



The State of the Judiciary

"I think it is fair to say that what has happened in this country is both the legalisation of politics and the politicisation of the law."

Prof Hugh Corder

1. Introduction

In the 27 years of our democracy there has been no shortage of drama and scandal in the executive branch of government, culminating in the depredations of state capture during the Zuma administration. Numbers of ministers have turned out to be corrupt or incompetent, sometimes both simultaneously; the attempt at a government of national unity post-1994 did not last very long; factionalism within the ANC has interfered with the executive's task of running the country; and the gap between the development of policies and plans on the one hand, and their implementation on the other, is as vast as ever.

The legislature, too, has not always sailed smoothly. There is broad consensus that the pure proportional representation system gives far too much power to political parties, and that MPs prioritise party loyalties over their constitutional role as public representatives. Parliament has seldom carried out its duties of executive oversight with proper diligence and integrity, and its presiding officers have too often sought to shield ministers from much-needed scrutiny. In recent years, major occasions in the National Assembly have been reduced to a circus by the opportunistic antics of the EFF, and the level of debate on the floor of the Assembly is generally less than edifying.¹

Amidst all this, the judiciary stands out as competent, effective, true to its constitutional

mandate, and fit for its purpose. Certainly, a few judges have behaved questionably, even deplorably, (which will be dealt with below) but the institution as a whole has performed well. At the low point of constitutional governance in the latter years of the Zuma period, the courts were widely regarded as the 'last bastion', a 'bulwark' that stood firm against an avaricious governing elite and upheld the rights of the governed.

But a question is now arising as to whether, just as the country slowly, and by no means certainly, emerges from an era in which the executive and the legislature deviated from their constitutionally-appointed paths, it is now the judiciary that is beginning to wander a little. This briefing paper, which is partly based on a recent CPLO/Hanns Seidel Foundation online discussion,² attempts to answer that question.

2. Background

In the traditional scheme of democratic governance, the judiciary forms one of the three 'arms of government', along with the legislature and the executive. For a democracy to function optimally, each of these arms must carry out its constitutional role faithfully, and without undue interference by the other two. The notion of the separation of powers refers to the delicate balance of mutual independence and mutual

accountability that ideally exists between the three arms.

When one of the three deviates from its constitutional mandate, the others must intervene and bring it back on track, and the Constitution provides various mechanisms and guidelines for this to happen. In South Africa we have become used to seeing the courts playing this role. On occasions far too numerous to mention, judges have found executive decisions, actions or omissions to have been unlawful or unconstitutional, and have gone so far as to make personal costs orders against ministers. Less often, but still quite regularly, they have ruled against Parliament, finding that it has passed Acts that are unconstitutional or procedurally suspect. By and large, the other two branches of government have accepted these judgements, even if they have sometimes failed to carry out the remedial steps ordered by the courts.

Up to now, our courts have managed to retain the respect and confidence of both the broad political class and the citizenry; with a few exceptions, our judges have earned and enjoyed professional credibility and high social standing. Lately, however, there are worrying signs that all is not as it should be with the judiciary. Some of its problems are internal, stemming especially from improper conduct by some of its own members. Some are of a procedural nature, especially where the main instrument of judicial discipline, the Judicial Service Commission (JSC), is concerned. And some are external – particularly the growing tendency of some politicians to target individual judges or courts as part of their never-ending struggles for power and advantage.

3. Problems within the Judiciary

In recent months we have seen South Africa's Chief Justice, Mogoeng Mogoeng, found guilty of misconduct by a Judicial Conduct Tribunal for entering into political controversy by making remarks that were critical of the government's foreign policy regarding Israel.³ Justice Mogoeng is challenging this finding in the courts. He also made a very ill-advised and medically ignorant remark about COVID-19 vaccines, again trespassing on territory in which as a judge he has no expertise at all, but where he does have the ability, given his profile, to cause significant harm.⁴ Most worryingly, perhaps, the Chief Justice has stubbornly refused to concede that in either of these matters he was at all out of line; this is

arguably not the type of example a country wants from its top judge.

