ADDRESS TO THE PRIZE WINNERS/ OPMERKINGS GERIG AAN DIE PRYSWENNERS

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by Edwin Cameron
Centre for Human Rights
University of Pretoria
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JUDGE : High Court of South Africa Witwatersrand Local Division /
REGTER: Hoë Hof van Suid-Afrika Witwatersrandse Plaaslike Afdeling

Dit is ‘n eer vir my om vanaand teenwoordig te wees, en ‘n eer dat u vir my gevra het om aan hierdie luisterryke geleentheid deel te neem.

Om deel te wees van ‘n prysuitdeling is ‘n besondere plesier. Vanaand is ‘n viering. Ons vier die gehalte van die Fakulteit se leerkragte. Ons vier die vakke waarin die pryse toegeken word. Ons vier dít wat om uit te blink in daardie vakke, van studente vereis. En bowenal vier ons die pryswenners.

Die pryse beloon nie slegs u harde werk en intellektuele vermoë nie, maar ook, glo ek, daarby iets groters. Daar is ‘n verskeidenheid redes om akademies te probeer presteer. Dit verhoog natuurlik u markwaarde - vir beide leerklerkposte en vir beurse vir verdere studie. Dit bevredig eweneens u ouers wat u klas- en losiesgelde betaal. Maar daarby wil ek glo dat u toewyding aan u regstudies op iets groters dui: u geloof in ons regstelsel se toekoms.

Daarby moet u my toelaat om twee waarskuwings te rig. Ten eerste: Akademiese prestasie verskaf geen waarborg van professionele sukses in ‘n regsloopbaan nie. Maar, miskien nog meer belangrik: akademiese briljantheid is nie onontbeerlik vir ‘n geslaagde regsloopbaan nie.

John Mortimer QC, the writer who created the now immortal character, Rumpole, stated after his own long and successful career at the English Bar: "No brilliance is needed in the law. Nothing but common sense, and relatively clean fingernails."

Mens hoop natuurlik dat die Tukkies Regsfakulteit beide skoon vingernaels èn briljantheid nastreef.

Maar hoekom sou ‘n mens in die eerste plek die regte as loopbaan kies? ‘n Beroep in die regte - in die praktyk, in die akademie of in regsadvies - bied vir mens nie slegs geleentheid tot selfvervulling nie, maar ook tot selfverbetering. Maar die regsberoep bied ook ryke geleentheid vir die nastreef van ‘n verdere oogmerk - diens vir ander. My opmerkings vanaand wil hierdie tema ietwat uitlig.

With the successful conclusion of the constitutional negotiations of 1992/1993, we South Africans embarked on an experiment that placed particular emphasis on the legal system, and accorded a special responsibility to the legal profession. It was an experiment of massive

proportions: A commitment to legal regulation as the framework for social development, and for the resolution of conflicting social claims.

I say that our commitment to a constitutional future was an "experiment", because it was by no means self-evident that the path of legal regulation would be attractive to the negotiators, or that it would be chosen. The history of the South African legal system embodied a paradox.

On the one hand, the legal system had been used as an instrument of social policy in the enforcement of apartheid.

On the other hand, the very fact that apartheid was enforced through legal mechanisms meant that the law itself could be used to curb the excesses of domination and oppression.

It is in this very paradox that the negotiators at Codesa and Kempton Park discerned a possible future dispensation - that of a constitution, embodying in broad terms the values common to the negotiators (or at least those values to which they attached their visions of our country's future). The values would be embodied in a constitution

- capable of amendment only by special parliamentary procedure;
- which, in the absence of amendment, would bind Parliament;
- the import, meaning and enforcement of which would be entrusted to an independent judiciary.

This is the grand venture we have embarked upon. The successful endorsement of the constitutional experiment by the parties at Codesa and Kempton Park is in many circles regarded as a "miracle". At this stage, it is no more than an experiment. According to my Concise Oxford Dictionary, an "experiment" means "test or trial; a procedure adopted on the chance of its succeeding, for testing a hypothesis etc, or to demonstrate known fact". What are the features of such an experiment?

There seem to me to be at least three:

- An experiment has an uncertain outcome. If the outcome were known, it would not be an experiment.
- Precisely by virtue of its uncertain end-point, the premises upon which the experiment is conducted are necessarily open to debate, re-examination, and challenge.
- The experimental nature of the enterprise or undertaking demands extra commitment, effort and dedication by those engaged in it. Each of these features of our constitutional experiment is, I believe, worthy of consideration.

