Judicial independence on a short leash: the unavoidability of second-order considerations

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Introduction

In South Africa, the judiciary is in certain respects dependent on the executive and legislative branches of government. The judicial branch depends on the executive and legislature for the appointment of judicial officers, the financing of the administration of justice, and state cooperation to give effect to its orders.[1] This dependency renders the prospect of absolute judicial independence non-existent. Given that judicial independence is nonetheless a constitutional principle championed within and beyond our borders, a resulting question is where the line should be drawn between the dependence and independence of the judiciary.

I argue that answering this question requires that we acknowledge the unavoidability of second-order considerations. I do so by highlighting the need to acknowledge the myth of absolute judicial independence and the hard questions to which this fact gives rise. In the interest of guarding against positivism, it will be suggested that answering these hard questions will necessarily bring about confrontation with realms beyond the law.

The relativity of judicial independence

The judiciary is in certain respects dependent on the political branches of government. Judicial appointments are made by the President, while Parliament enacts legislation effecting the "appointment, promotion, transfer, dismissal of, or disciplinary steps against" judges.[2] Moreover, cooperation from the two branches is required to uphold and enforce court orders.[3] Finally, in terms of chapter 11 of the Constitution, security services are regulated by the executive branch, which is answerable to Parliament in respect of matters connected thereto.[4] Therefore, not only do the political branches of government exercise control over the judiciary; they also control the means of the legitimate use of force.

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[1] K Malan "Reassessing judicial independence and impartiality against the backdrop of judicial appointments in South Africa" (2014) 17 *Potchefstroom Electronic Law Journal* 1965 1985.
[2] S 174 of the Constitution of the Republic of South Africa, 1996.
[3] P de Vos "Between moral authority and formalism: Nyathi v Member of Executive Council for Dept of Health, Gauteng" (2009) 2 *Constitutional Court Review* 409 410.
[4] S 198-210 of the Constitution.

It can be said that this is what Alexander Hamilton had in mind when he wrote about the dependency of the courts in the *Federalist Papers*:

> "The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm for the efficacy of its judgments."[5]

I propose that a literal interpretation of this passage would not do it justice. Courts are not mere puppets who only apply the law as it is written. On the contrary, some courts use their discretion to interpret the law in a creative fashion, with the purpose of bringing about social change.[6] Others defer to the executive to effect that change.[7] However, the Supreme Court of Appeal has endorsed judicial deference more than once, in so far as it may be appropriate and even necessary where the subject matter of an administrative action is so technical as to render the court not satisfactorily proficient to sustain a proper judgment.[8] Thus, even where courts defer to the executive, this does not establish by automation a lack of will and agency on their part.

Arguably what Hamilton had in mind was an imbalance of power between the judiciary and the political branches. Land, labour and capital are the economic fundamentals of a society.[9] The executive and legislative branches have direction in respect of these fundamentals. A liberal society's constitution bestows upon these branches Hamilton's sword and purse, without which it is hard to conceive how a state would be properly and peacefully governed – including giving effect to judicial rulings. In view of the courts' dependence on these branches for the purposes of appointment, financing and state cooperation, it is not unreasonable to infer that the independence of the judiciary is thereby significantly constrained.

Therefore, if such a thing as judicial independence exists, it cannot be said to be absolute. For one thing, judicial appointments are themselves not apolitical. Consider, for instance, that certain members of the Judicial Service Commission – the body whom the President must consult in respect of certain judicial appointments – are appointed by the President, whereas

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[5] A Hamilton, J Madison & J Hay *The Federalist Papers* (1961) 465.
[6] D Kleyn, F Viljoen, E Zitzke & P Madi *Beginner's Guide for Law Students* 5 ed (2019) 24.
[7] Kleyn et al *Beginner's Guide* 24.
[8] *Minister of Environmental Affairs and Tourism and Others v Phambili Fisheries (Pty) Ltd* 2003 6 SA 407 (SCA) paras 52-53; *Ekhuruleni Metropolitan Municipality v Dada NO and Others* 2009 4 SA 463 (SCA) para 10.
[9] P McAuslan "Land policy: a framework for analysis and action" (1987) 31 *Journal of African Law* 185 206.

certain others are drawn from the National Assembly and the National Council of Provinces.[10] For another thing, the concept of a court discretion necessarily invites subjectivity, which is no less susceptible to influence and value judgment than the plight of a medical professional who must from time to time exercise a choice between saving lives and relieving suffering. In the sections that follow, this point is situated in the context of second-order realms.

