

Judges under Fire – The Rule of Law in a Perfect Storm

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Introduction

1. I had the privilege of being lectured at the Law School in Trinity College Dublin by Professor Asmal, and the pleasure of being a colleague of his on the faculty there for a short period. That was in the 1980s. Kader, of course, left Dublin in 1990 to return to South Africa, but he came back to the Law School at Trinity in December 1994 where he delivered a public lecture. That lecture provides a very good starting point for this one. It was entitled '*The Making of a Constitution: The Case of South Africa*'.¹
2. His paper was, obviously, focussed on the then transitional Constitution which had taken effect six months earlier. He described it in memorable terms: '*a negotiated revolution of unique character*'. Central to this was, in his language, '*the elevation of the Constitution to the status of the supreme law of the land, with the concomitant substantial expansion of judicial power of constitutional review*'. Critical to that power of constitutional review was what was, by international standards, an unusually elaborate description of the value of judicial independence. That was framed in s. 96 of

***Judge of the Supreme Court of Ireland.**

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¹ (1995) 17 Dublin University Law Journal 1.

the Interim Constitution, which even more unusually, incorporated express and affirmative obligations on the organs of State to assist and protect that value. These provisions, of course, ultimately, made their way into Chapter VIII of the 1996 Constitution. I will say something more about them later.

3. But for the moment it suffices to observe that certainly as of the mid-1990s the guarantees in the South African Constitution represented the most extensive and detailed framework for the protection of judicial independence in the world. I know that the courts here have been active in implementing both their text and the spirit of the rule of law that animates that text. Indeed, in introducing this lecture it is impossible not to observe that I am delivering it almost thirty years to the day after the Constitutional Court delivered its first certification judgment.² Certainly, as I read that decision, it represented an emphatic declaration of the commitment of the court to the Rule of Law - one that was hugely significant in its timing. So, this seems a particularly appropriate place, a particularly appropriate time, and a particularly appropriate forum for considering how these values of judicial independence that are so central to the Rule of Law and constitutionalism as we understand it today are, three decades later, holding up across the world.
4. I am also particularly honoured to deliver this address. Not only did Kader have immensely close connections with Ireland – his adopted country and second home, as he often described it. He was fond of observing the parallels between the colonial experiences of South Africa and of Ireland. But the promulgation of the first Irish Constitution a little over a century ago, is viewed by many scholars as marking the end

² *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744: (10) BCLR 1253.

of the period of empire, and as representing the first instalment of a flood of written constitutions in newly independent post-colonial states.³ It, like succeeding and similar instruments throughout the world, included an emphatic declaration of judicial independence.⁴ As I will explain, the expansion of constitutionalism, the reconfiguration of the judicial function that the adoption of a written constitution with entrenched guarantees of human rights necessarily entails, and the political and social energies exerted against the judiciary, sometimes travel together.

The independence of the judiciary

5. When navigating the unprecedented blizzard of papers, lectures, and speeches about pressures on judicial independence that have been delivered, published and declaimed over the past three decades (and especially in the last ten years), it is necessary to remember that judicial independence as a legal and political concept is reactive in nature and origin. It exists only because the value it embodies has *always* been under threat. When Alexander Hamilton published Federalist Paper No. 78 in 1778 it was the ever-present danger from the executive and legislative branches that dictated the complete independence of the courts of justice: *‘the judiciary is beyond comparison the weakest of the three departments of power: ... it can never attack with success either of the other two; and ... all possible care is requisite to enable it to defend itself against their attacks’*.⁵

³ Kate O'Regan *‘Courts and the Body Politic’* (Cambridge 2025) at p. 21; L. Colley *‘The Gun, the Ship and the Pen’* (Profile 2021) at p.405 and following.

⁴ Constitution of the Irish Free State Article 69.

⁵ Hamilton, Alexander, James Madison and John Jay *‘The Federalist; Or, The New Constitution’* (Norwalk, CT: Easton Press, 1979) pp. 520-521.

