

STANDFIRST: Are current challenges to the legitimacy of South Africa's judiciary themselves legitimate? **Deputy Chief Justice Dikgang Moseneke** recent lecture, "The burden of history: The legacy of apartheid judiciary; the legitimacy of the present judiciary", follows Judge Dennis Davis's and advocate Gilbert Marcus's contributions in last week's M&G to a series of talks aimed at promoting public debate about the progress of South Africa's constitutional democracy.

Introduction

My good friend and brother at law, Dennis Davis, in order to secure my presence here, has assured me that this is the 60th anniversary of the University of Cape Town Summer School. It is indeed a privilege to be part of this lecture series which appears to be well steeped in history and has over time become a credible crucible of vigorous public conversations.

My invitation from the Centre for Extra Mural Studies and the Law School to deliver tonight's lecture explains that the course title is: "*The battle for constitutional democracy and the Constitutional Court*". However, I have been asked to expend my energies this evening on a narrower subset of that broader theme. My task, I gather, is to prompt and facilitate a debate on "*the burden of history which arises from the legacy of apartheid judiciary and the legitimacy of the present judiciary*".

To that end I propose to do three things. First I hope to paint in broad brush strokes the institutional and jurisprudential legacy of apartheid judiciary. Immediately thereafter I will turn inwards to introspect on the role of our present judiciary in the pursuit of the just society envisioned in our formal constitutional architecture. Towards the end I make a brief assessment of the legitimacy of the present judiciary within an increasingly problematic and contested democratic project.

Legacy of the apartheid judiciary

When this Summer School lecture series started 60 years ago, that is in 1950, the Second World War had just receded and the better part of Europe was undergoing large-scale post-war reconstruction. The war had been long, gruesome and touched everybody, everywhere and in every way. It inflicted a heavy toll on life, limb and property.

Its survivors and victors sought retribution and post-conflict redemption. They vowed to forge a new deal - a just world order. They hoped to transform the world irreversibly. To this end, state parties resorted to multilateral consensus and instruments.

The most visible were the United Nations organisation and the Universal Declaration of Human Rights, which was adopted in 1948. This newly-formed world body and the Declaration held great promise as collective antidotes against war, oppression, human cruelty and impunity. They were meant to uphold and advance peace, self-determination and development.

This quest for a new humane global order explains in part the large scale dismantling of colonial arrangements in Asia, Africa and Latin America and the advent of post-colonial efforts at pushing back under-development. Shortly thereafter, East and West power blocs emerged, a phenomenon which led to several decades of nuclear threat and the Cold War. Suffice it to observe that this post-Second World War zeal to reconfigure power relations amongst and within state parties by and large failed, particularly in relation to under-developed and developing countries.

The only significance of all this is that in our own lifetimes we too have come to terms with our own post-conflict reconstruction. Our embryonic democratic enterprise remains significantly vulnerable. The Universal Declaration of Human Rights did not in itself lead to a reduction of injustice on earth. If anything, inequity seems to have increased.

Making the same point, Amartya Sen, the Nobel Laureate, is quoted to have said: "The idea that history is on the side of the downtrodden and dispossessed has been, for most thinkers, terminally discredited." There is no longer a place for "grand narratives to provide moral comfort and political succour and existential hope". He argues that what matters are measurable outcomes on "when and why we are moving closer to or further away from realising justice in the present globalised world".

Much of what I will say today will point to the challenges we have to confront as a judicial arm of the state in order to refashion our own society as just and caring.

In our country, the socio-political trends assumed a trajectory at odds with post-war reconstruction. The National Party was voted into power

with the mandate to entrench and deepen the mutually reinforcing inequalities which criss-crossed along the fault lines of gender, race and class. This insane racial oligarchy of the apartheid order was matched only by a deeply impoverishing economic exclusion of the majority of South Africans.

