Advocates and outcomes: responding to the Hlophe saga

We live in a constitutional democracy. The good that advocates do is that we serve the constitutional democracy. We do, of course, all kinds of evil too. And we do all kinds of good besides serving the constitutional democracy. We may, for example, be cruel. Or we may be kind, and act accordingly. We are, in short, human beings. But, as advocates, acting as advocates, what we do - or rather, what we are supposed to do - is to serve the constitutional democracy. In particular, we are to serve the idea of constitutional democracy. The idea of constitutional democracy is partly a great fiction. This, however, is a very important fiction. The fiction is that we, the citizens of this country, have concluded a social contract that governs our lives in dignity and autonomy. This contract we concluded in part as a settlement of conflicts amongst ourselves that threatened (and still threaten) to tear our society apart. This contract is embodied in the Constitution. The fiction is that this Constitution justifies our current social order. The idea is that it is the right thing to do to subscribe to this Constitution, to ask ourselves what it tells us about what we should and should not do, about what we may or may not have, take, and ask for as a society and as citizens within that society.

Who is it that answers these questions for us? The judges. What about the people's representatives in parliament? No, the judges tell them whether and to what extent they are entitled to give, to take, to build and to break. The man who knocks on the window of my expensive motor car and asks me for a slice of bread, while I hope to God he has no intention violently to relieve me of the car or of my life, is expected to accept that his fate is governed, and rightly so, by this contract, by these judges. He is also to accept it, should one of these judges order the agents of the state by force to confine him to a cell for several years if he expresses his discontent with his fate in ways that threaten the social order. We, as a society, are also to accept it. It is what the constitutional democracy has decided must be. It is, therefore, in some way that is decisive to our continued existence as a society, right.

Now of course, only a fool would think it is always 'right', in all meaningful senses of the word. Judges, like advocates, are human. They too, do good and evil. Some do more good than others, and some more evil. Is it not then our moral duty to say, when we think the judges have got it wrong, that it is not right? Is it not then our moral duty to say that that which is not right cannot be forced upon others, and to accept as legitimate the actions of the rebel who has been wrongly condemned? What about the actions of the rebel who sees no reason to accept a constitution that does not allow him to take from those who have more than they can ever hope to consume just enough to make him comfortable? Is it his moral duty to accept the say-so of the judges who will tell his elected representatives how far they can go when interfering in the comfort of those others? Or is he entitled to rebel and to say 'to hell with the constitutional order; I insist on a decent life?'

We may not, and I dare say we should not, in good conscience, as human beings, all have answers to these questions that are too glib, or too simple. But as advocates, when we act as advocates, our advocacy must serve the idea of constitutional democracy. We may have different notions of how best to do so. But we must always serve the fiction, and serve it faithfully. That is, unless we believe the time has come for revolution, for rebellion, for rejection of the fiction.

The work of the German jurist Gustav Radbruch was a precursor to some of the agonising debates that did the rounds in South Africa during the apartheid years about fidelity to law in a system where the law is often so bad that the notion of fidelity to it can retain no redeeming feature.

The work of the German jurist Gustav Radbruch was a precursor to some of the agonising debates that did the rounds in South Africa during the apartheid years about fidelity to law in a system where the law is often so bad that the notion of fidelity to it can retain no redeeming feature. Radbruch, dealing with Nazi laws, expressed the idea in rather simple terms - when law becomes so unjust that any right-thinking person would recognise it as unjust, it ceases to be law in the sense of attracting that element of fidelity that something warrants merely for being the law. When the system has lost its entitlement to command respect merely for being the legal order of the day, then the lawyer is, as lawyer, entitled to say that he or she rejects its outcomes as a matter of law, and speaking as a lawyer.

This may sound to some like nothing more than delusion. It may be said to dress up a rejection of the law and the legal order in favour of some overriding moral compulsion as some mystical acceptance of the real or true law. Still, it is not an incoherent notion for the lawyer to recognise an argument that says: 'for the sake of true constitutional democracy, I reject this outcome which is a betrayal of true constitutional democracy'. Such an argument, however, is very difficult to distinguish from the argument for revolution, which says 'because this
social order does not conform to the principles I hold dear, I reject it and its outcomes as illegitimate.’