We have also seen the country's longest-serving provincial Judge President, John Hlophe of the Western Cape Division of the High Court, found guilty of gross misconduct for improperly attempting to influence two Constitutional Court judges to violate their own oaths of office back in 2008, when one of Jacob Zuma's many corruption-linked cases was before that court. Judge Hlophe also faces a number of other allegations and investigations, one of which involves an alleged assault of his wife (also a judge in the division)⁵, and another of which concerns an alleged assault by him of Judge Mushtak Parker.

Judge Parker, in turn, is being investigated on two counts – that he gave untruthful answers at his interview for appointment as a judge; and that he either lied under oath about having been assaulted by Judge Hlophe; or lied later, when he denied that such an assault had taken place.⁶ Last year eleven other judges of the Western Cape Division signed a letter indicating that they would not sit with Judge Parker as a result of these allegations. Over and above this, the Deputy Judge President of the Division, Patricia Goliath, is being investigated for her possible involvement in an alleged domestic dispute between Judge Hlophe and his wife.

Elsewhere in the country, Judge Tintswalo Makhubele of the Gauteng High Court was suspended late last year when it emerged that she had continued in office as Chairperson of the Passenger Rail Agency (PRASA) after being appointed to the Bench. Judges are not permitted to do other remunerative work without special permission being granted and, in any event, her position at PRASA placed her in the executive branch of government, thus violating the principle of the separation of powers.⁷ Going back a little further, Judge Mabel Jansen, also of the Gauteng High Court, resigned in 2017 after a series of racist tweets by her was published.⁸ Still further back, in 2007 Judge Nkola Motata drove his car into a wall while under the influence of alcohol and proceeded to racially insult the complainant in the case. He was eventually fined R1 million, but was not removed from the Bench. According to what appears to be the most recent research on the issue, and apart from the instances already mentioned, the only other disciplinary steps taken against judges concern long-outstanding judgements and, in one case, a failure to disclose financial interests.⁹

Finally, on self-inflicted damage, we must return to the Chief Justice. During the week of April 12th this year the Judicial Service Commission, which he chairs, conducted public interviews of candidates for the Supreme Court of Appeal and the Constitutional Court, amongst others. During these hearings various judges were pointedly questioned, and in one case, openly attacked, on a political basis by the EFF's leader, Julius Malema, who sits on the JSC as a parliamentary representative. Far from defending these judges from egregious questioning, Justice Mogoeng, in the words of one commentator, "piled on the pressure" against one of them, and in a manner that was "truly mind-boggling", allowed another to be questioned by Mr Malema about a damages award he had made against the EFF.¹⁰

Chief Justice Mogoeng has for quite some time had a reputation as something of a maverick, and he is not known for his sense of restraint. But it is a pity that, as he nears the end of what has generally been regarded as a successful term of office, in which he guided the Constitutional Court and the judiciary as a whole through some difficult encounters with the forces of state capture, various aspects of his conduct have become the subject of disciplinary investigation and of adverse professional comment.

4. The Judicial Service Commission

The JSC has two main duties – to interview and select candidates for judicial office, or for promotion to higher office;¹¹ and to carry out inquiries into judges' fitness for office, including disciplinary matters. Over the years of its existence, according to Prof Hugh Corder, it has carried out the first of these roles well: "I would say, broadly, on appointments [it] has done well [and] it's done well on demographic transformation in the judiciary. The JSC has [appointed] people of integrity, people of good working habits, and people who can be trusted and who enjoy the support of the profession and the wider public." There is little doubt that, up to now, Prof Corder's view in this regard has been widely shared by commentators and legal academics.

The same, unfortunately, is not true when it comes to the JSC's other main responsibility. Prof Corder again: "It is in the area of judicial discipline [...] that it has failed ignominiously from the beginning to the end." The twelve-year gap between the laying of a complaint by two Constitutional Court

judges against Judge Hlophe in 2008, and the decision to have the complaint investigated by a Judicial Conduct Tribunal at the end of 2020, exemplified "the paralysis of the JSC as far as judicial discipline is concerned."¹²

The principle of having an independent body to assess and recommend candidates for the judiciary is a good one, and it ought to avoid the kind of hopelessly over-politicised appointment process that the world has seen in recent choices for the United States Supreme Court. The JSC's interviews are held in public, which provides good transparency, and the nominees are often subjected to very probing questioning. There is no doubt that this method of selection has contributed to the generally high standard of judges appointed to our courts since 1994.