On healing and acceptance: towards the second order

Regardless that the independence of our courts appears to be relative, it must be conceded that judicial independence should be championed for its constitutional basis and as a moral imperative. The Constitution declares our courts independent "and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice."[11] No one may interfere with the functioning of the courts and organs of state must assist them to ensure their independence.[12] The judiciary must assert its independence from the political branches lest it becomes so dependent upon, or influenced by, them that it can hardly be said to function as a separate branch of government. In the interest of discharging justice to the public and maintaining integrity, then, it becomes a moral duty to act assertively.

While this is a good starting point for approaching the challenges facing our courts, we cannot simply wish away the fact that judicial independence is limited. We are unable to offer a meaningful response to the relativity and limited nature in question without first acknowledging them as such. Absent this acknowledgement, we ultimately risk misplacing blame in the face of frustration because of unrealistic expectations we may have developed in respect of the courts. After all, a distorted view of reality impoverishes our ability to hold appropriate institutions accountable.[13] Irrespective of what it is we champion by constitutional and moral principle, the constraints on our courts seem to be here to stay. It must be accepted that judicial independence is on a short leash, whatever our wishes to the contrary.

Arguably one of the hardest questions in the result is where the line should be drawn between courts' dependence on the political branches and the independence championed by constitutional/moral principle. Phrased otherwise, how far should we tolerate the constraints

[10] S 178(1) of the Constitution.
[11] S 165(2).
[12] S 165(3)-(4).
[13] A Guerrero "Against elections: the lottocratic alternative" (2014) 42 *Philosophy & Public Affairs* 135 140.

within which courts have to dispense justice in view of their dependence on the executive and legislature? At what point does it give rise to a threat and how should we respond to that threat?

Perhaps the issue is simply one of reviewing the constitutional status of and balancing the powers between the branches, but this conclusion is not warranted. For one thing, the doctrine of the separation of powers is seemingly toothless in the circumstance, as I will later suggest. For another, the apparent myth of absolute independence invites us to ask what to make of that fact in a constitutional democracy. Still further, the constitutional law itself does not seem to be sufficient to decide the matter. If not, what will? Whoever demarcates the boundary in question must necessarily be prepared to answer the second-order questions too.

By second-order considerations, I mean to refer to those instances within which we are confronted with questions and complexities whose answers are not readily available in the precepts of the law. That is, such answers potentially lie within a realm that is secondary to or outside of the realm within which the issue in question arises. As an illustration, consider that part of the reason South Africa's land reform programme is so complex, is that socio-economic, environmental and political issues cannot simply be dealt with in purely legal terms.[14] Thus, given the vantage point from which this paper presents itself, a consideration of political or other such factors would, in this light, be properly called a second-order consideration.

Preliminary objections

That a line should be drawn between the dependence and independence of the courts is an assumption that requires substantiation. *Trias politica* is the constitutional doctrine that entails a separation of the personnel and functions of the three branches of government.[15] Different powers for each branch are naturally to be expected, especially in view of the need for a system of checks and balances in terms of which any one or two of the three branches act as watchdog over the other.[16] According to Malan, the doctrine of the separation of powers is a "prerequisite framework for judicial independence".[17] In the previous section, the constitutional basis for judicial independence had been sketched. Consequently, one could argue that the constitutional law already provides for the demarcation of the branches. To that extent, it is not clear why this demarcation ought to be reconstructed as the dilemma in question assumes.