The majority had no recourse to the ballot in order to unseat, if not to hold accountable their rulers. And therefore political and military might became right. They were excluded from acquiring quality and equal education through which one stakes a claim to self-worth and to the social and economic goods on offer in one's country.

As Julia de Kadt, writing on education and justice, reminds us: "Over the longer term, those who receive poorer education, or spend less time enrolled in school, are likely to have lower incomes, fewer opportunities, poorer health and shorter life expectancies."

That is perhaps the most devastating aftermath of apartheid - deep and scarring social inequity. As Professor de Kadt, writing on justice and society remarks, that victims of exclusion and inequality are "marked by poverty, disease, often violent conflict and many other visible markers of injustice and suffering".

This intolerable social condition was fertile breeding ground for popular discontent. Uprising followed as day would follow night. Liberation and working-class movements flourished. The state responded in kind. It set up an enormous security apparatus and got on with the business of suppressing and repressing popular revolt. To this end, the state incarcerated, banished, maimed and murdered its opponents. In turn, a people's rebellion escalated. This spiralling nightmare was brought to a screeching halt in 1994.

The inescapable question must follow. In the face of all this, what did the apartheid judges do? The answer to that question would not merely feed our historical curiosity but yield a veritable comparator in our own search for a legitimate judiciary for our time.

Even then - under apartheid - severe questions about the legitimacy of the apartheid judiciary were posed by many activist lawyers, law academics, other social thinkers and the broader public, as they do today. Many of these questions were prompted by the conspicuous gap between law and justice. The questions about the legitimacy of the judiciary of the time were indeed well founded on several counts.

This nightmarish account of our past reminds us that law has played a very important role in our history. Apartheid oppression was itself a collection of laws which were harnessed to achieve unjust economic and political ends. The government, its security apparatuses and courts were obliged by laws of a sovereign minority parliament to give effect to apartheid. Unjust as the system was, it always hankered for a veneer of the rule of law.

However, in the eyes of the majority of people there was no rational divide between law and politics. Law served narrow socio-political ends and courts were seen as mere instruments. In the process, their legitimacy suffered and waned. For that reason, spirited political struggles were prosecuted in courts and through the law. Activists too used courts and the law to proclaim their cause.

This point is made rather sharply by Dennis Davis and Michelle Le Roux in *Precedent and Possibility*. They correctly observe that: "During the long night of apartheid, courts were often sites of vigorous political struggle, being places where different visions of the country were presented to the public by competing litigants, usually the state against accused persons or applicants whose rights were at stake.

Since 1994, and the advent of constitutional democracy, similarly significant contests have taken place in the courts. There is however a major difference: Litigation now takes place within the context of the Constitution which provides a vast range of rights for all who live in the country."

In the first instance, the Bench of the time had the unenviable task of giving effect to laws that were stridently in conflict with fundamental rights and freedoms which then were newly enshrined in the Universal Declaration of Human Rights and in great measure were part of the Roman Dutch Law *grundnorm*.

Their difficulty was compounded by the narrow judicial discretion, which the doctrine of parliamentary sovereignty and the tenets of positivism imposed on them. Like any judiciary, they had to be faithful to the law. The ultimate source of law was parliament and its laws were sovereign. Legislation was wholly impervious to judicial scrutiny.

In theory, judges made no laws. They only interpreted and implemented them and even when they did interpret laws, they were duty-bound to search for the intention of parliament, which trumped any other plausible reading of legislation that is being considered.

They were only a little more than minions, if not cronies of the legislative intent.

Of course, the common law held great opportunities for the pursuit of a good society. Dutch text-writers of the 16th and 17th centuries had a high place for universalistic values of human dignity, equality and freedom culled from classical Roman law. That however occurred seldom because quite often the legislature imposed a debilitating statutory overlay on the common law.

Besides the doctrine of parliamentary sovereignty, judges of yesteryear were drawn from a narrow all-male elitist clique, which consciously or unconsciously had internalised the values of the system they served. The inarticulate premise of their conduct, as it is of the present-day judges, was that the social order they served is worthy of protection. Even those who were not enthused by apartheid jurisprudence did not think that it was their place to impose their worldview on the judicial task at hand.

