

Fifteen years have passed since the first judges of the Constitutional Court were appointed. All have now retired from office. It is thus a fitting time to assess the progress made on the journey towards constitutional democracy.

The court has received widespread acclaim for its development of a coherent jurisprudence. A test for both equality and socio-economic rights, the assertion of the importance of dignity, and the role of the limitation clause, which permits justifiable limitations of the enshrined rights, by a large, have been settled by the court.

Whatever the criticism of the court's judgments in these areas, and it would be surprising if there were none, given the breath of the legal landscape traversed, there have been a number of justly heralded landmark decisions. In particular, judgments have promoted gender equality, asserted the key principle of non-racialism, developed a jurisprudence against discrimination on the grounds of sexual orientation (arguably further than any other comparable constitutional court) and promoted a conception of deliberative democracy. The court has grappled with the tricky relationship between the Constitution and culture. It has sought to strike a balance between a democratically elected government's prerogative to develop policies relating to social and economic goods and government accountability to the Constitution.

But it would be folly to suggest that the country has arrived at its final constitutional destination. Arguments are still raised about the alleged "Eurocentric" nature of the Constitution, in that a text borrowed to a large degree from Canada, the United States of America, the European Convention on Human Rights and the German Constitution, is not a "truly African" Constitution.

Although there has been a marked reduction in criticism of the judiciary recently, the statement of the national executive committee of the ANC on January 8 2005 remains a proverbial elephant in the court room: "The reality can no longer be avoided that many within our judiciary do not see themselves as being part of the masses, accountable to them and inspired by their hopes dreams and value systems. If this persists for too long, it will inevitably result in popular antagonism towards the judiciary and our courts, with serious and negative consequences for our democratic system as a whole."

While the statement was later qualified by important and totally justifiable criticisms about the lack of access to justice for the poor and the slow pace of change in the legal profession, further disturbing statements followed, including accusations that judges were counter-revolutionaries. When these sentiments were soundly rejected both by President Jaco Zuma and Minister of Justice Jeff Radebe, elements of civil society began to employ even more disturbing epithets.

The record of the Constitutional Court was classified in the media by some supporters of Judge President John Hlophe as "Green Robes White Justice" -- an adaption of the title of a book which is justly critical of racist elements in the US legal system, although its proponents appear to forget the far more powerful and nuanced critical race theory. The most senior members of that court, the chief justice and deputy chief justice among

them, were accused of being "house negros". These vicious comments elicited no defence of these distinguished judges from key elements of civil society. Of greater significance is that this discourse confirms the tenuous nature of constitutional democracy and the vulnerability of this complex and delicate enterprise to opportunist populism.

Calls have been increasingly made for the Africanisation of law. This is a complex issue, the nuances of which fall outside of the scope of this talk. Africanisation, in the sense of the demand that law must respond to the values of the majority of society, particularly as encapsulated in vernacular law, is manifestly a critical enterprise in promoting the legitimacy of the legal system. However, if Africanisation means the eradication of existing laws or the rejection of the Constitution due to a reliance on Western precedent, without any concrete substantiation as to how change is to be effected, this is but a populist war cry rather than a serious intellectual project.

Thirdly, a series of conservative criticisms have been raised about the nature of constitutional jurisprudence. In a recent opinion piece the Judge President of Gauteng, Judge President Bernard Ngoepe, summarises this criticism thus :

"There are perceptions out there that, in the interpretation of the constitution, the courts have in some respects gone overboard. In fact, there is a saying: if anything is allowed anywhere in the world, it will probably be allowed in South Africa; if it is allowed in South Africa, it is not necessarily allowed anywhere else."

Finally, the mechanisms for judicial accountability and the standard to be applied to judges have come into sharp focus due to recent high-profile complaints.

These developments have all impacted upon the legal terrain upon which constitutional developments will now take place. Most important, they have called into focus a social practice necessary for the existence and extension of a constitutional project. A social practice is essentially a range of shared ideas, values and rules upon which members of society act. The practice supplies a way of making sense of the world in which citizens live and act. Without a basic shared set of ideas, values and rules, no constitutional system can flourish in the long run. If society is so divided as to a set of core values underpinning the project, no constitutional text can plaster over these foundational fissures.

