Werner Horn: Independence of the OCJ a long-awaited necessity for democracy

Justice Kriegler in the case of *S v Mamabolo* made the following remarks in respect of the somewhat precarious position of the judiciary:

"In our constitutional order the Judiciary is an independent pillar of state, constitutionally mandated to exercise the Judicial Authority of the state fearlessly and impartially. Under the doctrine of separation of powers, it stands on an equal footing with the Executive and the Legislative pillars of the state; but in terms of political, financial and military power, it cannot hope to compete. It is in these terms by far the weakest of the three pillars yet its manifest independence and authority are essential."

This debate on Vote 22 and the establishment of the Department of the Office of the Chief Justice is an important milestone in the quest to reaffirm institutional and establish operational independence for the Judiciary in South Africa.

This is a milestone in a marathon journey embarked upon more than ten years ago by, amongst others, former Chief Justices Langa and Ngcobo, the latter remarking in in 2003 that:

"At a conceptual level, one cannot talk about the Judiciary as a genuinely independent and autonomous branch of government if it is substantially dependent upon the Executive branch not only for its funding but also for many features of its day-to-day functions and operations. The practical dimension flows directly from this. While the judicial officers may be free to operate independently and to hand down fair and impartial decisions according to law, their ability to do this may be constrained in various ways, notably by the financial, human and physical resources available to perform their tasks. A key element of this is the extent to which the judiciary has control over its own resources and thus is able to determine its policy and strategic priorities and how funds are allocated to pursue those priorities"

Chairperson: An important milestone, but not the finish line yet. The finish line will be reached only when the OCJ can negotiate its budget directly with Treasury and account to a standing committee of parliament on the use of these funds.

A finish line which could have and should have been reached already.

The fact of the matter is that a committee to investigate the best model of a judiciary-led model of

court administration was concluded under the chairmanship of Former Chief Justices Arthur Chaskalson and Pius Langa years ago already. A comprehensive report with the topic *Capacitating the Office of the Chief Justice and Laying Foundations for Judicial Independence: The next Frontier in our Constitutional Democracy: Judicial Independence* was compiled.

More importantly during the fourth Parliament a Memorandum of Understanding to implement a judicially led court administration model was signed by the Chief Justice and the then Minister of Justice and Constitutional Development. Only for the current Minister to apparently renege on this agreement, a decision which caused huge embarrassment towards the end of last year when the Chief Justice and the Minister got involved in what can only be described as a public spat.

The Minister has up to now not done anything to counter the perception that he indeed is unwilling to allow the Judiciary to obtain full operational independence.

The main reason he offers, namely that he in terms of the Constitution is tasked to oversee the administration of justice, and that he therefore needs to retain political control over the budget of the Judiciary, seems to be questionable on the grounds that once the Chief Justice has been declared to be the Head of the Judiciary it would seem inevitable that alternative ways needed to be developed to ensure accountability in this regard.

Chief of which is that the Office of the Chief Justice's budget should emerge from Parliament's budget vote rather than the Justice Ministry which has myriad complications for the autonomy and independence of an entire arm of government whose independence is vitally critical to the separation of powers and constitutional democracy.

Now, we have been informed that the Minister wants this issue to be discussed further at a colloquium towards the end of the year. Our point of view is simple: The operational independence of the Judiciary must be established sooner rather than later. And it should definitely not be under the Minister's purview.

Glynnis Breytenbach: The "half-hearted democrats" in the ANC at odds with Constitutionalism

The independence of the Judiciary in South Africa is firstly important because it is enshrined in our Constitution. As a matter of fact, in the case of State and Others v Van Rooyen, the Constitutional Court found that it is such an important principle in our Constitution that the independence of the Judiciary may not be limited by way of legislation.

The principle of independence is important because the Judiciary is the ultimate guardian of our Constitution and from time to time must strike down government action if it is found not to be within the confines of the Constitution.

The role of our judiciary is therefore to help establish a culture of constitutionalism and the Rule of Law. Generally, constitutionalism refers to a system of government based on a constitution. The concept of constitutionalism therefore encapsulates the idea of limited, open, transparent and accountable government. Constitutionalism is there to tame wayward governments that see no limits to their powers or simply ignore such limits under the guise of pursuing a common or greater good. Constitutionalism ensures that governmental powers are limited beyond theory, and in practice.