The judicial adjudication of the time was also held hostage by legal reasoning and culture, which insisted that where the law is clear there is no role and room for any equitable jurisdiction. This of course meant that where the law is clear there is no role and room for equitable jurisdiction. This of course means that where the law works a conspicuous injustice it had to be given effect to. They were happy to live by the adage that the law is sometimes an ass. In other words, they refused to assume the moral agency and responsibility for the judicial outcome they reached and imposed on those judges.

The jurisprudential justification for this approach seemed to be that personal predilection of judges or indeed public morality in a generic sense plays no role in the judicial function. In this way, that legal culture compelled judges to suppress their worldviews or, if you will, their "inarticulate premise".

Also, they rejected the existence of an "objective normative grid". Ethical considerations were seen as an unwarranted intrusion into the judicial function. This stands in sharp contrast to the stance of our Constitution, under which adjudication is value-drenched. The Constitution commands us in so many words that our state is founded on democratic values of human dignity, equality and freedom, and that these values are the only yardstick by which a law or a court could limit an entrenched constitutional right.

This means that apartheid judges would have crossed jurisprudential swords with Amartya Sen, the Nobel prize-winning economist and philosopher who famously proclaimed that all law must float on a seabed of morality. In his brilliant book of great scholarship, the *Idea of Justice*, Sen again emphasises the indispensable need for a "normative compass" in the search to eradicate injustice and, in his words, that "spurs decent men and women to action and the remediation of social ills".

Sen continues to say that the normative compass must speak to the need to revive this normative basis, not only in judicial function but also in political action. In this way, apartheid jurisprudence was the poorer for elevating law and order and sectarian class and race interest above inclusivity and justice.

In concluding my remarks about apartheid judiciary, I should acknowledge that although they were appointed directly by the executive only and in a secretive process, they were drawn from a competent and well-trained coterie of senior counsel with practice experience ranging between 20 and 30 years. Whilst they singularly lacked diversity as to race, class and gender, they were effective in executing their judicial function albeit with the quirks I have alluded to. They did much to develop and adapt common law into a coherent and pervasive system of law despite their preoccupation with the ousting of English law.

Expectedly, they did not embrace inclusivity. That explains why indigenous law was off their radar screen. They preferred and maintained a cloistered existence and stayed meticulously out of public conversations about the character of judicial function or the broader public discourse on justice.

It is appropriate to acknowledge that some judges of the time showed remarkable bravery and where judicial discretion presented itself they sought to do justice in an unjust system.

A few examples will suffice. As early as 1896 the chief justice of the Transvaal Republic, JG Kotze, made it known to Paul Kruger, the president of the Republic, that his supreme court had the power to review and set aside legislation of the Volksraad. Kruger in turn let him know that the principle of judicial review he had announced is the principle of the devil.

Kruger fired him summarily. Kotze sharply retorted that Kruger had no power to terminate his judicial tenure. As you know, in the end Kruger won and Kotze was dispatched.

In the 1950s, Justice Oliver Schreiner was unimpressed by the concerted project of the Nationalist Party to terminate the already limited and qualified franchise of coloured and African people. Sitting in the appellate division, he wrote two seminal judgments, the second being a solitary dissent in which he makes the telling point that when Parliament acts beyond its powers it ceases to act as Parliament and therefore courts are not obliged to give effect to its abortive laws. That he did at the pain of being overlooked as chief justice, not once but twice. Again, political will triumphed over his judicial steadfastness.

Towards the dying days of apartheid, an increasing number of judges found their voice and made judicial pronouncements, which ameliorated the burden of repressive laws. Judgments by justices Kriegler, Goldstone, Ackerman, Didcott, Milne and Friedman, to remember a few, are ready examples that come to mind.

