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**POLITICS AND CONSTITUTIONAL ADJUDICATION  
A RESPONSE TO PROF. F VENTER (PU vir CHO)**

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## **POLITICS AND CONSTITUTIONAL ADJUDICATION A RESPONSE TO PROF. F VENTER (PU vir CHO)**

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### **1 INTRODUCTION**

In order to respond appropriately to Prof Venter's paper on politics and constitutional adjudication I have already had sight of it. My comments therefore may be seen not only as a response but a reaction as well, to some of the opinions expressed by the Constitutional Court judges in the judgements cited therein.

Prof Venter posits certain considerations of how judicial officers should deal with personal convictions when required to adjudicate in matters that have political implications; these are:

Not to be politically motivated when producing judgements in cases having political consequences

That since this would require great effort and since it may well be impossible for a judge to divorce her/himself from ingrained predispositions and premises, a solution may be found in standards of justice with which decisions must comply rather than a preoccupation of what goes on in the mind of a judge.

I believe that there is more to it than in just attempting to establish standards of justice which in any event would be established by judges themselves.

### **2 THE JUDICIARY AND A CRISIS OF LEGITIMACY**

Perhaps the applications for the recusal of the judges in the SARFU and the SACCAWU cases may be attributed to perceptions of a crisis of legitimacy of the judiciary

Chaskalson CJ refers to an "evil and immoral" old order – a reference to the pre-constitutional era of apartheid. It was an era in which the judiciary was subordinate and subservient to parliamentary sovereignty; the law courts were undermined by successive governments that used them 'as instruments of

domination to work injustice, thus creating a crisis of legitimacy in the legal system as a whole.<sup>1</sup>

When recourse is had to the legal tradition of this country, it is generally accepted that parliamentary sovereignty as applied by the apartheid government had a deleterious and stifling effect on the judiciary and judicial activism. Judicial independence and the growth of judicial activism were compromised by the 'inarticulate premises' of judges<sup>2</sup> who either consciously or unconsciously articulated these premises in support of a minority government predicated on parliamentary supremacy and sovereignty as well as legal positivism that was 'invoked as a jurisprudential creed supportive of this approach'.<sup>3</sup> Parliamentary sovereignty and its cognate, legal positivism, did not nurture a culture of judicial activism and legal realism but rather one that typified a sterile and impotent judiciary.<sup>4</sup>

The apartheid regime engendered and fostered a legal system that was identified with a legitimacy crisis and complemented by a 'judiciary (that was) not only believed to be hardly representative of the population of South Africa, but to be out of touch with popular needs and notions of justice.'<sup>5</sup> The predilections of judges coupled with the notion of the 'inarticulate premises' was perceived as perpetuating not only the concept of parliamentary supremacy but worse still a minority white hegemony predicated on racism. 'The legal order of apartheid [had] brought not only white South Africa into disrepute. It [had] undermined faith and confidence in the whole South African legal system.'<sup>6</sup>

1 L du Plessis & H Corder Understanding South Africa's Transitional Bill of Rights 1994 at 191.

2 J Dugard Human Rights and the South African Legal Order 1978 374-382.

3 Op cit at 82.

4 George N Barrie 'The Challenge of the South African Judiciary in the 1990's' (1989) 4 TSAR 515 at 516.

### 3 Judicial Revisionism

What then is required to reinstate an impartial judiciary that Cameron AJ (as he was then) opines is more easily attainable than a “colourless neutrality”?

The new constitution heralds a new legal order in South Africa. It brings with it not only a new philosophy of constitutionalism but also the potential for a new constitutional jurisprudence.

The Constitution invests the courts with the power and function of judicial review<sup>7</sup> which necessitates that all law be examined against the standard of values that are enshrined in the Bill of Rights and where the law is inconsistent with these norms and values, the courts must declare it either in whole or in part constitutionally invalid.

Despite the criticisms levelled against it, the judiciary does possess the necessary skills, experience and intellectual capacity to interpret a Bill of Rights. Given that a cataclysmic transformation of the judiciary is neither practical nor desirable, what is required though to alter the mind-set of parochial and conservative-minded judges is a concerted judicial revisionism that would activate judicial thinking and constitutional jurisprudential development. Although it is anticipated that there will be a cautious, narrow approach by the courts in accordance with conservative activism, judicial revisionism must transform the judiciary’s intellectual and attitudinal inclinations to manifest creativity, tact, imagination and sensitivity in the interpretation and application not only of the Bill of Rights but the Constitution as a whole.

5 Johan van der Westhuizen ‘The Protection of Human Rights and a Constitutional Court for South Africa: Some Questions and Ideas, with reference to the German Experience’ (1991) *De Jure* 1 at 2.

6 *Du Plessis And Others v De Klerk And Another* 1996 (3) SA 850 at 401.

7 Chapter 8 of the Constitution of the Republic of South Africa, 1996, Act 108 of 1996.

To re-instate the confidence of the public in the impartiality, neutrality and independence of the judiciary, judges will be required to develop a judicial framework and policy that will produce a constitutional jurisprudence for the reconstruction of society.

And to achieve this the judiciary needs to transform itself by actively engaging in a process of judicial revisionism and activism so that judges may be seen to discharge their function without fear, favour or prejudice in a democratic constitutionalism the foundations of which are human dignity, equality and freedom. After all the Constitution should 'permeate all that judges do'.

The judgements in the Sarfu and Saccawu cases were good judgements for to have ruled otherwise would have exacerbated the crisis of legitimacy.