The Rule of Law, Judicial Authority, and Constitutional Democracy in South Africa.

1. Introduction: A Tribute to Professor Asmal

It is a privilege for me to present this lecture in honour of Professor Kader Asmal whose role and contribution in the development of our constitutional democracy was in no small measure. He was part of a select group of veterans and thought leaders whose exemplary work will remain a source of inspiration for future generations. Many of us have fond memories of him as a fellow patriot who has demonstrated his unwavering commitment to the rule of law and respect for the judiciary at appropriate moments.

His involvement in the processes that culminated in the adoption of our Constitution has been widely acknowledged. As former President, Kgalema Motlanthe, remarked, his contributions to the constitution-making process has ensured that "his voice will be eternally encoded in democratic South Africa".[1] Professor Asmal also saw our Constitution as a "detailed social contract" reflecting the views and aspirations of the people, a significant change and shift from the old apartheid constitution which he described as a ''convoluted monstrosity rooted in racism''.[2]

As member of cabinet, he worked tirelessly to ensure that the fundamental rights enshrined in our Constitution do not remain lofty ideals, good only on paper but with

[1] Kgalema Motlanthe 'Eulogy by Deputy President Kgalema Motlanthe at the Memorial Service of Professor Kader Asmal', Cape Town, 30 June 2011.
[2] Kader Asmal 'The Making of a Constitution' Mail & Guardian, Issue 36, March/April 1995.

no place in the real world. And who can forget how, as Minister of Water Affairs and Forestry, Professor Asmal displayed a unique understanding of human dignity and human rights by viewing government water policy as an important means through which some of the basic rights enshrined in the Constitution, such as access to clean water and sanitation, could be realised for the benefit of millions of people, especially the indigent.[3]

As Education Minister, being the accomplished academic he was, and despite some weaknesses in the education system ascribed to him, he demonstrated great understanding of the concept of access to education as a fundamental right, by taking a principled stand and adopting policies against the rising costs of education and the exclusion of the majority of young South Africans from institutions of higher learning, among others.[4] As he would later recount in his memoir, "I was not prepared to tolerate exclusion of any form wherever it appeared".[5]

Professor Asmal's admirable strength was his inability to remain silent in the face of deviation from democratic constitutional ideals and human rights violations. His description of then Government policy on HIV and Aids as a kind of "quackery" that deserved to be dismissed contemptuously was a classic example.[6] And here I must admit I chose to paraphrase rather than quote his exact words because he did use some choice words to express his frustration at what he saw as serious human rights

[3] Achim Steiner 'A Tribute to Professor Kader Asmal' (24 June 2 011).
[4] These included measures to merger various institutions of higher learning pursuant to section 23 of the Higher Education Act 101 of 1997. Some of the mergers were aimed at breaking down apartheid's racial divides that saw certain universities catering primarily for white students, with huge budgets and extensive facilities, while others catered for blacks on shoe string budgets and with almost no facilities.
[5] Kader Asmal, Adrian Hadland and Moira Levy *Kader Asmal: Politics in My Blood : A Memoir* (2011) at 287-288.
[6] Jeremy Michaels 'Rath Gets a Taste of Asmal's Wrath' IOL 4 May 2005.

violations[7] His decision to resign from parliament in protest against the disbanding of the Scorpions and his public outspokenness against the Protection of State Information Bill are other examples to illustrate this point.

Kader Asmal was greatly concerned that the foundation of our democracy was being "chiselled away" by public officials who appeared to respect the Constitution in public while attacking it by stealth.[8] In particular, he was troubled by the relentless attacks on the judiciary, which he felt had become standard practice in political discourse.[9] He believed that attacks like those threaten and undermine public confidence in the judiciary as an institution. Professor Kader Asmal strongly believed that the independence and dignity of the judiciary were non-negotiable preconditions for the survival of our own democracy. Clearly, he believed strongly in our Constitutional democracy, which I proceed to describe.

