Honderd jaar rechtsleven

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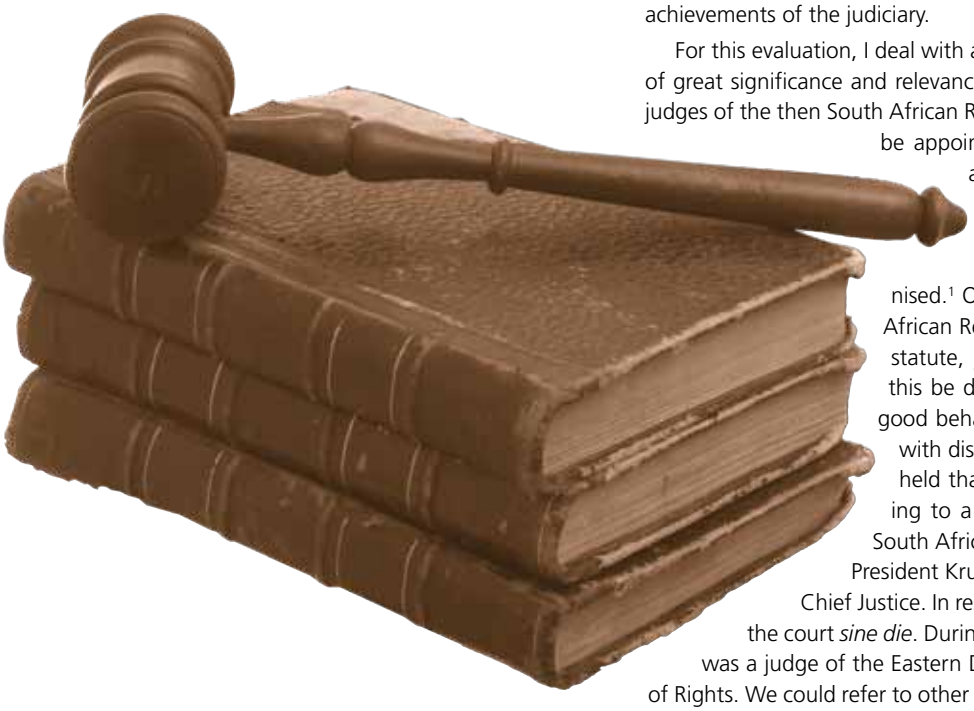
On 31 May 2010, we will be marking 100 years since the establishment of the Appellate Division (AD). It will also be 100 years since the provincial divisions became part of one judiciary. The South African judiciary was inaugurated by Part VI of the South Africa Act 1909. Section 95 of the Act provided that there shall be a Supreme Court consisting of the judges of the Appellate Division and other judges of the provincial divisions of the Supreme Court of South Africa.

When the GCB raised the issue of celebrating the event, the reactions varied from indifference to outright hostility by those who held the view 'there is nothing to celebrate'. The latter reaction begs some questions: How do we approach history? Do we do exactly what the colonialists did, namely pretend that history began in 1652? Did the South African judiciary come into existence in 1994? Undoubtedly 1994 marks the beginning of a new era. But that new era was a product of history. As we mark the hundred years we ought to pause and evaluate the mistakes and identify the achievements of the judiciary.



For this evaluation, I deal with a few events before and after 1910. The first event of great significance and relevance is a letter dated 16 June 1894 signed by all the judges of the then South African Republic. The letter demanded inter alia that judges be appointed for life; that their salaries be determined by a special law; that the salaries be fixed and that the distinction between judicial office and the person of the judge (especially when a judge had personally misconducted himself) be recognised.[1] On 22 July 1894, members of the Bar of the South African Republic resolved that salaries of judges be fixed by statute, judges be independent of government and that this be defined by statute, judges be appointed for life or good behaviour, and that a special body be formed to deal with disciplinary issues involving judges.[2] In 1897 Kotzé CJ held that a resolution of the Volksraad not taken according to a procedure prescribed by the Constitution of the South African Republic was null and void and unenforceable. President Kruger, who was unhappy with the decision, fired the Chief Justice. In response, the Chief Justice and the judges adjourned the court *sine die*. During the Sand River Convention, Kotzé J, who by now was a judge of the Eastern Districts, pleaded for a rigid constitution with a Bill of Rights. We could refer to other events such as the comments of the mainly English journals on Kotzé's judgment, the Constitution of the Orange Free State and decisions emanating from that Republic (such as Hertzog's decision on judicial review).

It is against this background that the Union Constitution should be viewed and understood. These events laid a foundation for the understanding of the compromises agreed to in 1994 at Kempton Park. The courage of Kotzé CJ to stand up against one of the most popular Presidents of the time has characterised the South African judiciary. Our judiciary is independent of the executive and has stood its ground in difficult times. Over the last 100 years, the position of the judiciary has improved. Today, judges' salaries may not be reduced.[3] As far as their tenure is concerned, judges may not be removed except in terms of an Act of Parliament. Although Parliament has long had the right to remove a judge, in the last 100 years no judge has ever been removed.