So what is at the heart of this turbulent climate? The answer is crucial as this debate concerns the terms of our future. The Constitution promises a non-racial South African society, in which diversity is celebrated but within the context of a shared South African nationhood. Recent events reveal how fraught this journey will be for the country. Both the promise of the text and the role of the courts have brought these problems into sharp focus.

Let me first turn to the constitutional promise of non-racialism.

In a perceptive contribution about race, Professor Njabulo Ndebele has written that, as a nation, we need to reconnect with the founding compromises of the negotiated

constitutional settlement. In his view, this compromise involves an embrace of the "the complexities and the ambiguities of managing a modern state". The Constitution was designed to move South Africa beyond the narratives of the 20th century, in particular the dominant narrative of apartheid in which identity was totally conflated with race:

"Depending on the choice we make we either relive the past to no end or create the future. The latter is the bigger challenge and requires that we recommit ourselves to the solemn commitment to non-racialism accompanied by visually and ethical leadership. We must recommit to diversity and a solidarity, collaboration, trust, accountability and civility, all of which have a binding effect that should allow us to be aware of barriers that could be permissive or inhibitive and to learn to think and feel beyond them and across time."

If we reduce our entire political debate to race essentialism, we can never move onto this promised terrain. We may then fail to develop a social practice of non racialism which lies at the heart of the present constitutional enterprise.

The destination promised by the Constitution was never going to be an easy journey, given the history of endemic racism which continues to blight our land.

Of course, social and economic redress are inextricably linked to social cohesion and thus to the possibility of a shared practice. Hence, without delivery of key services, populism will always enjoy political traction. For example, the long-term value of a high-quality schooling system can lead to the eradication of racial thinking in South Africa. The building of houses for those millions historically denied is vital, yet we seem to fail to build communities rather than bricks and mortar, as important as is the latter. This in turn forces us back to the judicial role .

A lack of fulfilment of promises invariably triggers greater recourse to the judiciary. To cite distinguished anthropologists John and Jean Comaroff, lawfare replaces political warfare:

"More and more are differences of all kinds being dealt with by means of law, whether they involve private freedoms or public resources, access to medical treatment or title to territory, cultural knowledge or civic authority, the physical and fiscal entitlements of rulers or the property, liberty and wellbeing of their subjects, religious tolerance or ethnic aspirations ... What once happened primarily in parliaments, street protests and other political theatres now finds a new - or to be precise, a parallel, expanding -- terrain of contestation [in the courts]".

The more the courts are drawn into the political struggle, increasing tensions develop between the various arms of government. This move is, of course, not only related to national law. As the Comaroffs note, intellectual property is employed by multinationals as a modern day form of gun boat enforcement of their assets. The current anti-apartheid case being heard in the US on the basis of the Aliens Tort Claims Act is a form of lawfare

as apartheid victims seek to gain redress in a foreign court; after having failed to so achieve in this country.

In this series of lectures two central sites of lawfare are discussed. The Constitution promised a series of social and economic rights including healthcare, water, housing and education. Although relatively few challenges have been brought under these provisions, that is probably more indicative of problems of access to justice than to the paucity of dissatisfaction with the implementation of these rights. But those cases which have been litigated concern a failure of the political process to fulfil the promises and hence a desperate attempt by poor communities to turn to more favourable sites of struggle -- the court room.

The court has also been conscious of the dangers of lawfare -- hence the development of a jurisprudence balancing deference to government policy against rights intended, at least in part, to refrain from removing government's prerogative about these key areas of social policy. Critics have questioned the balance struck by the courts and whether the interpretation given to these rights has not gutted the essence of their potential to empower the poor.

The second example of lawfare was the litany of cases generated in the prosecution of Jacob Zuma, the current president of the Republic of South Africa. Whatever the merits of the state case, the taped conversations of Leonard McCarthy, a senior member of the National Prosecuting Authority (NPA) and a former director of public prosecutions Bulelani Ngcuka (and I leave aside questions relating to the recording and their publication) reveal a use of the criminal justice system in pursuit of political opponents. This saga raises many crucial questions for the future of the legal system in general, the NPA and the National Intelligence Agency in particular, as well as the response of the courts best revealed in the diametrically opposite responses of Judges Chris Nicholson and Louis Harms; an opposition that at least one commentator has explained in terms of different backgrounds and experiences prior to assuming judicial office.