6. His assumption that absent adequate protections there *would* be such attacks reflected the fact that the significant constitutional developments in England of the early 18th century – the restrictions on the power to remove judges and the prevention of the reduction of their remuneration introduced by the Act of Settlement 1701 – were a direct response to the overreach of the Stuart monarchs in the course of the 17th century. These provisions were, in fact, originally intended to appear in the Bill of Rights 1689, emphasising the inevitable relationship between those instruments granting liberties to the citizen, and those prescribing the conditions under which they would be protected. The guarantees in the Act of Settlement, of course, informed similar provisions in the United States Constitution and were central to the structure of every other Constitution around the world thereafter. But the actuality of executive, and the potential for legislative interferences, with judicial function were, historically, not the only form of attack on the judiciary.
7. Throughout history, the popular press, political figures and indeed pamphleteers and essayists have been forthright, and sometimes unrelenting, in their assaults on court decisions. There is of course nothing wrong with any of that: Sachs J. in *The State v. Mamabolo* said ‘*it is particularly important that, as the ultimate guardian of free speech, the judiciary show the greatest tolerance to criticism of its own functioning.*’⁶ Sir Sydney Kentridge observed in his account of the Rule of Law:⁷

‘*Judges must accept strong criticism, even unfounded criticism. Lord Atkin’s statement that justice is not a cloistered virtue has become a legal cliché ... one*

⁶ (2001) (3) SA 409 at para. 78.

⁷ Sir Sydney Kentridge ‘*The Rule of Law: Ideals and Realities*’ (Hart Publishing 2014) p. 156.

of the attributes we expect of an independent judge is the moral courage to make decisions which will be unpopular with politicians or the media or the public.

Judges it has also been said must have broad backs, and usually have. The real mischief of unwarranted attacks on the motives or integrity of the judges, however, is not any hurt to the judge's feelings; it is that they undermine that respect for the judiciary without which ... the foundations of the rule of law are undermined.'

8. This was also the point made by Kriegler J. in *Mamabolo*: it is the people who have to believe in the integrity of their judges, without such trust, the judiciary cannot function properly, and where the judiciary cannot function properly, the rule of law must die. This is why special safeguards have always been in place to protect judges not against criticism, but against vilification, and not against vigorous disagreement, but against insidious, personalised and defamatory abuse. Thus, the law has criminalised speech that defames the judiciary or interferes with judicial processes. But the law has always tolerated strong public scrutiny and criticism of the judiciary.
9. However, as the late 20th and early 21st centuries have unfolded, the threats to judicial independence have evolved in nature and increased in intensity. There are various reasons for this. The spread of constitutionalism since the second world war has without question increased the power of the judiciary but has at the same time made judges more prominent targets for those who take issue with the underlying philosophies of rights protection. Modern constitutionalism has thus, perhaps paradoxically, highlighted vulnerabilities inherent in the judicial branch. Moreover, it is well understood and makes sense that it is at times of emergency and crises that tensions

between the executive branch, and indeed the public and press, on the one hand and the courts, on the other, are most amplified.⁸ From responses to the events of 9/11 through to the global financial collapse in 2008, the climate crises, migration, and COVID, the past quarter of a century has presented more than its fair share of global emergencies. Each of those crises has engaged the courts in some way, and judges have thus found themselves adjudicating on tense disputes in circumstances of heightened anxiety. Moreover, those disruptions have contributed to a diminution in the authority of democratic institutions, and inevitably the judiciary, has been caught in the resulting crossfire.

10. The nature of the attacks on the rule of law and on judicial independence in constitutional democracies, the reasons for them and the vectors through which they are delivered, feed off each other. So, it is not possible to separate one easily from the other. But putting the matter very generally, they derive from seven sources: (a) direct attacks on the independence of the judiciary by governments; (b) agitation against judges by populist political movements; (c) increasingly aggressive, sometimes organised and co-ordinated, and on occasion politically powerful individual litigants or groups of litigants, (d) social media, (e) the mainstream media, (f) artificial intelligence and (g) inadequacies in funding and institutional supports.

11. These, obviously, overlap: authoritarian governments may present the most focussed and direct challenges and may be populist in ideology, the categories of litigant who pose the greatest threats are often linked into populist causes, all use social media to intensify their attacks on the institutions of state and allied establishments, the responses of mainstream media are often the consequence of competition with social media, and

⁸ Kate O'Regan '*Courts and the Body Politic*' (Cambridge 2025) at p. 57.

all have a potent source of information, disinformation, presentation and misrepresentation, in the form of artificial intelligence. Underlying and compounding each is the pressing need in many States for the administrative and financial systems and supports required to ensure the institutional independence of the Judiciary. The importance of those supports to the institutional independence of the judiciary was most recently stressed by Chief Justice Maya in her Keynote Address to the Judiciary Conference in July 2026.⁹ Each of these seven factors would, on their own, represent a significant challenge to, and pressure on, the judiciary.