The task of the Judiciary to help establish a culture of constitutionalism is therefore not an easy task, especially while the Judiciary is faced with what Justice Rezine Mzikamanda of Malawi, a constitutional law expert held in high esteem worldwide, has termed *"half-hearted democrats".*

In referring to Southern Africa he points out that there continues to be a debate in relation to the constitutions of most of the Southern African states. The debate borders on questioning the validity of the constitutions themselves.

This debate is engaged in despite the fact that these constitutions have been widely acclaimed to be good and progressive democratic constitutions. Mzikamanda illustrates that a half-hearted democrat will not practice constitutionalism. In fact half-hearted democrats will seek to find fault even with the very best democratic constitution.

A half-hearted democrat will suggest that the constitution mostly contains western notions and values of democracy and good governance, with little or nothing of African cultural values and the idea of African democracy. Finally Justice Mzikamanda adds that in some countries there appear to be deliberate efforts to discredit and alienate the Judiciary from society with a view to render the Judiciary ineffective or compliant.

Unfortunately we have many half-hearted democrats amongst us today.

Despite the fact that our Constitution clearly states that we have in South Africa one system of law, comprising of both the common law and the customary law, the Hon Motshekga incessantly rants about the need to re-interpret our Constitution in order to, what he calls, indigenise our legal system.

To this half-hearted democrat the fact that all laws are subject to our Constitution and its underlying values is clearly a source of irritation.

Then we have the Minister of Justice who demonstrated his half-heartedness by boldly declaring that if he was to decide the matter of order in this House he would, without hesitation, call in the army to

ensure that Honourable Members acted in the subservient manner he would like them to.

This half-hearted democrat clearly is not committed to either constitutional rights like freedom of speech, nor constitutional principles like the separation of powers.

The ultimate half-hearted democrat is of course our very own President who apart from describing our Constitution as merely a guideline, has demonstrated his half-heartedness as a democrat by, as recently as January this year, calling for the transformation of the mind-set of those members of the judiciary who dare find against the government.

The half-hearted democrat is busy with a full on war on institutions crucial to the success of our constitutional order. In all likelihood the Judiciary will be one of their next targets – especially as it stands squarely in the way of half-hearted democrats.

Now is the time for full blooded constitutionalists and whole hearted democrats to stand up and be known – even if you sit on this side of the House.

Glynnis Breytenbach: Critical state institutions have been eroded, all for No. 1

Chairperson,

The DA would like to express sincere condolences to Adv Vas Soni and his family at the death of his wife.

Honourable Members,

The Minister, who has been noticeable by his absence, came to the Committee for only the second time ever to present an overview of his budget.

It is filled with the same empty platitudes as the first one.

No real progress has been made in any of the departments or institutions for which he is responsible, and under-spending is the order of the day.

A notable exception is Legal Aid South Africa, which is a great success story. This is, however, no thanks to the Minister. The turnaround must be attributed to the Chair of its board, Judge Mlambo, and his team.

The Minister wants us all to believe that all is as it should be.

Well it isn't.

The Special Investigating Unit (SIU) is again without a permanent head, and continues a history of flailing about with little direction, despite the best attempts of the current acting head. It's position, at best, remains stagnant, with little prospect of major improvement in the foreseeable future.

The National Prosecuting Authority (NPA) is an unmitigated political cesspool.

It has no direction.

On paper it is made to look functional, but just beneath the surface the internal turmoil is clearly at boiling point. This is hardly surprising while their new National Director is under threat. And why, one might ask, is he under threat?

It is simply a matter of connecting the dots.

Clearly, there are important issues that directly affect the President that must be decided by this very national Director of Public Prosecutions (NDPP), Mxolisi Nxasana, in the very near future.

Mr Nxasana has earned himself no friends in the Presidency by re-instituting charges of assault, kidnapping and corruption against the President's old "fixer" and praise singer, Richard Mdluli.

To crown that, he instituted charges against deputy NDPP, Nomgcobo Jiba, the good "yes woman" of the President who is hell-bent on the destruction of the NPA, delivering a weak, directionless organisation with no appetite for prosecuting the President.