Present Judiciary

There are many differences between the past and the present judiciary. However, the overarching difference is that they accomplish their judicial duties after the advent of constitutional democracy underpinned by ambitious constitutional enterprise.

The Constitution does not only establish its supremacy over all law and conduct, rule of law and fundamental right but also recites our collective convictions. It contains our most recent and joint ideological and normative choices of what a good society should be. It enjoins all to take reasonable steps without undue delay to achieve that good society.

It is much more than a neo-liberal constitutional creation. The virtuous society envisioned in it has a significant social democratic flavour. It protects and advances fair labour practices. It compels all to preserve an environment that is not harmful for the benefit of present and future generations. It does not permit arbitrary deprivation of property but permits expropriation and redistribution of land for public good, provided that it is against just and equitable compensation. The envisioned society sets itself firmly against poverty, ill health and ignorance.

In other words, it entrenches redistributive justice. This it does by promising everyone the right to have access to adequate housing, healthcare, food, water and social security subject to available resources and progressive realisation. A child's best interests are of paramount importance in every matter concerning it. And everyone has a right to basic education, including adult basic education. What is more, in our constitutional arrangements, all of these aspects of our ideal society are justiciable before courts. Executive government may be called upon to give account of the steps it has taken to progressively realise these prerequisites of a just society.

The Constitution sets aside a pivotal role for the judiciary. Those who are sceptical about this enlarged and seminal role of judges complain of a form of judiciocracy.

The truth is different. As you will see later, the Constitution itself constrains judicial power. However it is true that the exercise of all public power, and in appropriate circumstances private power, is subject to constitutional control and therefore susceptible to one form or another of judicial review. The Constitution makes clear that judicial authority vests in the courts and that they must apply the Constitution and the law without fear, favour or prejudice and that decisions of courts bind all persons to whom and to organs of state to which it applies.

It must follow from what I have said that the tenets of our constitutional democracy, adopted in 1994, constitute the most recent, reliable and binding social consensus on what a fully transformed society would look like. The elusive question is: what have the present courts done in deepening democracy and reconfiguring society? I start with the easier answer. At an institutional level, the composition of the judiciary has changed much. Whilst judges are still appointed by the president, he may do so, except in the appointment of the chief justice and the deputy chief justice, only from a slender slate provided by the open process of the Judicial Services Commission.

The pool from which judges may be drawn has been widened substantially. They are drawn from the ranks of law academics, attorneys, magistrates, advocates. And indeed any properly qualified person is eligible for appointment. It is fair to observe that whilst more needs to be done, much has been achieved in procuring remarkable diversity as to race, class and gender.

Some have argued that judicial experience and competence have been the casualties of the bid to transform the judiciary by rendering it more representative. I simply do not agree. The benefits of judicial diversity and inclusivity are as well as rehearsed as they are self-evident. Diversity is a well-recognised tool to eliminate the risk of prejudice and to enhance the quality of decision-making. Over 75% of sitting judges are post-1994 appointments. This means that they were appointed through an open and public process and well within the sway of the democratic process.

Scant experience is inevitable in transition but that may be cured by rigorous continual judicial education and increasing experience. We must all draw comfort from the wealth of the post-Constitution jurisprudence about which there is much to be proud. It is to that jurisprudence that I now turn.

In 15 years, some remarkable strides have been made in fleshing out the contours of an ambitious constitution. The tone was set by the 11 remarkable judgments of the Constitutional Court judges when they reached the conclusion of the death penalty is at odds with our constitutional arrangements.

Shortly thereafter, the court wrestled with a wide genre of rights-based claims: gender equality, sexual orientation, freedom of expression and of the press, fair trial, diplomatic protection, trade and profession, rights of a child, procedural justice; development of the common law, of customary law, extradition; legislative processes, participatory and representative democracy, administrative justice, rule of law, competition law, socio-economic public service responsiveness and accountability on labour law.