12. But what is of particular concern is that they are all happening at the same time. The convergence and mutual reinforcement of these threats creates a distinct problem. And we must devise strategies to meet them. In the course of its judgment in *De Lange v Smuts NO*, the Constitutional Court described judicial independence as “*foundational to and indispensable for the discharge of the judicial function in a constitutional democracy based on the rule of law.*”¹⁰ In *Democratic Alliance v Hlophe and Others*¹¹ it was explained that ‘*[a] strong and independent judiciary, as contemplated by section 165 of the Constitution, is vital to maintaining our constitutional democracy.*’ A failure to recognise and then address these challenges threatens the very foundation of our democratic order.

Judicial independence

13. I do not propose here to spend much time in the legal undergrowth of judicial independence. The reason for the principle, and its general shape, are well understood.

⁹ Mandisa Maya CJ ‘*Towards a Single, Institutionally Independent and Accountable Judiciary*’ (Opening Keynote address, South African Judiciary Conference, 14 July 2026).

¹⁰ [1998] ZACC 6; 1998 (3) SA 785 (CC); 1998 (7) BCLR 779 (CC) at para 59.

¹¹ [2025] ZAWCHC 234; [2025] 3 All SA 447 (WCC); 2025 (5) SA 166 (WCC); 2025 (10) BCLR 1206 (WCC) (2 June 2025).

But I hope it not inappropriate for me to say something in passing about the South African provisions, which I think are in some respects very striking.

14. Every definition and every theory of the rule of law¹² demands indispensable minimum standards for the fair and transparent resolution of civil and criminal disputes: Chief Justice Langa in *President of the Republic of South Africa v. Modderklip*¹³ explained that the first aspect that flows from the rule of law is ‘*the obligation of the state to provide the necessary mechanisms for citizens to resolve disputes that arise between them*’. These, in turn, require that adjudication be undertaken by judges who are free from improper external pressures: without that guarantee, the law becomes, or assumes the appearance, of partiality and arbitrariness. Judicial independence, our Chief Justice has said, ‘*is the lynchpin of the constitutional order*’.¹⁴

15. Four specific principles have developed under the general umbrella of judicial independence. They appear throughout the judgment of the Constitutional Court in *De Lange v. Smuts*¹⁵ - security of tenure, financial security, the institutional independence of the judiciary in respect of matters of administration bearing on the exercise of their judicial function, and adjudicative independence or the freedom of judges to perform their adjudicative role without interference from the other branches of government.¹⁶ They have been formulated in almost precisely the same way by the Irish Supreme Court, *In re Article 26 of the Constitution and the Judicial Appointments Bill*.¹⁷

¹² See, in particular, T. Bingham ‘*The Rule of Law*’ (2010) at pp. 23-25

¹³ (2005) 5 SA 3 at para. 39

¹⁴ *Zalewski v. Adjudication Officer* [2021] IESC 24; [2022] 1 IR 421 at para. 37.

¹⁵ (1998) (3) SA 785

¹⁶ *Valente v. The Queen* [1985] 2 SCR 673, 708,

¹⁷ [2023] IESC 34, [2024] 2 ILRM 1 at para. 165.

16. These mandates are all reflected in the provisions of Part VIII of the 1996 Constitution.

But it supplements them with some arresting, and important, innovations when they are compared with older instruments such as the US, Canadian, or for that matter, the Irish Constitution. They bear I think some short comment. First, it contains in s. 165(3) an express injunction against interference with the functioning of the courts by any '*person or organ of state*'. In other systems, this is extrapolated from more general decrees of judicial independence; and in many systems the mandate is understood as operating constitutionally only vis-à-vis other organs of State. Sub-constitutional rules govern attacks on the judiciary by non-State actors. Joining the two together is symbolically significant, I think.

17. Second, it contains a critical affirmative obligation in s. 165(4), which Jafta J. described in *Mjeni v. Minister for Health and Welfare, Eastern Cape* ¹⁸ described as '*the most important and fundamental duty imposed upon the State by the Constitution*'.

'Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.'