2. Constitutional Democracy and the Principle of Separation of Powers and Checks and Balances

The basic principles which underlie our constitutional order include constitutionalism, separation of powers with checks and balances, the rule of law and accountability.[9]. Some of these principles or values are expressly provided for in the Constitution while others are implicit. However, whether explicit or implicit, they are all justiciable in that any law or conduct inconsistent with them, may be declared unconstitutional and invalid. More particularly, these principles or values shape the basic framework

[7] Jeremy Michaels 'Rath Gets a Taste of Asmal's Wrath' IOL 4 May 2005.
[8] Speech by Professor Kader Asmal at the conferring of the honorary degree of Doctor of Laws by the University of South Africa on 12 April 2010.
[9] Speech by Professor Kader Asmal at the conferring of the honorary degree of Doctor of Laws by the University of South Africa on 12 April 2010.

which defines our constitutional order and inform the interpretation of the constitution and the law.

Whereas in any democracy, the political party elected by the majority of the electorate enjoys the right and authority to constitute the government of the day, when that democracy is a constitutional one, like ours, a written Constitution, among others create the rules for government and sets procedural and substantive limitations on the exercise of government power.

Important for the purpose of this address is that our Constitution is the supreme law of the land and is binding on all three arms of the state.[12] Needless to say, all law and conduct of any of the three arms of the state which are inconsistent with the Constitution are invalid. Further, any obligation imposed by the Constitution on any arm of the state is peremptory, and takes precedence over other internal rules of the legislature, the executive and the judiciary. That obligation must therefore be fulfilled. But then, what would constitutional supremacy mean if the Constitution cannot be enforced? Thus the power to enforce the Constitution is vested in the courts,[13] which are independent and subject only to the law and the Constitution. However, when the courts exercise this judicial power, courts must do so impartially, without fear, favour, or prejudice. But then again, there is the tricky aspect of the counter-majoritarian idea (not counter revolutionary), where the recurring question is always why unelected judges should have the power to strike down laws and conduct of a majority elected legislature and a representative executive, declaring them invalid. The answer lies in the nature of a Constitutional democracy. While democracy in its most literal sense may be understood as “rule by the majority”, in a constitutional

democracy “rule by majority” must be exercised subject to predetermined constitutional rules and procedures. An important provision in our Constitution, is the constitutional rule that the orders of court are binding on all persons and organs of state, including the legislature and the executive (or government). Therefore, whereas before the adoption of our interim constitution in 1994, parliament was sovereign and exercised legislative supremacy, today, the irreversible truth is that, integral to our constitutional democracy, our legislature is no longer sovereign. The Constitution is.

But let’s not belabour the point because although the separation of powers with checks and balances is also fundamental in our Constitution, what is also important is that the three arms of the state are not to pool in opposite directions. Their roles are complementary rather than competitive. Together they have an obligation to protect the supremacy of the Constitution. It is for that reason that all organs of state must assist and protect the courts and therefore the judiciary, ensuring its effectiveness, dignity, independence, impartiality and accessibility.[10] Any law or conduct which has the impact of interference in the functioning of the courts by any person or organ of state is a violation of the Constitution and may be declared invalid and set aside and the court must say so. Alternatively the court, as the case may be, may suspend the invalidity for a limited period of time, while the legislature is given the opportunity to correct the invalidity. An order of court which is just and equitable may ensue.

[10] See generally section 165 of the Constitution.