Just lately, however, concerns have started to emerge about the extent to which the JSC may be becoming a theatre for political and ideological battles. In part this stems from the fact that as many as 16 of its 25 members can be professional politicians (although at present only 11 are); in part from the reality that in South Africa almost anything that can be politicised, will be; and in part from the rather odd way – already mentioned – in which Chief Justice Mogoeng allowed political attacks on certain candidates during last week's hearings. Reflecting on what she witnessed there, the legal journalist Karyn Maughan wrote as follows:

"One thing is clear though: in circumstances where judges have found themselves personally targeted by the often very powerful people they rule against, the JSC has done little to nothing to publicly support or protect them from spurious and unsubstantiated attacks. In fact, it now seems that any judge who makes a politically controversial decision - or presides over a case where powerful interests are involved - must do so with an awareness that it may cost them professionally. There's something very, very wrong with that."¹³

It is too early to conclude that the JSC's selection process has become politically compromised, and we should not overreact to the predictable demagoguery of certain politicians; but at the same time we should not be so naïve as to think that the battle between those who favour the rule of law and constitutional governance, and those for whom politics is about the acquisition of power and wealth, will not spill over into judicial territory.

When it comes to the JSC's disciplinary role, there is much greater cause for complaint. It is hard to think of anything more likely to bring the judiciary into disrepute than for a senior judge to try to influence two other senior judges to render a politically convenient decision. That is the essence of the charge against Judge Hlophe and it was surely in the interests of everyone concerned, never mind the national interest, for it to be dealt with expeditiously. Instead, partly but by no means entirely due to Judge Hlophe's own delaying tactics, the matter has dragged on into its thirteenth year.

There appears to be a fear among members of the JSC that the impeachment and removal from office of a judge would be somehow an admission of defeat. Perhaps it is also felt that the removal of this particular judge, an early standard-bearer in the transformation of the Bench away from its apartheid past, would be a particular setback. The truth, rather, is that it is the JSC's failure to deal with the charges against Judge Hlophe, instead turning them into a veritable saga, which constitutes a defeat for justice and a setback for the reputation of the judiciary as a whole.

Unfortunately, even now that its Judicial Conduct Tribunal has found Judge Hlophe guilty of gross misconduct, the JSC is showing not the slightest sense of urgency in taking the matter to the next step. According to its spokesperson, Adv Dali Mpofu SC, the JSC regards the matter as "nothing special"; it will meet to begin considering the Tribunal's report on June 4th. South Africans deserve far better from an institution that is supposed to ensure that judges are faithful to their oaths of office and accountable to the people on whose behalf they serve.

5. Political Attacks on the Judiciary

The first thing to note about political rhetoric against judges is that it is not a new phenomenon. Ten years ago the then Deputy Chief Justice, Dikgang Moseneke, spoke out against what he termed 'wanton' attacks on the judiciary by politicians including the then ANC secretary-general, Gwede Mantashe and its then chief whip, Mathole Motshekga.¹⁴ On numerous occasions over the years governing party representatives have complained about decisions that have gone against them or their party in terms that suggested they saw the courts not as partners in the grand task of reforming and transforming South Africa,

but as obstacles to be dealt with. Prof Corder puts it this way: "The problem is, and it is a real problem, that the commitment to principle and the appropriate role of the Constitutional Court and the judiciary more broadly, comes at a price; and the price is overt hostility from the executive, from the legislature and from dominant political party leadership."

However, even if this kind of hostility is not new, it does seem to be intensifying in certain respects at the moment; but recent examples are of a narrower, more personal kind, even if they are disguised as matters of principle or even of solicitude for the integrity of the courts. It is no surprise, therefore, that among the loudest voices raised in criticism of the judiciary are those of politicians who are either facing criminal charges or whose long-term ambitions may be stymied by potential clashes with the law. Thus, as part of his battle to avoid having to account for his role in state capture, in March this year Jacob Zuma launched an attack on what he called "judicial dictatorship", warning that "when people rise up against [it] our young democracy will unravel..."¹⁵ In his latest broadside against the Constitutional Court, delivered as it decides whether to convict him of contempt of court, he accuses the judges of having "abused their powers [by taking] away rights that were accorded to me by the Constitution."¹⁶

This talk of people's disaffection with the judiciary echoed what Julius Malema said in Parliament during the debate on the State of the Nation Address, not long after his famous 'tea party' meeting with Mr Zuma: "[T]he people will rise against such few judges who have made themselves the law and are conspiring with politicians to deal with the opponents of the current establishment."¹⁷ Accusations of 'judicial dictatorship' have also been made by the Zuma-supporting Carl Niehaus¹⁸, while in the Eastern Cape his staunch ally Andile Lungisa¹⁹ accused the judges who sentenced him for assault of being unduly influenced by "political and familial affiliations."