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[14] J Pienaar "'Reflections on the South African land reform programme: characteristics, dichotomies and tensions (part 1)" (2014) *TSAR* 425 428.
[15] Malan (2014) *PELJ* 1984.
[16] A Heywood *Politics* 4 ed (2013) 312-313.
[17] 1984.

Even if we granted that the pursuit under consideration is in good faith, it could be said that it commits us to an unnecessary burden. One can imagine, as in the preceding paragraph, that some may argue that the laws of the state provide certainty on the nature of the branches of government. Surely this entitles us to disregard a pursuit that is possibly launched on an extra-legal enterprise – indeed, in fact, a pursuit that is couched in secondary terms. Besides, it has been admitted that judicial independence is on a short leash. If this holds, why should we make of that fact any more than what it is? Furthermore, the judicial authority in South Africa is vested in the courts.[18] Despite the fact that their independence is on a short leash, as it were, it surely holds the power of review. Failing state cooperation, prosecuting contempt, and issuing orders of various kinds, what more is there for the courts, in fact for any of us, to do?

Elevating the status of the second order: two strands of argument

In this section, I respond to the preliminary objections raised in the previous section and aim to consolidate the basis of this paper. First, I attempt to show that said objections are not responsive to the nature of the issues under consideration. Second, I attempt to show that second-order considerations necessarily accompany the undertakings of our courts.

a) The argument against positivism

Positivist jurisprudence arguably has its main tenets concerned with that which is empirical. The law is held to be comfortably set in what "is" and not what ought to be.[19] Any pronouncement on what the law ought to be is regarded as a piece of normative jurisprudence, which entails the application of moral theory to legal issues.[20] Positivists hold law to have force regardless of the morality of the day.[21] Law is what is found in that which is set as law and whose position is given by human authority.[22] Question regarding the law's fairness is moot.

Naturally, this seems to give theoretical impetus to the charge that constitutional law is clear on the boundaries to be drawn between the different branches of government. This may have the likely effect of rendering an appeal to second-order considerations redundant. If that is right, the concerns I have invoked in this paper are frivolous and the preliminary objections will have defeated its purpose. Legal positivism becomes the order of the day.

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[18] S 165(1) of the Constitution.
[19] Kleyn et al *Beginner's Guide* 15.
[20] JG Murphy & JL Coleman *Philosophy of Law: An Introduction to Jurisprudence* (1990) 19.
[21] Kleyn et al *Beginner's Guide* 15.
[22] Murphy & Coleman *Philosophy of Law* 19.

Not so fast. Pursuing the question of where to draw the line between the dependence and independence of the courts is more than just an exercise in constitutional law. Asking how far we are to live with the challenges to judicial independence is itself a second-order question because it invites us to take a step back and think about the degrees to which we are willing to accept the dependency of the courts. This cannot be an easy matter in view of the further questions we may have to consider: what do we aim to achieve by judicial independence, given its limits? Can we reconcile the drawing of too broad or narrow a line with our established constitutional principles? Which content of judicial independence should be more conforming to those principles? Which others can we permit to withstand constitutional scrutiny?

Consider, for example, how the paradox of *trias politica* renders the doctrine unsatisfactory in the instance. While conceivably admitting to the relative power of each branch of government, the doctrine is rendered meaningless where one political branch or the other does not uphold its end of the bargain. The political branches can get away because they have the sword and purse to which Hamilton alluded in *The Federalist Papers*.[23] The judiciary must make do with the rules of interpretation and possibly contempt proceedings. In a power struggle, the needle is no match for the sword any more than the holder of the word is no match for the holder of the purse. While *trias politica* is a defensible constitutional doctrine, it flies in the face of the confident view that legal principles should suffice to respond to any alarm at present.

Drawing a line between the dependence and independence of the courts is, therefore, more of an ethical attempt at critical reflection than it is to reconstruct constitutional law. The kind of demarcation that is invoked flows from the recognition that judicial independence is not absolute. It is a way of saying that there is a dilemma in which we strive for the independence of the courts, but we are up against the political branches on whom the courts under our law so depend, leading us to the question of what to do about it. If we are committed to judicial independence, that question is not an unworthy pursuit.