The other stooge, Lawrence Mwrebi, has also been charged and this will have further alienated Nxasana.

But most important of all, the NDPP, who has shown integrity and backbone, is the man who must decide, in June or thereabouts, whether or not the President should be charged with corruption following the "Spy Tapes" application brought by the DA.

And of course, the President does not want an independent and fearless person to make that decision. He must ensure, at any cost, that the person who has to take that decision is a sycophant, beholden to him on many levels, to ensure that the decision is taken in his favour.

Neither will it do to have an independent decision-maker in that position when the President vacates his office in 2019, or probably sooner if the ANC wishes to limit the political liability that he has become

This is the real story, the issue that the Minister so carefully dances around.

The President has systematically, with the able assistance of this Minister, and others, destroyed every institution with a mandate of independence that has, or could, come into conflict with his plan to avoid being held accountable for corruption for Nkandla or for outstanding taxes.

He has ensured that each institution, the SIU, the NPA, the Hawks, the SAPS, the ACTT and SARS have been ripped apart internally, and their Heads paid off with golden handshakes using taxpayers money.

The South African public should be very, very concerned about this agenda, and how their money is being misspent.

The message is clear: *Keep quiet, don't rock the boat, or the same will happen to you*.

It has instilled a culture of fear in these vital institutions,

And the result is that normally competent individuals are too afraid to challenge authority, especially when it is wrong.

The result is an orchestrated one, but is sinister and very, very dangerous.

It means that normally strong, honest, hardworking individuals try very hard to avoid making decisions because that is career destroying.

There are any number of examples of this, namely: Anwa Dramat, Ivan Pillay, even Robert McBride.

But the most public is probably that of the Public Protector. Doing her job and doing it well, has brought derision from the President and his government and both personal and professional attacks from every avenue.

But prior to the very aptly named *"Secure in Comfort"* report on Nkandla, all her remedial actions were attempted to be implemented without a whisper.

Now, having touched them on their President, she is subjected to the most indefensible and unsavoury personal attacks.

Shamefully this also happens in the Portfolio Committee, with the tone being set by the Chairperson.

When she makes an attempt to defend herself, she is told she is behaving like the DA – an unintended compliment.

This is equally unacceptable and cynical and is behaviour unbecoming of Members of Parliament, who are enjoined by the Constitution to support the Chapter Nine institutions.

On Monday 11 May 2015, Judge Nazeer Cassim SC, opened the inquiry into the fitness for office of NDPP Nxasana and, there and then then, he closed the inquiry.

It lasted perhaps thirty seconds.

The reason being that he received a call from Zuma's personal counsel, Michael Hulley, at 4am on the morning the Commission was due to start, and told to call it off.

The Presidency issued a weak statement saying only that there was engagement between the parties, in the best interests of the NPA and the country as a whole. The President failed to mention, of course, that he would again do what is in his own best interests.

And, as usual, the taxpayers will foot the bill.

As was pointed out by Stephen Grootes, this takes us to what is at stake, and who would stand to lose should the Inquiry have continued in public.

All things being equal, Nxasana would probably have won this round and the President would have been stuck with an NDPP that he could not get rid of and who must soon decide whether or not to prosecute him.

So what would the President then prefer?

Obviously to appoint a new and obedient NPA head just before he leaves office to guarantee him a trouble-free retirement.

In the meantime, the NPA and the criminal justice system are going to suffer.

Which means, Minister, we all suffer!

The South African people cannot trust the justice system when no one trusts those in charge. Equally the South African people cannot trust a justice system when not everyone is equal before the law. It is simply unfair.

This decision by the President to cancel this inquiry is going to have long-lasting ramifications for all of us. None of them are good.

But that's what happens when you impose chaos upon us time and time and time again, in the NPA, the Hawks, Eskom, Sars, the SABC, SAA, and almost everywhere else you look.

The consequences are there for us all to see, every day, in almost every way. Chaos. Constant and unending. And imposed by cronyism and political patronage.

These are the issues, Minister, that keep South Africans concerned about our Constitution awake at night. And they should be the issues that keep you awake at night.