

THE SOUTH AFRICAN JUDICARY IS SHOWING HOW TO GATEKEEP A GROWING DEMOCRACY AND HOW TO DEFEND THE RULE OF LAW!

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Former President Zuma has spent few days in prison following an order of the Constitutional Court of South Africa (the SA concourt). South Africa became a democracy in 1994 and the courts were charged with the mandate to sustain their democracy by upholding the rule of law. Once apartheid was dismantled and replaced with constitutional democracy as a system of governance, it became the duty of the courts to guard the new ‘rainbow nation’ against the ghost of the apartheid system. Constitutional scholars concur that, that despite the imperfections of their society, the Constitutional Court of South Africa has earned global respect in international jurisprudence in particularly areas of constitutionalism and human rights. The famous decisions of the concourt striking down the death penalty (CCT3/94 *S v Makwanyane and Another*); declaring corporal punishment as a sentence for juveniles unconstitutional (CCT20/94 *S v Williams*); upholding the right to dignity, shelter and the obligation on government to progressively realise socio-economic rights (CCT11/00 *SA v Grootboom*); upholding the right to health and healthcare (CCT8/02 *Minister of Health v TAC*) are among dozens of groundbreaking judgments which have redefined constitutional governance and have engendered the growth of human right and dignity in both narrative and compliance across many nations in the world.

Less than a fortnight ago, the SA Concourt ordered the incarceration of former President Jacob Zuma for contempt. Their judgment of 29th June 2021 is prefaced with a quote from Nelson Mandela: “*We expect you to stand on guard not only against direct assault on the principles of the Constitution, but against insidious corrosion.*” From my reading as a constitutional scholar, the decision is consistent with the law and procedure on contempt of court but thoroughly steeped in a political desire to insulate the court from any erosion of its respectability by political vandalism. In the opinion of the court, **the sacred duty to uphold their nation’s constitution was besieged by the defiance of a powerful political figure. In their view, to excuse the continuous contempt of Mr. Zuma, an influential political figure in South Africa, and to overlook his defiance to obey their orders, was to undermine the whole edifice of the administration of justice.** This quote in their judgment best summarises their view:

“if the State, an organ of State or State official does not abide by court orders, the democratic edifice will crumble stone by stone until it collapses and chaos ensues”.

In my view, constitutional decadence in any democracy is enhanced or enabled by the omissions of the judiciary. In a constitutional democracy, the courts are the defenders of the contents and the intendment of the constitution. They do so to protect the society against the idiosyncrasies of politics which are inconsistent with the letter and spirit of the law. For a judiciary to be perceived independent, it must always and in all circumstances uphold and defend the rule of law against subversive actions, policies, and programs by executive holders of power. The courts are the gatekeepers of the constitution and the rule of law and not henchmen of politics or escorts of executive power. Once the judiciary caves in to political pressures and demand, they abdicate their role to protect society against the onslaught from political chaos—just as a general would desert the battlefield and leave their men at the mercy of the aggressor. When the court ingeniously wove the concept of supreme executive authority, it invented and handed a potent weapon to the executive lever of government to demolish our democracy whenever it chooses to. Recently, we had a minister of lands who was on a prowl. Many cases were filed against him in court, but not a slap landed on his wrist. These incidents send a simple and clear message, unfortunately that message is opposite of what the South African concourt has sent across its society by putting former President Zuma behind bars for disrespecting the law.

The judiciary must realise it is the heart of our democracy. That while the legislature makes the law to ensure evolution, development and social decorum, while the executive implements the law and midwives development of the society, it is the courts that must ensure that the other arms conduct their affairs within the frontiers of the constitution and comport with the ideals of democracy. In societies like ours where political figures have a huge appetite to abuse power and privileges, the judiciary should be extra-vigilant and alert lest society be swallowed up by the gluttony of power. To earn or preserve public trust in its role, the judiciary must embark on a deliberate mission to demand accountability from our leaders and to do so by the necessity of judicial activism. In building a democracy, the judiciary cannot elect to be reticent or passive. It must be active, deliberate, and conscientious, for democracy to grow and for institutions to outgrow big men and women in our society. Fortunately, South Africa is showing us what our Constitution has charged our courts to do at all times without fear or favour.