18. This strikes me as a remarkable provision. It is remarkable not only because it entails an affirmative obligation on the State, but because the obligation is pinned down: it is not an obligation to protect judicial independence in some vague or general way, but to assist the Courts in ensuring not just independence, but the impartiality, dignity, accessibility and effectiveness of the courts. Certainly, to a lawyer coming to these provisions from outside this jurisdiction, it seems pregnant with possibility.

¹⁸ (2000) (4) SA 446 at 452e

19. Third, it expressly regulates certain judicial appointment which, in Anglo-American jurisdictions, has traditionally been a matter for the executive in a broadly drawn discretion. This, too, is a critical innovation. And it is, I think, an important one in constitutionalising diversity and assuming criterion of merit in the judicial appointment process. The advantages of this are self-evident. It avoids the issue with which my court was confronted in 2023 when it was – unsuccessfully - contended that legislation limiting the scope of the power of the Government to appoint judges by reference to the recommendations of an independent judicial appointments commission were unconstitutional as interfering with the executive power over judicial appointment.¹⁹ As Charles Manga Fombad has explained²⁰ :

In those countries where the selection and appointment process as well as the process for dealing with judicial misconduct are transparent, such as is the case under the South African Constitution, the judiciary is more likely to employ competent, independent and impartial judges.

20. Fourth, it establishes a Judicial Service Commission. Other states depend on sub-constitutional institutions to discharge these functions. Here, selection, appointment and disciplinary processes are afforded a crucial constitutional status. The place given to these institutions reflects a singular acknowledgement of their practical importance, while the status afforded to the entity responsible for their implementation confirms the weighty function and responsibility reposed in it.

¹⁹ *In re Article 26 of the Constitution and the Judicial Appointments Bill.*

²⁰ C.M Fombad, 'A preliminary assessment of the prospects for judicial independence in post-1990 African constitutions' [2007] Public Law p. 233

Some examples: The problems and responses in Europe

21. But the real question for lawyers, judges and students of political science is how these and cognate rules respond to real-world problems. I could take many examples from the past decade that show how these values have been subjected to full frontal assault. The European experience is particularly telling, not merely as a warning, but because it demonstrates what courts can do when constitutional guarantees of judicial independence come under sustained pressure. Here, I should say that Ireland has been fortunate insofar as Parliament has traditionally exercised extreme caution in legislating in areas that might be seen to impact the independence of judiciary or to interfere with the administration of justice by the courts. But other jurisdictions in the European Union have not been as lucky. The rule of law crises in Hungary and Poland have prompted the intervention of the Court of Justice of the European Union to sculpt from the foundation treaties principles of judicial independence which have been – latterly at least – stringently enforced against recalcitrant states. In Hungary, as one commentator has explained it, *‘[t]he Orban government has systematically dismantled judicial independence, restricted media pluralism, and concentrated power through constitutional and legislative changes since 2010, prompting concerns about the erosion of democratic checks and balances.’*²¹ A favoured method of achieving this, was through the rigging of the case allocation system, whereby court presidents or chief prosecutors would allocate politically sensitive cases to friendly colleagues. The result was that in a very short period of time, the independence and impartiality of the

²¹ N. Kirst *‘Dealing with Rule of Law Crises in the European Union’* (Hart 2026) at p.1.

judiciary was significantly curtailed.²² The difficult process of reversing this has begun recently.

22. The same happened in Poland. There, the measures extended across eight years beginning with the election of the Law and Justice party in 2015. Almost immediately after it took office, the newly elected Polish Parliament moved to annul the selection of five judges to the Constitutional Tribunal that had been made by the outgoing government, appointing five judges of its choosing instead. The functions of the Justice Minister and Public Prosecutor were merged, and a new President was appointed to the Constitutional Tribunal. In December 2017, a law was passed lowering the retirement age for judges, forcing out 1/3rd of sitting judges. In March 2018, the National Council of the Judiciary was overhauled. Whereas its judicial members had previously been selected by sitting judges, the members of the new Council were selected by Parliament, affording the political organs complete control over all judicial appointments. A remarkable law was then passed in December 2019 – the so-called muzzle law – which made it a disciplinary offence for judges to question the validity of the appointment of those judges selected by the government through this process, or to question the legality of judicial reforms. While these prompted public protests by the judges, supported by colleagues from other jurisdictions, the manner in which, and speed with which, this was achieved was alarming. As one English judge observed recently:

‘in a number of jurisdictions, the capture of the courts has begun, not with soldiers at the courtroom door, but with changes to the way judges were

²² J. Morijn ‘Unpacking Judicial Resistance; Europe’s national judges and rule of law backsliding’ in P. Bard and J. Krommendijk ‘Sustaining the Rule of Law: The Future of Judicial Independence in Europe’ (Elgar 2025) at p. 288.