3. The Rule of Law and Judicial Authority

That is the power of judicial review assigned to all higher courts in our Constitution. And the courts must exercise that power. There is no question that the exercise of the power of judicial review, where the laws of parliament or conduct of the executive are set aside, is potentially imposing and my even overwhelm. In crucial times, it can indeed determine the destiny of a nation. Indeed, this power of the courts will add up to nothing and be totally impotent if organs of state in particular, have the choice to disregard court orders. The potential for this notion in my view is not far-fetched considering the recent events in the matter of *Southern Africa Litigation Centre v Minister of Justice and Constitutional Development and Others*[11] (popularly known as the Al Bashir matter). Speaking for myself, I must admit, I am still reeling in shock at what appeared, and we might be wrong, to have been a blatant disregard for the order of court in the *Al Bashir* matter, including the subsequent responses of leading public figures in that regard. And I was reminded of the insight of the late Chief Justice Ismael Mahomed when he stated, in an address he gave to the International Commission of Jurists in Cape Town on 21 July 1998, how the judiciary does not have its own massive physical resources to execute its own orders and can only rely on the executive to do so. Thus, he said, if court orders are disregarded, "the courts could easily be reduced to paper tigers with a ferocious capacity to snarl and roar but no teeth with which to bite and no sinews to execute their judgements, which may then be mockingly reduced to pieces of sterile scholarship, toothless wisdom and pious poetry".[12] And he continues, "…the potentially awesome theoretical power of the judiciary in the Constitution could in those circumstances

[11] (27740/2015) [2015] ZAGPPHC 402 (24 June 2015).
[12] Id.

implode into nothingness. Judges, in such circumstances, would visibly be demeaned. But much much worse: human rights could irrevocably be impaired and civilisation itself dangerously imperilled".[13] In no circumstances have I ever found these often quoted powerful words of Ismael Mahamed CJ more compelling. That, for me, is exactly the cause for concern.

Besides, I too believe that the fact that judges are not elected must be seen as an important strength of our judicial system, rather than its weakness. For me, it reinforces the impartially interventionist and protective role of the courts. Here there is no room for populism. Personal views and positions are irrelevant. That is the role mandated to the judiciary by the Constitution. In many respects, that role is assigned to the judiciary by the legislature who is the authority elected by the people. And as our Constitution has it, the legislature and executive must protect this role and assist the courts to remain independent, impartial, accessible, effective and perform their role and function with outmost dignity.[14] That obligation to protect the courts is therefore assigned to them in the Constitution by the people who they represent.

But then, to manage the irony of the lack of their own physical resources for the effective execution of their orders, the judiciary can only continue to cultivate for its self-respect and legitimacy in the minds of the society they serve generally, and of the litigants who appear before them – based on their fierce independence and awe-inspiring integrity at both individual and institutional level. It is on this independence and integrity that the legitimacy and esteem of the courts will thrive, as long as

[13] Id.
[14] Section 165(4) of the Constitution.

judicial officers continue to ensure that the judicial power they exercise is matched by the depth of responsibility they have to fulfil their constitutional mandate and to do so honourably, without fear, favour or prejudice. That too is a responsibility mandated by the Constitution.

It is important, however, for judges to be cognisant of the notion that when litigants appear before the courts, they are entitled and will anticipate an outcome of a case in their favour. If the decision goes the other way, there will certainly be disappointments. Where the outcome is about striking down and invalidating laws or conduct of the executive, controversy and/or vigorous debate may ensue from time to time. Besides, robust and constructive debate and free expression of views or opinion are integral to a vibrant democracy and must be welcomed. However, what places the legitimacy and integrity of the courts at risk is the reckless responses of litigants amounting to attacks without substance to decisions of the courts, whenever they are dissatisfied with the outcome of their cases. And it makes it so much more dangerous when litigants are influencial public officials. In that case, it easily sends the wrong message to an already restless public that if the outcome of a court case is not favourable, a litigant is entitled to publicly “attack” the judicial officer and may even disregard court orders. This is a culture of disrespect for courts and the judiciary we can least afford.

However, judges can take solace in the idea that their decisions are the outcome of a fair adjudication process, where relevant issues are raised and submissions are made in open court, and each party has a fair opportunity to make compelling arguments in support of their contentions. It is then the responsibility of the judicial

officer to ensure that the orders they make are just and equitable, taking into account facts of the case in the context of surrounding circumstances, the issues raised in argument, the contentions submitted, research analysis and interpretation of the applicable law and the Constitution using classical judicial approaches and rational objective standards of assessing available evidence.. Important for the judge is to recognise and identify the limits of their judicial power in the decisions they arrive at and the orders they make.

