party caucus in order to determine the course of action over the functioning of the judiciary. Party leaders and stalwarts have a moral and sacred

responsibility to instill “*respect for the law and its institutions*” as being of fundamental importance and as a virtue that transcends all political expediency.

[42] The rogue or pariah states that today defy all fundamental principles of international law as documented in various conventions and protocols under false pretext of populism should not be imitated by others.

[43] One of the most nefarious objectives of politicization of the judiciary is to bring about a culture of “*immunity*” and “*impunity*” – with certain people not being amenable to law and being able to commit criminal acts with impunity and to gain undeserved victories in court through biased judgments influenced by political leanings.

[44] In presenting itself as a real menace and challenge to the independence of the judiciary, politicization has recently assumed devious facets of judicial and political corruption which aim at hijacking and distorting justice in a most grotesque fashion. The nefarious motive of politicization is to accomplish selfish political ends by manipulating the judges by destroying their judicial independence and impartiality. As it is often said, the judiciary then becomes the extended arm of the executive and this would violate **Montesquieu**’s doctrine of Separation of Powers wherein he states:-

*“There is no liberty if the judicial power be not separated from the legislature and the executive. Were it joined with the legislature the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator; were it joined to the executive power, the judge might behave with violence and oppression.”*⁴

[45] As the former **Chief Justice Pius Langa** has recently opined
*“...an intimidated judiciary subservient to those who wield power becomes an extension of the executive and cannot be trusted to deliver justice”*⁵

⁴ **Spirit of the Law**; see *SA Association of Personal Injury Lawyers v Health – 2001 (1) SA 883 (CC)* at Paras [25] and [26]

⁵ **At International Conference of Commonwealth magistrates and Judges Association – Cape Town 6th October 2008.**

- [46] **Justice L. Mpati**⁶ in his Lecture “**Is the Judiciary in Crisis**”⁷ has strongly deprecated gratuitous attacks made upon the judiciary in South Africa by party vigilante groups when the government and the ruling party fail

“...to reign in and condemn those within its ranks and its alliance partners and those who have sought to undermine and in fact damage the integrity and credibility of the judiciary.”

“... Judges should act without bias and should not be susceptible to external pressure or influence Judges should not succumb to any kind of pressure, criticism or intimidation from whatever source”.

“... the state has a duty to respect, protect and promote the independence of the judiciary as without it there can be no genuine democracy and thus no prosperity.”

- [47] Politicization of the judiciary generates judicial and political corruption which can permeate the entire justice system corrupting the staff and lowering morale and productivity. Once corruption sets in, like cancer, it soon becomes systemic and endemic with disastrous results to a budding democracy.

- [48] Politicization of an institution that should manifest honesty and impartiality always emanates from moral decadence prevalent in society and it is decadence that has no respect for constitutionalism, legality and the rule of law. In hot pursuit for self aggrandizement, unscrupulous politicians will unashamedly target judges to win them to their political philosophy and influence; and once under their beck and call then they can twist judges around their little fingers in the manner of a quivering dog at the sight of a raised whip or a mendicant uncontrollably salivating at the sight of a tantalizingly tilted bowl of soup.

⁶ President of the Supreme Court of Appeal of South Africa.

⁷ Delivered on 29th October 2008 at Law Faculty of University of Pretoria.

- [49] Beneficial results can be achieved if politicians holding high positions of leadership in government can cultivate higher sense of maturity, integrity and tolerance. Party interest need be balanced against national interest. A culture of respect for other institutions also need be nurtured in unstinting earnest.
- [50] Far be it from everyone of us therefore to condone subjugation even to the slightest degree, of high judicial principle founded on sound ethics to barefaced pursuit and acceptance of unorthodox political favours for satisfaction of love for glory and self-aggrandizement on the part of a judicial officer.