

Now is the time for the JSC, in embracing the foundational principles of our constitution

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This year we are celebrating the 25th year since our constitution came into operation.

A constitution, which as our supreme law, in a deliberate and foundational manner, determined not only that we are to be served by an independent judiciary, but which has also entrusted our judiciary with the responsibility to act as the final arbiter, not only when we have disputes with one another, but also when we dispute the legality or lawfulness of any action by those who exercise any public power.

One of the fundamental human rights we enjoy in terms of this constitution is freedom of speech. It is the exercise of this freedom which enables even those who believe that the rule of law must be replaced with the rule of man, by substituting the supremacy of our constitution with the supremacy of this legislature, the national parliament, to air this myopic view in public.

From our side we are unequivocal in our support for and our resolve to protect the supremacy of our constitution, the rule of law and the independence of our judiciary.

The best protection against these attacks on the rule of law is of course to ensure strong trust and confidence amongst ordinary South Africans in the judiciary as an independent and effective arm of state.

On this score the announcement by the Minister, during his political briefing of the Portfolio Committee on the 3rd of May that this government is finally ready to proceed to establish a judicially led court administration model, is appreciated.

This is long overdue and the almost decade long standoff between the judiciary and the executive on this issue served no other purpose than to undermine the independence of the judiciary and our constitutional democracy.

Quite possibly the one thing we have however learnt from this protracted stand-off is that this model will have to ensure that a proper system is put in place to ensure not only the operational independence of the judiciary, but in a correlating manner a system which will also ensure that the judiciary properly accounts for its use of public funds.

And accounting must happen to this legislature, being the authority entrusted by our constitution with the appropriation of public funds and being the authority entrusted with oversight in respect of the spending of public funds.

Similarly, this system will, for the sake of the judiciary but more importantly for the sake of our constitutional dispensation, have to ensure that the judiciary properly deals with all matters within its authority that holds the potential to undermine and erode its own independence.

This would in simple terms mean that the judiciary must deal with allegations of impropriety and misconduct in its own ranks in a speedy, effective and transparent manner. The judiciary must understand that its failure to do so invariably will hold the dangerous potential that public trust and confidence in it will be undermined and eroded.

While adding our voices to those who have used this debate to congratulate Judge Zondo on his appointment as our Chief Justice, we do so knowing that that our new Chief Justice will need no reminder that with great power comes great responsibility.

Another issue which will require the wisdom of Solomon from our new Chief Justice, but in respect of which it is equally important that he gives decisive and effective leadership, in order to prevent a situation where the trust and confidence of South Africans in the judiciary will be undermined, is the manner in which the Judicial Services Commission deals with interviews of potential judges.

Unfortunately there is a growing perception that the JSC is becoming merely a stage for political duels, manipulation and score setting, to the point where good appointments to the bench happen despite the JSC and not because of it.

In addition, the time has indeed come to call on the JSC to also work towards a course correction in respect of the way in which it exercises its constitutional duty to consider the need for the judiciary to broadly reflect the racial and gender composition of South Africa when recommending candidates for appointment to the bench.

The guidelines for the questioning of candidates for nomination to the Constitutional Court adopted in 1994, right at the dawn of our democracy, in very clear terms stated that if our constitution makers clearly did not opt for a court which should represent the races and genders "in direct proportion to their share of the national population" it must follow that the JSC cannot act as if this was indeed the case.

Now is the time for the JSC, in embracing the foundational principles of our constitution, which includes non-racialism and non-sexism, to be guided again by this and another portion of the 1994 guidelines which I, in conclusion quotes and which in an instructive manner directs as follows:

"the Constitution-maker is not concerned with the interests of the individuals who, by appointment to the Court, might benefit from its instruction. Its concern is with the effectiveness of the Court as an instrument of justice."