We must finally be weary of answering these difficult questions by reference to only the precepts of the law. The positivistic response that the law is clear on the matter is patently at odds with stronger evidence to the contrary. The paradox of *trias politica* has shifted the probability that constitutional law may not be enough to pursue the dilemma in question. Doing so is short-sighted and a knee-jerk reaction under the auspices of *ius dicere non facere*. What leading psychologists call the "What You See Is All There Is" problem, or the tendency to make

[23] Hamilton *Federalist Papers* 465.

poor decisions because of limited information, has undeniably been at play.[24] To put the point in its proper context: a response to the difficult questions under consideration has required an awareness of the need for extra-legal reasoning in the first place.

b) The argument from indispensability

We live in a complex society. Conflicting claims and demands abound. This is compounded by among others the fact of resource scarcity, limited generosity and incompatible values.[25] See also incompetence in the public administration as having been an endemic obstacle to judicial independence.[26] Notwithstanding the effect of *trias politica* as separating the branches of government, it can nonetheless be said that they are interdependent. State organs depend on the judiciary for deciding their disputes in as much as courts depend on them to enforce rulings thereto. Yet when dealing with complexity, we are forced to make modelling choices because complex phenomena, by definition, cannot be perfectly elucidated.[27] This invites interpretation, which will from time to time demand the task of asking uncomfortable questions and confronting issues that have otherwise fallen prey to inaction and discomfort.

The judiciary is no stranger to rolling up its sleeves in this respect. Adjudication involves expressing the meaning of a legal text and the values it embodies.[28] That expression can only materialise by making value judgments about what order would be "just", "reasonable" or "equitable". The employment of these concepts in statutory texts is itself a direct invitation for the jurist to engage the moral principles debated and laid down by the legislature. Converging with Duncan Kennedy's *A Critique of Adjudication*, perhaps Malan put the point too bluntly:

> "Judges, being senior members of the legal profession and well-versed in the rhetorical and doctrinal strategies of the legal discourse, can avail themselves of many techniques to express themselves convincingly in legal terms, and credibly to sustain the impression that their judicial decisions were genuinely and objectively reached and based on the applicable law and nothing else."[29]

Of course, this does not mean that court rulings are as "saturated by ideology" as Kennedy suggests.[30] Malan himself concedes that Kennedy writes of this saturation as serving a

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[24] D Kahneman *Thinking: Fast and Slow* (2011) 85-88.
[25] A Guttmann & D Thompson *Why Deliberative Democracy?* (2004) 10-11.
[26] *Jayiya v Member of the Executive Council for Welfare, Eastern Cape* 2004 2 SA 611 (SCA) para 18.
[27] M Woermann & P Cilliers "The ethics of complexity and the complexity of ethics" (2012) 31 *South African Journal of Philosophy* 447 448.
[28] OM Fiss "Objectivity and interpretation" (1982) 34 *Stanford Law Review* 739 739.
[29] Malan (2014) *PELJ* 2007.
[30] D Kennedy A *Critique of Adjudication* (1997) 1-2.

rhetorical purpose – that the *ratio decidendi* follows the law and not ideology.[31] It means, instead, that courts earnestly attempt to engage the unavoidable second order.

Concluding remarks

In this paper, it was not my attempt to offer a solution to the problems our courts face. Instead, my aim was three-fold: i) to acknowledge the fact that absolute judicial independence is a myth, ii) to stimulate questions arising from this fact and iii) to argue that an attempt to answer such questions will have to come from more than just a legal vantage point. An obvious implication points to the need for various role-players at various sectors of society to do the difficult task of having conversations about our courts in general and judicial independence in particular. That seems to be a precursor to tackling what appears to be an escalating problem.

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[31] Malan (2014) *PELJ* 2007.

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