After 100 years, we have a Judicial Services Commission which recommends judges for appointment and which deals with complaints against judges. In 1994 a Constitutional era was ushered in, signalling the end of Parliamentary sovereignty and 'de onschendbaarheid van de wet' (inviolability of an Act of Parliament) and marking the beginning of an era in which the Constitution is supreme and the only source of all law. Our judiciary has acquitted itself well under the Constitution. In fifteen years we have had the benefit of a diverse judiciary of distinction whose opinions are studied all over the world.

The purpose of law is to regulate society. It is an instrument for resolving disputes to avoid what Sir Thomas Hobbes calls the war of every man against every man. Law, according to Hobbes, is a precondition for the establishment of industry, for the flourishing of culture, for building an economy, for banishing fear of death, war and poverty and for preserving peace and prosperity.

In the last 100 years our society was characterised by race politics, racial laws, struggles (in some periods violent) against the regime and its unjust laws, and, during the 1980s, a state of near revolution and war. In the last 100 years many disputes which came before the courts were between victims of these unjust laws and a violent state.

It is indeed true that there were also litigants who approached courts for resolution of ordinary civil disputes such as disputes relating to property and business contracts. Even these apparent neutral disputes were tainted by the fact that the racial laws prohibited black people from owning property and businesses in certain parts, if not the greater part, of the country.

The history of the courts is the history of the country. Painful as this history may be, it is still the history of the courts and of the judiciary of this country. We cannot change history by wishing it did not exist. What should concern us is: How did our judiciary behave in difficult times? Is there something the courts did not do which they could have done? Are there lessons to be learnt from this period? Is there a correlation between the fact that of the first 20 judges of the Appellate Division, most had been former attorneys-general or former politicians and the fact that this court during this period tended to defer to the executive? Is there any substance to the view that Rumpff CJ tended to lean in favour of individual liberty? If so, is there any correlation between that and the fact that during the 1940s he was one of the defenders of the anti-war activists? Is there any substance in the view that LC Steyn was executive-minded? If so, is there any correlation between that and the fact that he was a former civil servant? To what extent are judgments of this era the product of what Prof John Dugard calls the inarticulate premise in the judicial process? Perhaps more pertinent even, to what extent were judgments produced by the interaction of rules of law and concealed stimuli such as a judge's education, race, and class, and his or her political, economic, and moral prejudices? Could judgments such as the sentencing to death of Samuel Alfred Long during the 1922 mineworkers' strike or a similar sentence of Solomon Mahlangu during the armed struggle in the 1970s have been a product of judges bowing to pressure from government (which demanded that someone be seen to be punished for the deed)? If so, does this mean that our courts were not as independent as we say they were?

In my view, there are many lessons that can be learnt from the history of the judiciary pre-1994.

My idea of pausing to evaluate is to enable us to examine the period and extract whatever lessons we may find to strengthen our present judiciary. In his seminal work[4], Professor Dugard makes the following observations about the period:

1 In the three emergencies between 1910 and 1960 – the First World War (and the 1914 Rebellion), the 1922 strike and the Second World War – the courts adopted a policy which at best could be described as one of restraint.

2 In 1934, the Appellate Division delivered a major ruling that inclined generously towards the legislature and the executive.

3 In the early 1950s the Centlivres Court adopted a somewhat more activist approach, but it is arguable that this was an exceptional period in South African judiciary history.

4 In both world wars the courts acquiesced in the power of the executive to detain without trial.

5 Generally the courts were not seen by the workers themselves as sympathetic to the workers' cause. In 1922 strikers went so far as to describe judges as 'the bogus aristocracy partly of coloured blood … who have in most cases both a political bias and a social prejudice against the white worker.'

6 In interpreting statutes, the courts tended to surrender to the legislative will and adopted an approach which took no account of the possibility of judicial interpretation to avoid a harsh result.

7 In several decisions dealing with the interpretation of the Suppression of Communism Act, the Appellate Division construed the Act in a manner that did not advance the cause of individual liberty.[5]

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The political, historical and constitutional context in which the judiciary has had to operate in the last 100 years makes it difficult for us to comment objectively on its achievements and in particular to admit the wrongs that may have been committed. We are too close to the fire. This notwithstanding, may I venture the view that in general, our judiciary in the last 100 years developed a tradition to administer the law without fear or favour. That independence is something worth cherishing and strengthening. It is one of the legacies and traditions of 100 years of existence of our judiciary. It is something we should strive to retain. The diversity of our courts is a great cause for pride and celebration. While there may be criticisms of the judiciary for being restrained or executive-minded in the greater part of the century, the hundred years also produced judges who leaned towards individual liberty and where possible pronounced in favour of individuals. Different researchers name judges such as Rumpff, Milne, Didcott, Friedman and many others.

Finally, may I also venture to say that outside the political arena the judiciary did develop a tradition of thorough scholarship. The South African judges' pursuit of forensic excellence, capacity for rational thought and intense intellectual energy produced some outstanding judgments in the areas of the law of evidence, company, property and business law and earned our judiciary respect from some of the best jurists in the world.

Endnotes

[1] (1894) XI *Cape Law Journal* 178 at 183.

[2] Full copy of a Resolution published in (1894) XI *Cape Law Journal* 176.

[3] Section 176(3) of the Constitution.

[4] *Human Rights and the SA Legal Order* (Princeton University Press 1978).

[5] *R v Sisulu & Others* 1953 (3) SA 276 (AD).