POLITICS, SOCIO-ECONOMIC ISSUES AND CULTURE IN CONSTITUTIONAL ADJUDICATION

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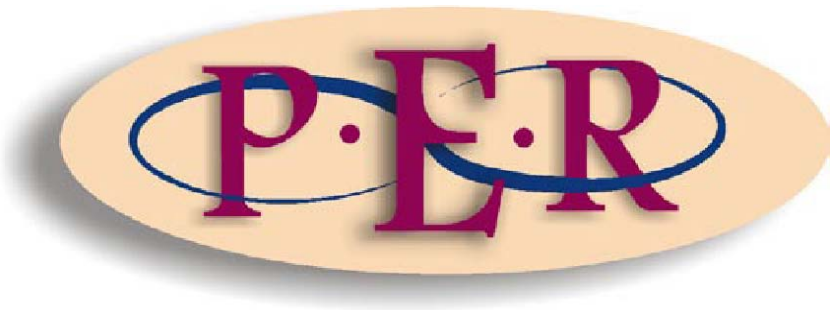

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POLITICS, SOCIO-ECONOMIC ISSUES AND CULTURE IN CONSTITUTIONAL ADJUDICATION

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In dealing with the influence of political considerations on the Constitutional Court's interpretation and application of the Bill of Rights it appears to be useful to first consider the meaning of "politics" in the judicial context, then to determine the considerations when politics are alleged to require the recusal of a judge and lastly to describe the Constitutional Court's position on judges and politics.

1 POLITICS

I have not been able to find a judicial definition of "politics" or "political". Most dictionary definitions of these terms refer to government and the state, opinions or attitudes regarding choices to be made regarding government and association with a group or party promoting a particular approach to government. For present purposes, therefore, the opinions, preferences or attitudes of judicial officers regarding the manner in which the country should be governed and by whom, will be the focus of this analysis. In the highly institutionalised area of contemporary party politics, the meaning of "politics" is easily reduced to support for a specific political party or grouping.

It would appear that the Court considers it unavoidable that its judgments will in certain "crucial political areas" within its jurisdiction have "political consequences". These areas constitute the core of the constitutionally allocated areas of jurisdiction of the Court, viz. disputes between organs of state, decisions on the constitutionality of Bills and legislation, amendments to the Constitution and of the conduct of the President.[1]

The Court recently found it necessary in the Van Rooyen case[2] (in which the constitutionality of the legislation and regulations pertaining to the magistrates' courts had to be adjudicated) to quote the following passage from the famous judgment of the Appellate Division in Minister of the Interior v Harris[3] where Schreiner JA stated that:

> [t]he Superior Courts of South Africa have at least for many generations had characteristics which, rooted in the world's experience, are calculated to ensure, within the limits of human frailty, the efficient and honest administration of justice according to law. Our Courts are manned by full-time Judges trained in the law, who are outside party politics and have no personal interest in the cases which come before them, whose tenure of office and emoluments are protected by law and whose independence is a major source of the security and well-being of the state.

Chaskalson CJ followed this quotation with the following:[4]

> Under our new constitutional order much has changed since then and more changes are foreshadowed in the bill presently before Parliament.[5] As was previously mentioned, judges are now appointed by the President on the recommendation of the Judicial Service Commission.[6] Their salaries and benefits cannot be reduced,[7] and a decision of the Judicial Service Commission supported by a resolution of two thirds of the members of the National Assembly is required for impeachment.[8] Salaries and conditions of service are still fixed by regulation, but the Bill makes provision for an independent commission to make recommendations to government on the remuneration of judges.

1 Paras [72] and [73] of the SARFU recusal judgment: "Section 167(4) thus confers exclusive jurisdiction to this Court in a number of crucial political areas which include the power to decide disputes between organs of state in the national and provincial sphere, to decide on the constitutionality of any parliamentary or provincial Bill, to decide on the constitutionality of any amendment to the Constitution and to decide whether Parliament or the President has failed to fulfil a constitutional obligation. And, in terms of section 167(4), this Court makes the final decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional. . . . It follows that the drafters of the Constitution necessarily envisaged that this Court would be called upon to adjudicate finally in respect of issues which would inevitably have important political consequences."

2 Van Rooyen v The State 2002 5 SA 246 (CC) para [82].

3 1952 4 SA 769 (A) at 789.