A further problem of a more general nature concerns an issue raised in the anti-apartheid case -- namely the past and the future. Hannah Arendt in *The Human Condition* observed that no matter how disastrous the consequences of a deed, it can never be undone. What transforms the human situation from tragedy to hope is the possibility of forgiveness; without being forgiven, released from the consequences of what we have done, our capacity to act would, as it were, be confined to one single deed from which we could never recover. Forgiving does not re-enact, it acts anew and unexpectedly, unconditioned by the act which provoked it and freeing from the consequences both the forgiver and the forgiven. That provides the opportunity for both parties to act differently than in the past and not to be trapped in a cycle of vengeance and retaliation. Mr Nelson Mandela understood this insight better than probably anyone in the 20th century (save perhaps for Gandhi) but an increased racial polarisation as evidenced in public discourse, a continued pattern of material accretion at the expense of the majority of the country (vide the worsening Gini coefficient), an absence of further development of a non-racial tradition,

a rise in ethnicity, and a reproduction of a skewed education for South Africans must all cast doubt on the resilience of the long-term project as captured in the constitutional text.

A further contributory factor to the recent legal turbulence is to be found in the nature and composition of the legal profession. It remains sadly untransformed. A recent study by Shane Godfrey reveals that, while a rising number of black lawyers have been admitted as attorneys, this entry has made little impact on the racial composition of the profession. The same is true of the Bar. Godfrey offers this comment:

"Many African advocates find it difficult to build and sustain a practice because the major (predominantly white) law firms continue to brief white advocates. Lack of transformation in the attorney's profession and the entrenchment of the historic briefing patterns therefore undermine transformation of the Bar."

In my experience, a similar glass ceiling appears to be imposed on women advocates. In short, the profession must conduct a serious debate and move decisively on questions of race and gender so that the present dominantly white male narrative of the legal profession is reconstructed.

But institutional transformation is not enough. Transformation of the legal culture is arguably more important. The court in an early case (*Carmichele*) laid out the idea that the Constitution contained a normative framework in which the development particularly of private law should take place. To a large extent, the court eschewed the development of more than a skeleton for this framework and accordingly South African private law remains in a state of great incoherence, caught between the promise of the constitutional future and the proclaimed "glory" of a Roman Dutch common law. If the Constitution was designed to open a new chapter in the history of this country, a meta-narrative that is "future bound" and thus aspirational is required in order to break with the past and reconfigure a legal system that gives working content to the core principles of equality, freedom and dignity, accountability and integrity. But one searches, save in a few exceptional cases, for acknowledgement of the way forms of private law reinforced a legal system that privileged the power of the few.

What are the overall implications of these problems for constitutional democracy? The absence of a social practice which underpins our progressive Constitution renders it vulnerable to conservative elements. Their combination of social amnesia and an inability to consider the "Other" will gain popular support in a climate of increasingly societal discontent.

An increasing use of lawfare, accompanied by an absence of a shared practice, may promote greater judicial caution and deference towards the other arms of government. Some commentators have already seen a retreat by the Constitutional Court in its judgment in the recent Johannesburg water case. That assessment is debatable but the anxiety is understandable.

We seem unable to conduct a serious debate about the meaning of legal transformation which, in turn can inform civil society's participation in the overall political discourse.

Without civil society's vigilance, conservative and deferential slippage is inevitable and more so will be the problem of the critical balance to be struck between the twin imperatives of demographic representivity and non-racialism.

An absence of vigorous discourse is another consequence. Take the recent Constitutional Court appointments. In the US, when Judge Sotomeyer was nominated to the Supreme Court, she was subjected to careful public scrutiny. A national debate took place about her suitability for appointment. Here, save for a couple of thoughtful pieces in the newspapers and on radio, the public remains in blissful ignorance about the implications of the appointments; this at a key moment when four out of 11 members of the most powerful court in the country were to be appointed. Without adequate coverage, the public will remain in ignorance, save for exaggerated reports of personality clashes which invariably gloss over the key differences of principle.

In the final analysis, we have much to celebrate. Our Constitutional Court has developed a rich jurisprudence. Government complies with the orders of the court. The Constitution is a majestic source to inspire the key debate about the transformation of South African society. But a combination of apathy from civil society, ignorance, particularly as a result of poor media, an increased pressure upon the courts as result of lack of delivery and greater use of lawfare and a return to racial narratives of the past, present threats which should not and cannot be ignored.

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