Superior courts have increasingly displayed a taste for constitutional adjudication. A significant challenge remains that some judges, and so too litigations, resort to constitutional injunctions as a last resort. We have to ensure that the newly -found constitutional ethos permeates and dominates adjudication.

Legitimacy and current challenges

Even now, questions are asked about the legitimacy of the judiciary. The starting point, I think, is to recognise that constitutional adjudication has a far-reaching impact on the manner in which the country should be governed in all spheres and at all levels. Judges are obliged to decide on disputes with and between organs of state,

decisions on the validity of legislation, constitutional challenges related to elections and amendments to the Constitution.

All of these matters have political implications in the sense that they relate to conduct of politically elected or appointed executive or legislative functionaries. It is thus self-evident that conflict between the judiciary and the executive or the legislature is inevitable. This contestation, one wants to believe, has been foreshadowed by the Constitution.

The Constitution seems to make an express election in resolving the inevitable political implications of judicial activity. It installs courts as independent and subject only to the Constitution and the law. It is crucial to emphasise that courts are bound by the democratic will of the people as expressed in legislative instruments that are constitutionally compliant. Courts may not depart from valid legislation, executive decisions or policy in preference to their own worldview. They must apply the law impartially.

This however is not the end of the matter. Our model of separation of powers must strike equilibrium between rigorous judicial review on the one hand and the historic need for effective executive government to pursue reconstruction and development of society. The balance must be struck without relinquishing the rule of law requirement that all public power must be sourced from the law. Our system of separation of powers must give due deference to the popular will as expressed legislatively or through executive decisions and policies provided that the laws, decisions and policies are consistent with constitutional dictates.

This observation is prompted in part by the "counter-majoritarian dilemma". Judges are not elected democratically and yet the Constitution itself entrusts them with the authority to invalidate any law or conduct that is unconstitutional. This authority to upset a legislative or executive choice must be exercised sparingly and in clear case of unconstitutionality. The judicial officer must decide according to the facts and the law and not according to subjective predilection. A judge must put any party-political loyalties behind her or him on elevation to the Bench. Experience teaches that judges worthy of the office do. And above all, a decision on the unconstitutionality of the conduct of another arm of the state must be clear, strongly motivated and accurate on the nature and extent of the impugned unconstitutional conduct.

Under apartheid oppression the judiciary had no legitimacy in the eyes of the disenfranchised majority. Matters are different now. However questions have been raised about whether, in its rulings, the judiciary is being accepted as credible in the eyes of the public. Some have urged for a change of the "collective mind-set" of the present judiciary.

Professor Max du Plessis raises the legitimacy dilemma sharply in a journal article: *The Constitutional Court and Public Opinion*. He observes that "[t]o strengthen respect for human rights, under the Constitution, the court is expected to be fearless in upholding rights in the sway of public opinion. But to ignore public opinion, Constitutional Court runs the risk of being labeled undemocratic and illegitimate." The essence of the dilemma he raised is that courts are duty-bound to give full effect to the Constitution in order to transform society.

However, if their judgments are substantially at odds with the dominant political and social views of society they may lose the respectability they so sorely need to function well.

Lessons from the recent jurisprudential past suggest that there is no one correct answer to the question posed. As I near the end of this lecture, I turn now to a few cases that highlight the inevitable tug of war, at the one level, between executive and judicial activity and, at another level, between judicial decisions and dominant political and social outlook.

Lessons from the recent past

I look first at decisions of the Constitutional Court which very well may be at odds with popular sentiment. In the death penalty case, *S v Makwayane*, the court took a strident stance that when it interprets the Bill of Rights it will not resort to head-counting as a reliable means of substantive reasoning. In essence, the court took the view that when it protects individual rights it does so even against the clamour of public opinion.

We know now that the *Makwayane* decision was met with angry response from the retentionist lobby, which frequently pointed to the rise in crime rates and alarming increases in atrocious crimes of violence.