Of course, judges are human and are not infallible. However, errors in law and in fact are appealable to the highest court through the hierarchy of courts. That too is the case when a judge has over-reached herself or himself. That is the discipline the rule of law requires of each litigant who comes before the courts and is aggrieved by court decisions.

Further, judgments are handed down in open court, in the presence of litigants and or their representatives. They are presented with a copy of the judgment to study and determine whether or not to lodge an appeal within a stipulated time. A litigant will know if even an aorta of irrelevant, extraneous, undue and unbecoming influence has affected the decision of the court and or the logic of the court's reasoning does not add up. Any unbecoming conduct identified and affecting the integrity of the judge and amounting to misconduct in terms of the judicial oath of office and or under the Judges' Code of Conduct, may be basis for lodging a complaint against the judge with the Judicial Services Commission (JSC). The process before the JSC may result in the impeachment of the particular judicial officer. This disciplined route is equally available to all litigants including organs of state and all public officials.

The JSC itself is constituted by a cross-section of representatives including members of the executive and the legislature.[15] Again, the availability of these processes leave no room for any form of public attack on a judicial officer and or the judiciary.

4. Conclusion

The judiciary has the first responsibility, in my view to cultivate for itself public respect, trust, integrity and legitimacy, based on the way they perform their constitutional mandate. But I have no doubt that organs of state and public institutions or bodies who have an interest at stake if the independence, integrity and legitimacy of judiciary is placed at risk, to various degrees and in various ways, also have a responsibility to protect the courts. In my view they have an obligation at least to speak up in defence of the judiciary which is the bulwark of our constitutional democracy. Although the show of leadership demonstrated by the Heads of Courts led by the Chief Justice after the recent spate of attacks on the judiciary is commendable, and was appropriate in the circumstances, the judges do not have to go that far in defence of the judiciary if others who have what I view as a constitutional responsibility stoop up in defense of the judiciary. Notable however, are the efforts of the Public protector, the media and others in that regard.

More specifically the Chapter 9 institutions, which are independent and like the courts, are subject only to the Constitution and the law, have primary role of supporting constitutional democracy. They certainly have an important interest in the

[15] See Section 178 of the Constitution.

protection of the courts. Surely, other public institutions and bodies who have a stake in the strength of our courts to perform effectively also have an important role:

The organised legal profession is integral to the system of the administration of justice. In view of their close association with the courts and the direct reliance they place in their work on the independence and integrity of judges, they should be the first line of defence of the courts when their integrity is placed in jeopardy. Similarly, the academia, in particular the legal academy is clearly an important role player. Only last week, the Society of Law Teachers had their General meeting and it would be interesting to learn of their response regarding these recent developments.

The role of a vibrant independent media in identifying and investigating the most pertinent issues for public attention and debate, promoting public dialogue cannot be exaggerated and should therefore not loose its lustre.

My generation can remember well the game-changing role that human rights civil society organisation's played in the dark days of apartheid oppression and repression. And we know also too well how the need for transformation in government generally, and the public service in particular almost depleted the resourcefulness of the civil society sector. And although the majority of these non-governmental bodies are now limited in membership and for various reasons, are much more restricted in their funding, affecting their impact, the role that they still play, although slightly shifted, is obviously as critical today as it was yesterday[19]. I believe they have a serious interest at stake if the independence of the courts is not protected.

The long and short of it is that whether state or the public at large, we all have an interest in the independence, integrity and legitimacy of our courts and must therefore protect them and desist from creating circumstances which weaken them and place their authority in jeopardy. If there is a point of social cohesion which has the greatest potential for institution-building with a view to nation-building, it is the respect we must show for our Constitution as the foundation of our constitutional democracy, where the role of our courts is central.