Executive control over the judiciary*

L Mpati, Supreme Court of Appeal

In all my years at the Bar in Grahamstown – of course they were not many – this is the closest I have ever been to a GCB annual general meeting. I have always felt that my early appointment to the Bench (not in terms of age, for I was already 47 years old on my permanent appointment) robbed me of an opportunity one day to serve on the GCB. But in a sense I do now, and have since 1997/98, served as a moderator on the National Bar Examination Board.

The relationship between the High Court Bench and the Bar has over the years been a very strong one – I suppose it had to be, precisely because appointments to the High Court were historically almost exclusively from the Bar, ie from the ranks of senior counsel. And because judges could not (and still should not) react or respond to criticism or attack, however unfounded and from whatever source, such relationship translated into a responsibility on the part of the Bar to take up the cudgels on behalf of the Bench. I hope that the changes to the old system of appointing judges brought about by our democratic order have not relieved the Bar of that responsibility.

But I do not think that judges have ever expected protection from the Bar, even when criticism was warranted. And indeed, if judges begin to whine and scream for no reason, the Bar should be able to call them to order.

Early this year, the National Executive Committee of the ruling party released a document containing a statement to the effect that there was a challenge to transform the 'collective mindset' of the judiciary to bring it into line with the aspirations of the 'millions who engaged in the struggle to liberate our country from white minority domination,' and further that many within the judiciary 'do not see themselves as being part of these masses, accountable to them, and inspired by their hopes, dreams and value systems'. As would have been expected, this loaded statement drew comments of concern from many quarters. Within the judiciary itself concerns were raised, for the statement involved judges – no doubt about that. One can accept that some suspicion would be harboured by the ruling party (and maybe the masses) towards those judges who already held office as such at the time of the introduction of our constitutional dispensation, and it would therefore be necessary to transform their 'collective mindset' so as to bring it in line with constitutionalism.

The late former Chief Justice of Zimbabwe, Enoch Dumbutshena, showering accolades on the Constitutional Court, once advised South African judges that to contribute to building a democratic order and the upliftment of the poor they should, from their high chairs, look through the windows and see the effect of their judgments on the ordinary people. I can, therefore, accept too that a judge who fails to do that and who has no concern about the effect of his judgments on the ordinary and the poor, can be described as one who does not see him- or herself as being part of the masses. I have difficulty in understanding the concept, however, of judges being accountable to the masses. I say this because, upon appointment to the Bench, judges swear or affirm solemnly that they will be faithful to the Republic of South Africa, uphold and protect the Constitution and the law, which they must apply impartially and without fear, favour or prejudice. According to the late Chief Justice Ismail Mahomed:

'What judicial independence means in principle is simply the right and the duty of judges to perform the function of judicial adjudication through an application of their own integrity and the law, without any actual or perceived direct or indirect interference from or dependance on any other person or institution.'

Mark Ellis, the executive director of the International Bar Association, in an article in the *Sunday Argus* of 23 January 2005, an extract of which was published in 2005 April *Advocate* 21, says the following:

'It is important to emphasise that judicial independence also requires judicial accountability. However, striking a balance between independence and accountability is a tempestuous challenge. In return for the independence guaranteed to judges, society trusts that they will act fairly and impartially when reaching their decisions.'

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And in much the same vein as the late former Chief Justice of Zimbabwe, he continues:

'Society has a right to demand from the judiciary sensitivity to and awareness of the many issues that affect the lives of its citizens. If the judiciary fails to understand this responsibility, it will surely lose credibility and, ultimately, perish.'

If by the allegation that many in the judiciary do not see themselves as being accountable to the masses, the ruling party means that many in the judiciary fail to act fairly and impartially when reaching their decisions or are not sensitive to the many issues that affect the lives of the country's citizens, then the statement is justified if indeed there is evidence of such shortcomings in the judiciary. But is this what it means? Does the ruling party not consider itself as representative of the masses and that therefore the judiciary should be accountable to it? Mark Ellis correctly observes that there will always be an inherent tension where judges, who interpret the law in controversial cases, hold views that are in conflict with those of the government. In this regard one thinks of the *Grootboom*, *Treatment Action Campaign* and *Pharmaceutical Society* cases.

That is where our concerns lay as the judiciary. But such concerns were put to rest by the chair of the GCB in an article in the *Mail & Guardian* of 14 January 2005 in which he responded to criticism raised against the statement of the ruling

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party. That article, the heading of which was in the form of a question – 'A threat to the judiciary or much ado about nothing?' – was reproduced in 2005 April *Advocate* 22 where the author says:

'What is important is whether judicial decisions are good in law, and whether they are justifiable in relation to the reasons given for them.'