*appointed, promoted, disciplined, retired or replaced. Court-packing, forced retirement, politically controlled judicial councils, and appointments made on the basis of loyalty rather than merit are familiar methods by which constitutional democracy is weakened from within’.*²³

23. The foundational treaties of the European Union do not contain express guarantees of judicial independence. However, in various proceedings brought to the Court of Justice arising from these measures, the court deduced from those treaties guarantees of judicial independence upon which it has gradually elaborated over the past eight years. Those cases came variously in the form of references from the courts of other member states inquiring as to the conditions under which they could extradite to Poland in particular, proceedings brought against Poland by the European Commission, and references from judges within Poland itself.

24. From six words in the Treaties – ‘*rule of law*’,²⁴ and ‘*effective legal protection*’²⁵ - the Court of Justice has constructed a guarantee of judicial independence supported by an elaborate edifice. It has decided that judicial independence required rules as regards the composition of a judicial body,²⁶ and the length of service and grounds for abstention, rejection and dismissal of its members. They demand that the disciplinary regime for judges must contain guarantees that prevent its abuse, or its deployment as a system of political control. The court has required that the rules concerning the composition of judicial panels be transparent and known to litigants and which are such as to preclude

²³ Dame Victoria Sharp ‘*Without fear or favour: Judicial Independence, Past, Present and Future*’ 22 June 2026, p.

²⁴ Article 2 Treaty of the European Union.

²⁵ Article 19(1) Treaty of the European Union.

²⁶ Judgement of 11 July 2024 Joined Cases C-554/21, C-622/21 and C727/21 *Financijska agencija v. Hann-Invest d.o.o. and Others* (‘*Hann-Invest*’) ECLI:EU:C:2024:594 at para. 52.

any undue interference in the decision-making process in a given case.²⁷ The principles governing the assignment of judges to hear cases have been of particular concern to the European Court; in one of the Polish cases a judge was removed from hearing a case because, it was suggested, she had queried the appointment of another judge.

25. The CJEU has also required rules governing the appointment of judges that dispel any reasonable doubt as to the imperviousness of courts to external factors and their neutrality with respect to the interests before them.²⁸ Those rules do not preclude selection by the Executive – a point similarly made by the South African Constitutional Court in its first certification judgment – but they do require that where there are procedures for appointment, they are fully complied with.

26. The court has extended those principles to the secondment of judges from one court to another, and, in some circumstances, to the reallocation of cases and assignment of judges within a court.²⁹ The CJEU has not merely prescribed the need for rules to this end, but has demanded that compliance with legal provisions relating to the composition of the court sitting in each case be subject to judicial review.³⁰ In one case, it condemned legislation that enabled the Polish Minister for Justice to second a judge from one criminal court to a higher criminal court for a fixed or indefinite period: this was viewed as creating the risk that political control would be exerted over the content of judicial decisions.

²⁷ Judgement of 11 July 2024 Joined Cases C-554/21, C-622/21 and C727/21 *Financijska agencija v. Hann-Invest d.o.o. and Others* ('Hann-Invest') ECLI:EU:C:2024:594.

²⁸ Judgment of 26 March 2020 Cases C-542/18 and C-543/18 *Erik Simpson and HG v. Council of the European Union and European Commission* ECLI:EU:C:2020:232 paras. 74 and 75.

²⁹ Judgment of 6 October 2021 C-487/19 *WZ (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment)* ECLI:EU:C:2021:798.

³⁰ Judgment of 14 November 2024 C-197/23 *S.S.A. v. C. sp. z o.o. Prokurator Prokuratury Regionalnej w Warszawie* ECLI:EU:C:2024:956.