4 Para [83].

5 Judicial Officers Amendment Bill 72 of 2001.

6 Section 174(6) of the Constitution.

7 Section 176(3) of the Constitution.

Over time the attitude of the South African bench toward matters of politics and policy has received much attention. A useful historical mirror of current judicial thinking is to be found in Professor John Dugard's inaugural lecture of 1971[9] in which he endeavoured to expose the endemic positivism in the judicial thinking of the time and the judges' refusal to recognise their own "inarticulate premises". As a solution he offered two "antidotes"[10]:

> First, a frank recognition on the part of the judiciary that their role is not purely mechanical; . . . and that in disputes between individual and State subconscious personal preferences are an ever-present hazard. Secondly, what is needed is a conscious determination by judges to be guided by accepted traditional legal values . . .

For present purposes a useful opening to an investigation into the influence of politics on the judiciary is to be found in the two judgments of the Court dealing with recusal, viz. the SARFU recusal case[11] and the SACCAWU case.[12]

2 RECUSAL

The matter of recusal of a judicial officer is of key importance to the development of practical guidelines for courts confronted with issues of a political nature. The main judgment of the Court dealing with recusal, is that of the SARFU recusal case, in which justices of the Court were requested to recuse themselves from the case in which the appellant was the President of South Africa, who had appointed them to the bench of the Court. Much of the detailed grounds for the recusal application concerned the past political activities and affiliation of the justices.

8 Section 177 of the Constitution.
9 Dugard 1971 SALJ 181.
10 At 195
11 President of the Republic of South Africa v South African Rugby Football Union 1999 4 SA 147 (CC).
12 South African Commercial Catering and Allied Workers Union v Irvin and Johnson Ltd 2000 3 SA 705 (CC).

The essential test for recusal has been formulated as follows:

> The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves. At the same time, it must never be forgotten that an impartial judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of a litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial.[13]

The judgment in the SACCAWU case (deliverd by Cameron AJ, who was not a member of the bench that deciced the SARFU recusal case), provides some useful analyses of the former judgment. The Court pointed out that the following considerations are prominent in the test for recusal:[14]

1. A presumption that judicial officers are impartial in adjudicating disputes. Consequently —
   - the applicant for recusal bears the onus of rebutting the presumption of judicial impartiality, and
   - it is a strong presumption, rebuttal of which requires cogent or convincing evidence.
2. Because judges are human, their life experiences will unavoidably influence their understanding of judicial duties. "Absolute neutrality" in the judicial context is therefore not achievable..
3. Judicial impartiality, clearly dinstinguised from "colourless neutrality", is however an absolute requirement for a civilised system of adjudication. Such impartiality the Court defines as "that quality of open-minded readiness to persuasion – without unfitting adherence to either party or to the Judges's own predelictions, preconceptions and personal views." In practical terms, therefore, "a mind open to persuasion by the evidence and the submissions of counsel."
4. A "double requirement of reasonableness":
   - the person concerned about the danger of judicial bias must be a reasonable person, and
   - the concern ("apprehension") itself must be reasonable in the circumstances.[15]

13 Para [48] of the SARFU recusal case.
14 SACCAWU case paras [12] – [17].

> Anxiety on the part of the litigant requesting recusal, however strong and honest, is therefore not sufficient: " The court must carefully scrutinise the apprehension to determine whether it is to be regarded as reasonable. In adjudging this, the court superimposes a normative assessment on the litigant's anxieties. It attributes to the litigant's apprehension a legal value, and thereby decides whether it is such that it should be countenanced in law."[16]

5. In recusal applications, two contending factors need to be weighed:
   - ill-founded and misdirected challenges to the composition of a bench should be discouraged, and
   - public confidence in impartial adjudication must be maintained.

15 Cf also S v Roberts 1999 4 SA 915 (SCA) para [32] approvingly referred to by the Court in the SACCAWU judgment (para [14]).

16 Para [16] of the SACCAWU judgment.

3 JUDGES AND POLITICS

Regarding the specific issue of the political opinions of judicial officers, the SARFU recusal case contains a number of relevant dicta which produced the following opinions:

- Because courts are required to give reasons for their judgments, criticism of the judgments should be focused on those reasons and not be motivated by political discontent or dissatisfaction with the outcome.[17] In the Mamabolo case[18] the Court added that a court must in its judgments "rely on moral authority".
- A judicial officer's constitutional duty is to "resist all manner of pressure, regardless of where it comes from."[19]
- The Constitution requires of a judicial officer to adjudicate a case "according to the facts and the law, and not according to their subjective personal views."[20]
- Because the core values of the Constitution are in contrast to the pre-constitutional dispensation, political opposition in pre-constitutional times to the old order is practically a requirement for appointment to the bench of the Constitutional Court.[21]
- Nevertheless "all judges are expected to put any party political loyalties behind them on their appointment and it is generally accepted that they do so."[22]
- In the opinion of the Court[23] "it follows that a reasonable apprehension of bias cannot be based upon political associations or activities of judges prior to their appointment to the bench unless the subject matter of the litigation in question arises from such associations or activities."

