

Eastern Cape Bar Dinner

At a recent Bar dinner held in Port Elizabeth the following speech was delivered by the guest speaker, former Supreme Court of Appeal President Craig Howie:

It gives me a feeling of great warmth and nostalgia to be invited to dinner by my Bar. I had frankly lost track of how much time had passed since 1985 when I moved to Cape Town. It is now more than the period I spent in the Eastern Cape. But seeing so many old and friendly faces - only slightly older? - and the memories flood back.

I think we all know that what one achieves at the Bar or on the Bench is never just the product of one's own efforts. It is hugely influenced by interaction with colleagues and by learning from their skills and experience. In that regard I was especially fortunate to practise at the Bar and to serve on the Bench. The standards of industry and personal conduct set by seniors and contemporaries was exemplary. I have no reason to think things here today are different. But the importance of setting such examples is this.

One of the criteria major foreign investors want to have met before committing their money is whether the country they have in prospect has an independent judiciary, functioning effectively and with integrity. The recent past has seen the position in our country clouded with doubt. Albeit that very serious allegations of misconduct have not yet been resolved in the various jurisdictions concerned, one has seen what a disturbing effect the mere existence of such allegations has had. We all owe it to the maintenance of our country's stability and to foreign and domestic confidence to achieve and maintain a judiciary that is beyond approach. Of equally profound concern, is the readiness with which certain leading politicians thought fit to be outspokenly critical of the judiciary, and of senior Judges who have by no means, with matters still pending, in any measure deserved such censure. Whether these published outbursts stemmed from political point-scoring or ignorance, they were gravely unwarranted and damaging. To brand judges as counter-revolutionary is cheap political speak or emotive rabble-raising. If adherence to the law poses an obstacle to political aims then it is the latter that must yield, not the law. Would anyone doubt that that was the right approach in pre-constitutional days? The same must hold

good now or are memories so short?

Moreover, there is the prevalence of threats to judicial independence by popular supporters of popular litigants. Judges are entitled to be spared these orchestrated pressures. Failure by the relevant authorities to curb the people who transgress in this way will amount to a breach of the Constitutional duty on organs of state to assist and protect the courts to ensure their independence. As a practitioner representing such a litigant it must be comfortable to have so much wind at one's back. The profession has a higher duty than to harness such an advantage. It must, with the organs of state, do all it can to enhance the independence of the courts.

Speaking of governmental attitudes brings me to the endless difficulty which the Eastern Cape Province has had in regard to governmental inertia - to put it no higher - in response to orders of the High Court. It must have been greatly disturbing to have to face this problem and would have caused great judicial frustration. Historians will find it hard to credit that governmental ineptitude could have reached such extremes.

The upside was that the judgments which these crises spawned did great credit to its Bench. A number of appeals which came to Bloemfontein revealed the considerable quality of judicial wisdom and exposition which characterised this court's work.

Your Division - it should be noted - has for many years had the good fortune to be headed by a Judge President whose sense of correctness, commitment to efficiency and talent for team building were always very evident and the envy of not a few of his fellow Heads of Court.

Your Bench has also been conspicuous by the contributions which its members have made in the Constitutional Court and the Supreme Court of Appeal, all of which efforts have served the country well.

The immediate future of the two current final courts is a matter of much concern. You may recall the proposals in the Constitution Amendment Bill which surfaced in 2005. Leaving aside their manifest problems for judicial independence, their respective proposals were that any case can go to the CC if in the interests of justice and that the SCA take all appeals emanating from the High Courts. Strong objections resulted. The Bills disappeared. But, at Polokwane last year it was resolved that they should be revived.

Accepting that a predominance of view favours the establishment of a single final court of general jurisdiction, nothing has been done to canvass debate as to how that

should properly be achieved. The proposed amendment will leave qualification for the CC as being what it was in 1994 when what is needed is clear recognition that qualification for a court of general jurisdiction demands wider experience and knowledge. And to stifle the SCA with appeals on fact which are capably disposed of by a High Court Full Bench is to impair the value and usefulness of that court to an intolerable degree and, more importantly, to waste the resources it has.

Apart from a colloquium organiser by the then Minister in April 2005 at which the objections in question were raised (they have since been refined) no meaningful workshops, conferences or hearings on these issues have to date been set up.

Reverting to the CC it would not be out of place to say, as a personal view, that this Bench includes among its members several judges who would add strength and distinction to a court that will be weakened later this year by a batch of retirements of present incumbents. I can only hope - I won't say 'we' because you might not like to lose them and they might not want to migrate - that candidacy for the vacancies be seriously considered.

In similar vein might I urge senior members of this Bar to remember that the pool from which to appoint appropriate new judges has all but dried up. And the drought is due simply to the unavailability of the senior Bar. The Bar remains the best training ground, generally speaking. I know there have been understandable reasons for not wanting to go through an exacting selection only to fall foul of an interpretation of the term transformation that is unworkably narrow although mesmerizing to some. I believe the approach to transformation that should prevail is one according to which transformation is not a process in a vacuum. One must have regard to what it is that is sought to be transformed. In our case it is a properly functioning superior court judiciary. And the institution sought to be transformed must continue to exist as a service-delivering entity. If the process to be applied leaves the institution dysfunctional, the latter will not have been transformed but disabled. The process must therefore involve a balance whereby skilled experience and promising potential are blended. I have seen it work in the SCA.

Thank you for your kind hospitality and for receiving me in your company. May this Bar and Bench continue to strengthen as they diversify and continue, as in the past, to give top service to the country, good health, good fortune and *'au revoir.'* 