27. These decisions have resulted in penalties on the defaulting States, and may, in cases of extreme and systemic breach, render it impossible for States to return fugitives to non-compliant jurisdictions or to enforce judgments from the courts of those states. The court has also decided that where a judge is appointed in clear breach of fundamental rules, and the integrity of the outcome of a judicial procedure is undermined, national courts must find the decision of the judge to be null and void where this is essential to ensure the primacy of EU law.³¹
28. The point is that judges may interpret constitutional guarantees of independence in a way that pre-empts, negates and punishes abusive behaviour. The CJEU's jurisprudence shows that power being used in an imaginative, creative and proactive way. It provides, I think, an important lesson for all judiciaries as to how the sometimes very general values that drive the rule of law can fashion sharp and specific rules to great effect, when it is necessary to do so.

Non-State actors

29. But, direct attempts by States to reconfigure the judiciary to their liking in very short periods of time are mercifully rare – although the nature and extent of the changes introduced in Hungary and Poland are alarming, as was the speed with which they took effect, the limited resistance they met, and the difficulties that have been encountered in unwinding them. But as I have alluded to, there are other supervening pressures. The European Network of Councils for the Judiciary reported in 2025³² that 30% of the

³¹ Judgment of 6 October 2021 C-487/19 *WZ (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment)* ECLI:EU:C:2021:798 at paras. 154, 155 and 161.

³² 'Threats and Intimidation Against Judges: assessing the current level of Protection.'

respondents to its survey of judges had reported experiencing threats arising from their judicial work. In half of the judiciaries surveyed, more than 10% of judges had experienced intimidation or threats. It reported that in several countries, attacks on judicial independence take on a personal dimension by criticism and mobilisation against individual judges, noting that social media creates an environment in which animosity can be stirred up while organisers remain anonymous. In its survey, 12% of respondent judges believed that in their country decisions or actions of individual judges in the preceding three years been inappropriately influenced by actual or anticipated social media postings. I am conscious that there have been recent surveys of the South African judiciary disclosing similar, if in some regions, higher, incidences of threats of physical attack on judges.

30. That this occurs in an environment in which it is spectacularly easy to whip up hostility towards any identified group should be of concern to all. In the United Kingdom, when the courts were called upon to adjudicate on legal aspects of *Brexit*, the judges deciding the first and most significant of the challenges were famously pilloried in one leading daily newspaper as ‘*Enemies of the People*’, their photographs – of course bewigged and ermine-clad – blazoned across the front page of the publication. The newspaper proposed that the judges had purposely blocked the *Brexit* process, referring in the online edition of the article, and for no evident reason, to the sexual orientation of one member of the court. In recent years immigration judges there have been subject to political campaigns conducted across social media, resulting in two of those judges being formally advised to move out of their homes. Social media, as one English judge has crisply put it, ‘*compresses the space between criticism and intimidation, and*

*rewards heat rather than accuracy. It allows anonymous hostility to appear as public opinion’.*³³

31. In the United States earlier this year the home floor plans personal phone numbers and addresses of judges who had ruled on various immigration cases were leaked online, with judges receiving torrents of messages, being required to take enhanced security measures for themselves and their families and, in some cases, also leaving their homes. The practice of ‘*pizza doxxing*’ judges – ordering pizza deliveries to their homes sometimes in the name of Daniel Anderl, the son of a judge who was shot and killed at this home by a disgruntled lawyer – has been extensively aired in the press.
32. Indeed, in the United States, the description of judges by reference to the President who appointed them (with the implication of some inevitable and consequent ideological bias) has been long normalised. Personalised criticism of individual judges by senior political figures has become more frequent, sometimes more vicious and on occasion excitable and inciteable. Inevitably, these noises from government not only osmotically cast a doubt on the impartiality and legitimacy of judicial decision-making as a whole but are also a short step away from more disruptive questions around why judicial decisions and orders should be complied with at all. That is precisely what has recently occurred in Israel, the cabinet there having resolved on July 5th that it would not obey a Supreme Court order of three weeks earlier ; the order, the cabinet said, was illegal. Harsh criticism is not a problem, but there is a line between that and intimidation, interference with the judicial process and attempts to undermine the orders of the court.

³³ Sharp at p. 7.

33. I have avoided dwelling on specific examples from South Africa, for three reasons.

First, because they will be known to everyone here. And second because my experience of foreign lecturers who visit Ireland is that when they colour their presentations with local examples, they sometimes neither choose the best ones, nor fully understand the nuances of the examples they do give. And finally, I am acutely conscious of not trespassing on local issues of a politicised nature.