17 Para [68] "Success or failure of the government or any other litigant is neither grounds for praise nor for condemnation of a court. What is important is whether the decisions are good in law, and whether they are justifiable in relation to the reasons given for them. There is an unfortunate tendency for decisions of courts with which there is disagreement to be attacked by impugning the integrity of the judges, rather than by examining the reasons for the judgment. Our courts furnish detailed reasons for their decisions, and particularly in constitutional matters, frequently draw on international human rights jurisprudence to explain why particular principles have been laid down or applied. Decisions of our courts are not immune from criticism. But political discontent or dissatisfaction with the outcome of a case is no justification for recklessly attacking the integrity of judicial officers."

18 S v Mamabolo 2001 3 SA 409 (CC) para [16] per Kriegler j: "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 state; but in terms of political, financial or 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. Having no constituency, no purse and no sword, the judiciary must rely on moral authority. Without such authority it cannot perform its vital function as the interpreter of the Constitution, the arbiter in disputes between organs of state and, ultimately, as the watchdog over the Constitution and its Bill of Rights — even against the state."

19 Para [104] ". . . The nature of the judicial function involves the performance of difficult and at times unpleasant tasks. Judicial officers are nonetheless required to "administer justice to all persons alike without fear, favour or prejudice, in accordance with the Constitution and the law." To this end they must resist all manner of pressure, regardless of where it comes from. This is the consitutional duty common to all judicial officers. If they deviate, the independence of the Judiciary would be undermined, and in turn, the Constitution itself."

20 Para [70] "That a judge may have engaged in political activity prior to appointment to the bench is not uncommon in most if not all democracies including our own. Nor should it surprise anyone in this country. Upon appointment, judges are frequently obliged to adjudicate disputes, which have political consequences. It has never been seriously suggested that judges do not have political preferences or views on law and society. Indeed, a judge who is so remote from the world that she or he has no such views would hardly be qualified to sit as a judge. What is required of judges is that they should decide cases that come before them without fear or favour according to the facts and the law, and not according to their subjective personal views. This is what the Constitution requires."

21 Para [72] "The core values of our new order are reflected in the provisions of section 1 of the Constitution. None of those values was recognised by the old order, which was replaced by the Constitution. Where we used to have a supreme Parliament, we now have a supreme Constitution. The Constitutional Court has been given the responsibility of being the ultimate guardian of the Constitution and its values." And para [74]: ". . . it would be surprising if respect and support for the core values of the Constitution by candidates for appointment to all of our courts, and particularly the Constitutional Court, were not taken into account by the Judicial Service Commission when preparing a list of nominees for submission to the President. It would be equally surprising if the President and the Cabinet failed to do so. Barely five years into the new order it is all but inevitable that in the professional or public lives of such candidates their antipathy and opposition to the evils and immorality of the old order, to a greater or lesser extent, would have manifested themselves. The public hearings of the Judicial Service Commission reflect this reality."

22 Para [75] then continues: "In South Africa, so soon after our transition to democracy, it would be surprising if many candidates for appointment to the bench had not been active in or publicly sympathetic towards the liberation struggle. It would be ironic and a matter for regret if they were not eligible for appointment by reason of that kind of activity."

23 Para [76].

4 COMMENTS

For the consideration of the question how a judicial officer should deal with personal political convictions when required to adjudicate in matters which have political implications, at least the following should be considered:

1. There is a distinction between politically motivated judgments, and judgments having political consequences. A judicial officer has no choice or control over the latter situation, which is brought about objectively due simply to the nature of the jurisdiction of the court. A politically motivated judgment is however engendered entirely through the subjective predisposition of a judge. The challenge to the bench is not to produce politically motivated judgments in cases having political consequences.
2. To achieve this, requires great effort and it remains open whether it can actually be done. It helps that adjudication requires the justification of the decision. The conventional wisdom is that justice is achieved by an objective analysis of the facts followed by the objective application of the law to those facts. If it is impossible for a person to be divorced from ingrained presuppositions and premises, can a judge be expected to deliberately go against all instincts in order to achieve justice?
3. Perhaps an answer must be sought not in what goes on in the mind of the judge, but in the standards of justice to which decisions must comply . . . .