Many have argued that the court has failed to reckon with the political character or implications of its judicial activity. And often the following statement by Kriegler J is called into question: "The issue is not

whether I favour the retention or the abolition of the death penalty [or] know whether this Court, Parliament or even the overwhelming public opinion supports the one view or the other. The question is what the Constitution says about it."

In a collection of decisions, the court has struck down a series of laws which discriminated unfairly against gays and lesbians. In another decision, the court held that gays and lesbians had the right to enter into a union akin to marriage.

There is no gainsaying the fact that gays and lesbians have faced the brunt of social prejudice in this country and elsewhere for centuries. The public mindset has not changed much. However, the jurisprudential stance of the court is that fundamental rights are meant to provide a dyke against the sea of popular prejudice provided that the Constitution requires the court to do so. The solution may very well be to amend the Constitution rather than require courts to respond to popular conviction which, in a diverse society such as ours, may very well provide partisan and inaccurate diagnoses.

In the terrain of indigenous law, the court has on a good few occasions adapted its rules, tainted by patriarchy, in order to give effect to the gender equality and dignity dictates of the Constitution. Many steeped in the indigenous tradition would not consider the rule that adult male offspring are entitled to all inheritance and status within the family to be offensive. However, mere public clamour for retention of this patriarchal arrangement ought not to weigh heavier than the express dictates of the Constitution to obtain equal worth for all.

In conclusion, on this aspect, it must be emphasised that the court is not alien to but part of the democratic ethos that the Constitution puts in place. It must operate fully conscious of the dilemma that confronts it. It must give effect to the democratic will of the people as expressed in the Constitution and in other legislation. It must remain alive to the collective mindset of the people over which it presides. It must find the careful balance between the dictates of the Constitution and public opinion that may be properly had in regard to resolving contested social claims.

On the other side of the scale, there are cases which Davis and Le Roux refer to as "lawfare". The learned writers refer to a recent work by John and Jean Comaroff, who describe "lawfare" as "politics ... [being] played out more in the courts". The layman's understanding is that this is political warfare that converts into legal warfare.

In the last 24 months our society has had a fair share of political contestations that have played themselves out in our courts and in the Constitutional Court in particular. There is no prize for guessing which cases I am referring to. You read about them every day or saw them on your television every other night.

Our court was called upon to deliver judgments in matters of grave public, if not political, controversy. We had to adjudicate on the fate of Mr Schabir Shaik; of Mr Billy Masetlha when his term as director general of intelligence was brought to an abrupt halt; on the bid of Mr Hugh Glennister to prevent the disbanding of the unit known popularly as the Scorpions; on the application of Mr Thabo Mbeki shortly after he had been recalled from his position as president; on a few interlocutory applications against the prosecution, brought by Mr Jacob Zuma, now our president; on the right of foreign-based South Africans to cast their vote in national elections; on the coercive incorporation of communities into other provinces.

In the words of Davis and Le Roux, in all these cases the elephant in the courtroom was the public. "Lawfares" inevitably opened courts to potential political criticism because the law is engaged to pursue battles that belong properly in the hinterland of political contestation. Lastly, in recent times the court had to mediate increasing conflict between the state and its citizens on matters that may loosely be described as service delivery. We have had to make determinations on access to water, to sewage and electricity; education in the language of one's choice; arbitrary eviction; and tenants' access to electricity.

In each of these cases, entrenched socio-economic rights were invoked. The court was well alive to the importance of allowing the executive a margin of appreciation in the execution of their constitutional duty, to diminish poverty and to facilitate a better life for all. However, where there had been blatant violation of socio-economic rights in the issue, the claims of the citizens concerned have been upheld.

Deputy Chief Justice Dikgang Moseneke presented this lecture on Thursday January 21 2010 as part of the University of Cape Town's Summer School, which featured four talks focusing on constitutional democracy and the Constitutional Court, 15 years after the establishment of the court. Advocate Michelle Le Roux's lecture in the series – the fourth and final one – will be published next week.