34. But having said that, I hope I will be allowed to say that the judgments of the Constitutional Court in *Secretary of the Judicial Commission of Inquiry v. Zuma*³⁴ sharply reveal many of the phenomena I have described, while making all of the themes I have highlighted earlier – and more – in a particularly forceful manner. Without engaging with the merits of these cases, where the immediate response of powerful litigants to Court orders is to challenge the political impartiality and integrity of the court that makes them, and to impugn its commitment to democratic and constitutional values, all courts have a clear obligation to respond emphatically and unequivocally. As the majority observed, if the conduct of persons whose power is such that they can incite others to defy court orders is met with impunity, it does significant damage to the rule of law. And as it also said, ‘*if with impunity litigants are allowed to decide which orders they wish to obey and those they wish to ignore, our Constitution is not worth the paper upon which it is written*’.

What is to be done?

35. All of this, of course, raises the question of what – precisely – must be done to address these various challenges. The European experiences have shown both the value and

³⁴ (2021) 5 SA 327.

importance of strong connections between and support of international judiciaries. They also demonstrate the capacity for courts to respond to threats to independence at a legal and constitutional level. But mostly, it depends on the support of others. The solutions to many of these issues are obvious and some of them are expensive. But they are not complicated, and they are absolutely necessary to maintain the foundations of our democratic system. To repeat: these are not luxuries or optional extras. They are critical to the stability of the administration of justice, and the stability of the administration of justice is critical to the stability of our democracy. Those propositions merit repetition.

36. The Executive must provide courts with the resources they require to discharge their functions independently, effectively, and securely. It must safeguard judges and court staff when they need physical protection. The State should institute and enforce regulatory measures that ensure that social media is not used to incite violence against or violate the privacy of judges or their families simply for doing their jobs. Laws of contempt of court must, while fully protective of free speech, be adequate to ensure that the judiciary can function in accordance with its constitutional mandate. Judges must have the power to control their courtrooms and the buildings in which they work and must be able to guarantee their own safety and that of their staff. When court orders are made, they must be enforced, and the Executive must provide the means to ensure that this is done. Politicians should exercise prudence when criticising judicial decisions and avoid attributing base motives or political bias to judges. The systems of judicial appointment must, at the very least, operate in a way that engenders public confidence that only truly meritorious candidates are appointed to judicial positions.

37. But while we, as judges, are very good at thinking of things that others must do to protect our independence, we need to remember that judges themselves can compromise and undermine those values as corrosively as the State or private actors. As Kader argued, judicial independence itself demands a properly constituted mechanism through which judicial incompetence, partisanship or bias can be investigated.³⁵ This strongly held belief, of course, animated his personal participation in the proceedings arising from the Judicial Service Commission's handling of complaints involving the Western Cape President in 2010. In the course of his submissions to the court in that case, his counsel drew attention to the important commentary to the Bangalore Principles, the widely adopted international code of ethical judicial principles. In an essay in a book commemorating Kader his barrister,³⁶ discussing the case, quoted from a speech delivered by Michael Kirby, the former judge of the High Court of Australia who, as it happens, acted as rapporteur to the Committee of the Judicial Integrity Group that prepared the Bangalore commentary. His comments bear repeating not only for judges, but also for all who value the principles of constitutionalism and the rule of law:

'Rawls theory of justice conceived of a well-ordered society as one in which people were associated, recognising certain rules of conduct as binding in relation to one another, and acting in accordance with those rules. Thus, for Rawls the fundamental institutions of society – which certainly include a competent, independent and impartial judiciary – represented one aspect of the basic understanding between the state and the individual. The individual gives

³⁵ K. Asmal 'Judges are not exempt from review' Mail and Guardian (23 June 1998).

³⁶ See M. Du Plessis 'Kader Asmal as Amicus Curiae' in K. Asmal and T. Maluwa 'Law Politics and Rights: Essays in memory of Kader Asmal' (Martinus Nijhoff 2013) at 234-235.

loyalty to the State. In return, the individual expects that the basic organs of the state will act with integrity in all dealings with the individual. In no organ is this more central than in the judiciary. Whatever expectations and tolerances may exist in other branches of government and in other walks of life, the very essence of the nature of a judiciary is incompatible with the existence of corruption, partiality, lack of competence and dependence on mere power.