The debate about the best way for advocates, as advocates, to react to the saga involving, for want of a better term, the unfulfilled attempt to impeach the Chief Justice of the Cape, Judge John Hlophe, is characterised by two strands. The first strand is a tremendously destructive, and tragically unnecessary, racial brawl. The matter is approached as one of racial politics, as if the merits of one’s position on the issues depended on racial politics. Whether and to what extent in truth racial politics animate, fuel, or even bring about the debate I do not know. What I do know is that the important principles at play have nothing to do with racial politics.

The other strand in the debate echoes the voice of Radbruch. Those who believe that advocates ought, as advocates, publicly, to decry the outcome (or absence of an outcome) do so, not because they think a revolution is justified or that our constitutional order is illegitimate, but because they think that in this way they serve the idea of constitutional democracy best.

In this they are gravely wrong.

It is important to consider the fact that most of those who believe that they ought, as advocates, and publicly, to denounce the outcome, draw a distinction (or would if asked) between this particular outcome (that of the JSC process) and the verdict or judgment of a court of law of final appeal. They would feel justified in rejecting the former but compelled to accept the latter as inherent in serving the idea of constitutional democracy on the basis that the former is a political process whereas the latter is a legal one. We are, they would say, not bound to accept the say-so of politicians as legitimate, whereas we understand that we must foster acceptance of the say-so of judges if we are to serve the idea of constitutional democracy.

This distinction, while interesting jurisprudentially, appears misconceived in a South African constitutional context. What it forgets is not only the fact that the final authority to determine the question whether a judge is fit and proper to serve as a judge is constitutionally granted to parliament (on motion from the JSC), in precisely the same way as final authority on the interpretation of the constitution and the Bill of Rights is constitutionally granted to the judges.

More fundamentally, it also forgets that the very legitimacy of the supremacy of the judges depends critically upon the authority of the JSC (and, when it comes to their status as fit and proper, ultimately of parliament), as provided for in a very particular structure in section 177. Does this particular form of supervision violate some essential attribute of the trias politica? Maybe. But it is our contract. It is what we buy when we sell the idea of constitutional democracy to those who are at the wrong end of the law and of the social order. And if the trias politica is indeed fatally violated by this structure, the problem will lie with section 177, not with the outcome of the process in the saga about Judge Hlophe.

Have we reached a point in our constitutional order where rebellion is mandated if we do not like, or do not understand, the outcome in this matter? I think not. What, apart from their thoughts on the merits of the outcome itself, can those who would want to denounce the outcome publicly as advocates, point to as the rot in the system that justifies rebellion? Where is the pervasive illegitimacy in the legal order that makes it politically legitimate to reject its processes as undermined? Is the idea of constitutional democracy better served here by acceptance of the outcome as legitimate (and therefore, at some fundamentally important level, as right), or by signing petitions publicly expressing our dissatisfaction with the outcome? Do we have a principled basis for distinguishing rejection of this outcome from rejection of any other constitutionally mandated outcome we happen to disagree with? Do we foster respect for the integrity of the law and of our judiciary by accepting the outcome, or by rejecting it whilst continuing to act as advocates in a judicial system in which we have publicly denounced a Judge President as unfit to be a judge?

The problem is that we cannot deny that this particular matter is at the heart of the idea of constitutional democracy. This is far truer of this case than of the outcome of any particular court case. At issue is the legitimacy of the supervision of the judiciary by the JSC and parliament, which in turn underpins the legitimacy of the supremacy of the judiciary in the first place.

In 2000, many people in the United States felt, on very good grounds, that Al Gore had duly won the Presidential election, and that the United States Supreme Court had thereafter come to a decision, in confirming the Bush appointment, that was bad in law, intellectually dishonest and the product of pure party politics. The fact that the Bench split along Republican-Democrat lines did not help. At stake was the government of the most powerful nation in the world. There could be no case where the stakes could be higher and the call for following the ‘truly correct’ outcome more pressing. For the sake of true democracy, it mattered whether the people actually chose Gore or Bush, whatever the courts said about this. The Americans went to court rather than to war. The outcome was far from perfect (I think hindsight might say it was tragic), and the legal process was far from immune to grave and crippling criticism. Yet it is a great credit to the legal culture of the United States that the nation overwhelmingly accepted the outcome of the Supreme Court decision as legitimate, and therefore, at a fundamental political level, as right. This is because of the vast internalisation in that country of the idea of constitutional democracy. Well might we, as lawyers, try to foster such an internalisation here.