Given that there is not the slightest evidence that 'people' are unhappy with the courts, or that there is any sort of 'uprising' on the cards, it must be asked what the purpose of this seemingly orchestrated series of attacks might be. In the view of the Council for the Advancement of the SA Constitution (CASAC), they are "designed to distract from the processes of our courts and the

Zondo Commission of Inquiry, which seeks to hold public officials to account.”²⁰

What we have, then, is a situation in which various populist and opportunist politicians are seeking either to intimidate the courts or, if that doesn't work, to paint themselves as victims of biased judges. In this way, when they are convicted they can try to claim some kind of martyr status and thereby rally support. Unfortunately for them, there is as yet no indication that this strategy is succeeding.

Indeed, we should take some comfort from these attempts to undermine the judiciary; it is only because, by and large, the judges are doing their job calmly and professionally, faithful to their constitutional mandate that these desperate measures are being resorted to.

6. Conclusion

It was mentioned earlier that in the dimmest days of the state capture project, when various public institutions were being suborned, the courts were seen as the 'last bastion': the rest of the constitutional edifice was crumbling, to one extent or the other – especially the executive and the legislature, but also such bodies as the National Prosecuting Authority, the Public Protector, the Police Service, the Hawks, etc. – and thus the only hope of sustaining the rule of law and the legal order lay with the courts.

This may well have been the case, but there is also a sense in which the courts are always the last resort: when all other methods – negotiation, bargaining, political compromise, begging and

pleading – have failed, we turn to the judges. That is what they are there for. It becomes a problem, though, when this happens almost as a matter of course; when litigation takes the place of political negotiation and compromise. Then, politics becomes legalised and the law risks becoming politicised. This state of affairs certainly obtains in South Africa at present.

Despite this, however, and despite all the issues discussed above, we are not in a situation of crisis. Of our approximately 270 judges, all but a handful go about their business quietly and diligently. Our courts are not the most efficient in the world, but neither are they the least. Very few people who pass through the legal system have genuine reason to complain about the outcome and, if they do, their grievance can almost always be addressed on appeal or review.

Perhaps most importantly, our judges remain independent. There is no evidence that judges are susceptible to inducements or that they use their office to advance specific agendas. If there are one or two headline-grabbing exceptions, then it is precisely because they stand out from the norm that they attract attention. The fact that the highest court in the land is contemplating the conviction and sentencing of a former President, and is doing so in a considered and procedurally rigorous manner, despite considerable political pressure, is indicative of a judiciary that knows what its constitutional task is, and which is prepared to live up to that task.

If the same could be said for the other two arms of government, especially the executive, our country would be in much better shape than it is.

Mike Pothier
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¹ It must be noted that the situation is very different in Parliament's committees, where there is usually a much more constructive approach to the job of making laws. There is less grandstanding and less of a tendency to play to the cameras.

² *"The State of the Judiciary"*, held on 5th March 2021, and addressed by Prof Hugh Corder, former Dean of the Faculty of Law, University of Cape Town, and Ms Alison Tilley and Mr Mbekezeli Benjamin of the organisation *Judges Matter*. The full presentations of the speakers are available in video and podcast format on the CPLO website, www.cplo.org.za. For the purposes of both the online discussion and this paper, 'the judiciary' refers to the judges of the various divisions of the High Court (and the specialised courts such as the Labour Court), the Supreme Court of Appeal, and the

Constitutional Court. Although some magistrates consider that they should be included under the heading 'judiciary', that is not yet an established practice.