He then concludes by saying:

'We are in the fortunate position … that this government has a good track record of abiding decisions made against it in many important cases. There is therefore no cause or reason for alarm.'

But that assurance has been shortlived. In April 2005, the judiciary were invited by the Minister of Justice and Constitutional Development to a colloquium in Johannesburg to consider and comment on certain Bills that relate directly to the judiciary, being, *inter alia,* the Superior Courts Bill, South African National Justice Training College Draft Bill, Judicial Conduct Tribunals Bill and the Constitution of the Republic of South Africa Amendment Bill. Except for the last-mentioned Bill, the others had been agreed upon between the judiciary and the previous Minister of Justice and Constitutional Development, but now certain amendments have been effected which are of grave concern to the judiciary.

To start with, the Constitution Amendment Bill seeks to introduce, amongst others, subsections (6) and (7) to section 165 of the Constitution. Subsection (6) will read:

'The chief justice is the head of the judicial authority and exercises final responsibility over the judicial functions of all courts.'

Taken as it is, this proposed insertion is totally benign: the Chief Justice is the head of the judicial authority. But then clause 11(2) of the Superior Courts Bill provides that:

'The chief justice, as head of the judicial authority … exercises final responsibility over the judicial function of all courts … including the direction and supervision over court sittings and the assignment of judicial duties referred to in subsection (5).'

The proposed subsection (5) says that 'the direction and supervision over court sittings and the assignment of judicial duties include…the power to –

(a) ….

(b) assign judicial officers to sittings;

(c) assign cases and other judicial duties to judicial officers;

(d) determine the sitting schedules and places of sittings for judicial officers; …'

These functions have always been the responsibility of the heads of court. What the proposed provisions seek to do is to empower the Chief Justice to, for example, give a directive that certain judges in the SCA should sit in a particular case, thus overriding allocations made by the head of that court. Surely that would be an untenable situation? It has never been part of our judicial tradition, nor is it consistent, in my view, with fundamental constitutional principles.

In line with the proposed subsection (7) of section 165 of the Constitution, which will confer upon the Minister final responsibility over the administrative function of all courts, clause 12 of the Superior Courts Bill proposes the establishment of the office of the Chief Justice, comprising an executive secretary to the Chief Justice, who, together with other personnel in that office, will be officers of the department. The executive secretary will be appointed by the Minister after consultation with the Chief Justice. The other personnel will be appointed by the director-general of the department.

The question is: Why does the department want to have influence in the office of the Chief Justice? Why can't the Chief Justice appoint his or her own executive secretary and support staff?

There are other proposed provisions in the Superior Courts Bill which are quite objectionable to the judiciary, including one requiring ministerial approval for a judge to be absent from the court where he or she is permanently stationed unless such judge is officially on leave, an aspect that has always been in the hands of the heads of court. In my view, this new statutory micro-management will have the effect of bureaucratic interference in the functioning of the courts and will offend against judicial independence.

The judiciary accepts that there may be failures on the part of certain judges to perform their judicial functions properly and conscientiously, but this is not prevalent. Most, if not all, judicial officers who are not currently subject to civil control are capable of and do exercise self-discipline in the performance of their functions. We recognise nonetheless that there are concerns; we recognise too that there must be transformation – this is a constitutional imperative – but we do not believe that these should be addressed by asserting parliamentary control over the manner in which judicial functions are performed.

There are also provisions in the other pieces of proposed legislation that are objectionable, but I shall not burden you with these. Suffice it to say that all these objections were raised at the colloquium as the judiciary had been invited to comment on them. Well, the following extract from an article in *Business Day* of 12 May 2005 is the response we received from the Deputy Minister:

'Obviously, when the self-interest of the judiciary is at stake, it should be consulted, but the process must take place within the confines of the separation of powers, with the constitutional mandate of each branch of government being respected and promoted. To this end, the judiciary must refrain from undertaking or participating in policy formulation or legislation-drafting processes, which could raise the spectre of impropriety, constitutional invalidity, or undermining of the separation of powers.'

Well, the answer is simple, is it not? Do not invite the judiciary to comment on legislation, even if such legislation affects it.

Let me emphasise, in conclusion, that the judiciary is not opposed to measures that will address shortcomings in the efficient functioning of the courts and the enhancement of public confidence. The objections relate to the manner in which this is sought to be achieved. Corrective measures are to be achieved rather by enhancing, and, where necessary, introducing, self-regulatory measures within the judicial institution. The exercise of parliamentary or executive control over the judicial function is inherently destructive of the separation of powers, irrespective of whether that control operates benignly in particular cases.

One can only hope that, in the end, all this will prove to have been much ado about nothing! 🕮