UNCERTAIN OUTCOME

The survival of law and legal regulation in our country can by no means simply be assumed. Large sections of the public view the legal process, and the Constitution itself, with a

measure of misgiving. Many South Africans had little reason to place their trust in legal regulation or in law enforcement agencies.

In the hubbub of daily legal practice, the performance of judicial duties, in the atmosphere of learning, debate and legal enquiry in the academic faculties - in the happy atmosphere of this occasion - it is not easy to envisage that constitutional regulation in our country is an experimental endeavour.

But there are alternatives. Not only Africa, but the world, presents them to us. There were no constitutional entitlements to protect the population of Kosovo from brutal dismemberment. There were no ringing promises and inspiring commitments when the Tutsi population of Rwanda was butchered in 1994.

Legal regulation is a fragile venture that depends upon shared commitments. Shared commitments spring from shared values, and shared values from shared interests. We must make certain we in South Africa share sufficient interests, and that those interests are sufficiently reflected in our constitutional practice, to ensure that the experiment can succeed.

Within our country, too, there are outlaws and criminals who contest the validity of the constitutional experiment's premises. We are engaged in a war with them. It is a war for the life blood of our country. It is not only incidental and hap-hazard criminals who attack the experiment's premises. Organised cartels and sophisticated networks seek to undermine its success. The outcome is anything but clear.

Our Constitution represents :

- an uneasy pact that South Africans made with each other about the past and how to deal with it;

- a pledge that South Africans made to each other about how governmental power would be used in the present; and

- a promise about how we would deal with the future.

The most striking general feature of our Constitution is contained in the promise of equality that we as South Africans made to each other. That promise must be given substance. The vast differentials in wealth and resources between South Africans must be diminished: not only for reasons of social justice - but in order to ensure that the path of legal regulation we have chosen remains one that we can walk on.

Those who conceived of apartheid as a social policy also embarked on an experiment - one that Holmes JA, in a phrase that has justly become notorious, called "a colossal social experiment" (Minister of Interior v Lockhat 1961 2 SA 587 (A) at 602D-E). It is now the shared belief of a vast majority of South Africans, black and white, that this social policy was not only mistaken, but evil.

Nevertheless, the Nationalist ideologues who enforced the policy were correct in their appreciation that the law could be an effective instrument of social policy. It was not wrong of the apartheid government to seek to enforce social policy through the law. What was wrong was the social policy it sought to enforce.

In post-apartheid South Africa, the law remains a proper instrument for giving effect to social policy. The difference is that the social policy we now seek to fulfil through the law is regarded by the vast majority of South Africans, not just a self-seeking rational minority amongst them, as just and even noble.

Those social policies include:

- attaining substantive equality between the races;
- redressing past inequities by transforming our institutions of state and of corporate governance; and
- advancing inclusive attitudes to the participation in our national life of disadvantaged social groups - particularly women, but embracing also the disabled (including persons, for example, with AIDS or HIV), the landless, rural persons and gays and lesbians.

If our Constitution is to succeed, these ideals must be capable of visible attainment through constitutional means.

DEBATE AND RE-EXAMINATION

An experiment must be open to sober scrutiny. Its premises must be open to challenge. Its intended outcomes must be vulnerable to dispute. The means adopted to realise those outcomes must be subject to challenge.

In the advocates' journal Consultus November 1998 (pages 136-138) my colleague Mr Justice K van Dijkhorst expresses strong opinions about our Constitution. He endorses the view that the Constitution renders justice powerless because it ties up the hands of those enforcing the norms of justice. He goes on to say: "The criminal justice system does not deliver. It has broken down."

He proceeds to propose a consideration of radical interventions in court procedures and pre-trial hearings in order to address the ailments he diagnoses.

Mr Justice Van Dijkhorst has been criticised for his candid expression of views. I do not agree with my colleague that the Constitution is at fault. Many of the innovations he proposes seem to me to present no constitutional challenge. Even his most radical proposal, namely the reconfiguration of the right to silence, could in my view well be debated within the context of the limitation of section 35(3)(h) [the right "to be presumed innocent, to remain silent, and not to testify during the proceedings"].

In any event, that right was not conferred by the Constitution - it derived from the common law. The "Hiemstra reforms", embodied in the Criminal Procedure Act 51 of 1977, triggered a similar debate about the common law right to remain silent. The constitutional enshrinement of the common law has not changed the premise of that debate.