If there is some truth in Rawls' analysis, as I believe there is, it becomes essential that the organs of the state – including relevantly the judiciary – should undertake their own vigilant endeavours to ensure to every person integrity, efficiency, competence and justice in the performance of judicial functions. If they do not, the loyalty of citizens to the state will be undermined. Powerful individuals will seek out ways to advance their interests outside the principles of constitutionalism and the rule of law.'

Artificial Intelligence

38. These comments frame the context in which the judiciary must negotiate a new challenge in the form of artificial intelligence. Of course, insofar as artificial intelligence and the courts are concerned, the headlines tend to gravitate towards stories of hapless lawyers who use artificial intelligence to produce briefs only to find themselves in hot water for citing non-existent legal authorities. This certainly reflects a problem. So does the deluge of lengthy submissions to courts, or otiose – and in some cases fabricated – evidence generated in this way. These, however, are problems that can be solved by cross-checking and suitable disciplinary measures. But artificial

intelligence presents dangers at more fundamental and troubling levels. These need to be urgently addressed.

39. At the root of the problem lies a simple dilemma. Most courts face significant backlogs of work. The resulting delays in processing cases damage the administration of justice. The efficiencies enabled by artificial intelligence afford a mechanism by which these problems can be meaningfully tackled. And if we, as judiciaries, do not use the facilities afforded by technology to do our work faster and better, then that in itself will ultimately damage the administration of justice. In particular, a substantial cohort of an entire generation now lives significant parts of their lives online. They expect that they can transact business with the courts and obtain justice in the same way and with the benefit of the same technologies and efficiencies as they conduct all of their other affairs. If we are not providing this, we need, at the very least, to be able to explain why.

40. At the same time, justice is a human value, and its administration is an exercise in humanity, not in the execution of robotic analysis. If appropriately monitored, artificial intelligence can be used without objection to translate, to summarise, to organise, to identify errors of logic or reason, to research or manage documents and, I presume, to identify what has been produced with the assistance of artificial intelligence. But without understanding its proprietary technology, and without appreciating the datasets, sources, selection criteria and the objectives it has been prompted to use or to achieve, it is not possible to understand its biases or shortcomings. And most importantly, once it is there, the prospect that some judges in some situations will succumb to the temptation of allowing it to make decisions that are constitutionally required to be those of the judge becomes unavoidable. This is not simply the peril of laziness: resorting to artificial intelligence to obtain even preliminary pointers or nudges risks the exertion of

influence by technology we do not fully understand, created by people we do not know, informed by preconceptions or biases we will never see. But these issues may not be obvious to all. That is why a discrete ethical standard addressing the use of this technology is necessary; and why courts must begin to publicise widely and explain the uses they do, and do not, make of this resource.

The culture of justification

41. And that leads to my final point. Kader explained how he saw the constitutional transition of South Africa in the Sir William Dale Memorial Lecture, delivered at Chatham House in 2006.³⁷ There he drew expressly upon Etienne Mureinik's famous description of South Africa's constitutional development as a movement from a culture of authority to a culture of justification.³⁸ He spoke of an ethos that should inform the judiciary, Parliament and the executive alike. But in a constitution so understood, it is the judiciary that is at the heart of demands for, and assessments of, '*justification*'. And if that truly is the underlying ethos, it must follow that the question is not simply whether judges are independent and should be seen to be independent. It is whether the constitutional culture is strong enough to preserve judicial independence, to support its judges, when necessary, to accept their authority when their judgments are politically inconvenient, and to hold them properly accountable where they fall short of those standards. If we believe in a culture of true constitutionalism, it can do all of these things, and if it can do all of these things it is strong enough to meet the challenges I

³⁷ K. Asmal '*The South African Constitution and the Transition from Apartheid: Legislating the Reconciliation of Rights in a Multi-Cultural Society*' IX European Journal of Law Reform pp. 155, 160 citing E. Mureinik '*Emerging from Emergency: Human Rights in South Africa*' (1994) 92 Michigan L.R. 1977, 1986.

³⁸ Etienne Mureinik, '*A Bridge to Where? Introducing the Interim Bill of Rights*' (1994) 10 South African Journal of Human Rights 31, 32; Kader Asmal, '*The South African Constitution and the Transition from Apartheid: Legislating the Reconciliation of Rights in a Multi-Cultural Society*' (2007) 69 Amicus Curiae 26, 28-29.

have described here this evening. But first, we ourselves have to see, understand and define those challenges, and we must make sure that everyone else sees, understands and grasps the necessity to confront them.