³<https://mg.co.za/news/2021-03-05-judicial-conduct-committee-orders-mogoeng-to-apologise-for-his-remarks-about-sa-israel-relations/> Contrary to some assertions, the Chief Justice was not targeted for being 'pro-Israel', but rather for crossing the very clear boundary that is meant to prevent serving judges from taking public positions on policy matters that are the responsibility of another arm of government.

⁴<https://www.iol.co.za/pretoria-news/news/covid-19-charges-against-chief-justice-mogoeng-mogoeng-over-devil-666-anti-vaccine-stance-c3fa8c22-bb44-4887-9a03-350492a91044>

⁵<https://www.dailymaverick.co.za/article/2021-03-09-judicial-conduct-committee-recommends-tribunal-to-hear-evidence-of-john-hlophes-alleged-spousal-abuse/>

⁶ <https://mg.co.za/news/2020-06-11-mushtak-parker-gross-misconduct-judicial-committee/>

⁷<https://www.news24.com/news24/southafrica/news/judge-tintswalo-makhubele-is-suspended-but-is-still-hearing-cases-20201111>

⁸ <http://www.702.co.za/articles/13387/twitter-uproar-over-judge-mabel-jansen-s-racist-rape-remarks>

⁹ <https://hsf.org.za/publications/hsf-briefs/judging-the-judges>

¹⁰[https://www.dailymaverick.co.za/opinionista/2021-04-18-judicial-service-commission-hearings-were-a-disturbing-show-of-intimidation-impropriety-and-indecency/?tl_inbound=1&tl_groups\[0\]=80895&tl_period_type=3&utm_medium=email&utm_campaign=First%20Thing%20Monday%2019%20April%202021&utm_content=First%20Thing%20Monday%2019%20April%202021+CID_c3f594b956fa61d0890984972c9da7ed&utm_source=TouchBasePro&utm_term=Judicial%20Service%20Commission%20hearings%20were%20a%20disturbing%20show%20of%20intimidation%20impropriety%20and%20indecency](https://www.dailymaverick.co.za/opinionista/2021-04-18-judicial-service-commission-hearings-were-a-disturbing-show-of-intimidation-impropriety-and-indecency/?tl_inbound=1&tl_groups[0]=80895&tl_period_type=3&utm_medium=email&utm_campaign=First%20Thing%20Monday%2019%20April%202021&utm_content=First%20Thing%20Monday%2019%20April%202021+CID_c3f594b956fa61d0890984972c9da7ed&utm_source=TouchBasePro&utm_term=Judicial%20Service%20Commission%20hearings%20were%20a%20disturbing%20show%20of%20intimidation%20impropriety%20and%20indecency)

¹¹ Most judges are appointed by the President from lists presented to him or her by the JSC. The exceptions to this rule are, strangely enough, the four most senior judges of all – the heads and deputy heads of the Constitutional Court and the Supreme Court of Appeal. Here, the JSC plays a merely consultative role.

¹² Prof Corder's analysis can be found at <https://www.cplo.org.za/videos/>

¹³<https://www.news24.com/news24/opinions/fridaybriefing/karyn-maughan-mogoeng-malema-and-the-judges-inside-the-jsc-hearings-that-shook-the-judiciary-20210415>

¹⁴ <https://www.news24.com/witness/archive/ball-in-the-court-of-politicians-20150430>

¹⁵<https://www.news24.com/news24/analysis/analysis-angry-zuma-launches-extraordinary-attack-on-courts-warns-democracy-could-be-reduced-to-ashes-20210326>

¹⁶<https://www.news24.com/news24/southafrica/news/just-in-zuma-tells-mogoeng-he-is-resigned-to-being-a-prisoner-of-the-constitutional-court-20210414>

¹⁷ <https://ewn.co.za/2021/02/17/malema-warns-of-uprising-against-corrupt-members-of-judiciary>

¹⁸<https://citizen.co.za/news/south-africa/politics/2445489/have-you-lost-your-mind-mkmmas-niehaus-calls-judiciary-a-dictatorship/>

¹⁹<https://www.news24.com/news24/southafrica/news/remarks-allusive-and-false-judiciary-responds-to-allegations-of-political-interference-by-andile-lungisa-20200923>

²⁰<https://citizen.co.za/news/south-africa/politics/2445630/casac-condemns-devious-despicable-attacks-on-sa-judiciary/>



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