So I disagree with my colleague Van Dijkhorst that the Constitution is at fault, or that the Constitution is hampering justice. I also disagree, however, with those who think either that

he should not have expressed his views so strongly, or that he has been disloyal to the Constitution in doing so.

Mr Justice Van Dijkhorst's stature, intellectual powers, and professional efficiency need no endorsement, particularly not from a junior colleague. But they are relevant to assessing the integrity with which he has voiced his criticisms.

To me his criticisms seem to be an example of what N P van Wyk Louw called "lojale verset". Lojale verset, to Van Wyk Louw, entailed a commitment to the ideal of Afrikaner regeneration, while questioning the means and the premises of the apartheid ideology.

Mr Justice Van Dijkhorst is in lojale verset against what he conceives to be some of the implications of our constitutional experiment. His strong expression of views can in my view only be beneficial. As a senior and respected judge, his criticisms of the Constitution, even though they seem to me to be misplaced, alert us to misgivings shared by a very wide section of the population. And his proposals for reform are an invitation to revitalising that Constitution. Mr Justice Van Dijkhorst's views are therefore a call to justification – a call to justify the Constitution itself, and its premises, and the means that we have chosen to effect them. All of this, to those who value the Constitution, should in my view be welcomed without reservation. There is too much at stake, and the forces against us are too momentous, for us to treat with reservation the strongly expressed, thoughtful and powerfully motivated reservations of a loyal constitutional skeptic. We imperil the very efficiency and success of the experiment by disowning criticism of it.

EXTRA COMMITMENT AND EFFORT

The final point I wish to make really follows from the first two. Lawyers who participate in our fragile venture into constitutionalism have a particular duty to ensure that the experiment succeeds. A scientific experiment, in laboratory conditions, must be nurtured, supervised, tended and cosseted. Any risk of failure carries a high price in effort and endeavour.

This places, I believe, a particular responsibility upon lawyers. The legal system, particularly practice as an advocate or an attorney, undoubtedly offers opportunities to prosper, and even to become affluent. This has led in my view to some distortions in legal practice, particularly though not solely at the Bar, which takes the form of extortionate fees. This is not only unbecoming, but damaging to our constitutional enterprise.

Some senior advocates, and some attorneys, seek to justify the fees they charge by alluding to rates of remuneration current in London, Sydney, Toronto or New York. The truth is that our lawyers do not practise in those cities, nor have they chosen to make their practices there. They are in South Africa - a country where disparities of income and of access to resources render the charging practices of some of them excessive and even extortionate. The disparity between a tiny minority of practitioners charging R9 000,00, R15 000,00 or even R30 000,00 per day, and the fact that the vast majority of South Africans do not have even elementary legal services available to them, is not only open to moral challenge, but damaging to the future of the legal system itself.

Our constitutional experiment undoubtedly needs an independent and strong-minded profession. Such a profession needs to prosper financially. Those seeking to enter the legal

profession have every reason to ensure physical comfort for themselves and for their families, and a good future for their children.

But the legal profession in a country which is still desperately poor in resources and in which gaping disparities in income and resources exist should not, I believe, be a means for garnering extravagant wealth.

On the contrary, the legal profession requires from each of us an investment in the debate about our country's future. It requires a commitment to the success of our constitutional experiment. This, in turn, requires some attention to the absence of legal services to the great majority of our population.

If you propose to enter commercial or third party practice, make it a success. But also give some time every week - even only a limited or small amount of time - to servicing the needs of people who would otherwise be without legal advice or representation. That is not only moralistic advice. It is advice directed at the self-interest of all who wish to see the legal system in our country succeed.

If the legal system does no more than protect the affluent, and serves as no more than a mechanism for the accumulation of copious wealth by some senior practitioners, it has little chance of surviving as the common premise of our country's future.

Each legal practitioner, each academic staff member, each judge, each law student, each legal adviser is an agent on behalf of our constitutional experiment. Each of us bears responsibility for its success in a future where its success is by no means certain.

This happy occasion at your faculty this evening marks our joint commitment to this fragile experiment. May you continue to excel in the law. May the law excel in rewarding you. And may you excel in giving back to the people the law is supposed to serve - so that legal values may flourish and their eventual triumph in our country be certain.

Mr Justice Cameron delivered the speech reprinted in this Occasional Paper at the Faculty of Law's prize giving function on 29 April 1999.