



Communication and Marketing Department
Isebe loThungelwano neNtengiso
Kommunikasie en Bemerkingsdepartement

Private Bag X3, Rondebosch 7701, South Africa
Welgelegen House, Chapel Road Extension, Rosebank, Cape Town
Tel: +27 (0) 21 650 5427/5428/5674 Fax: +27 (0) 21 650 5628

www.uct.ac.za

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Research highlights rise of lawfare in SA and implications for judiciary



Kate Dent

Photo: Lynton Dent

The rise of 'lawfare' in South Africa, or the judicialisation of politics, threatens not only the judiciary but democracy too. University of Cape Town (UCT) graduand Kate Dent's PhD thesis explores the phenomenon, the legitimacy of courts to act in a political role – and the inherent dangers for the country when accountability is at large.

Dent graduated from the Faculty of Law on 14 December.

She describes lawfare as "a growing reliance on adjudicative means for clarifying and settling highly contentious political questions". This has become part of the South African zeitgeist, she said. Although her thesis focuses on the years between 2009 and 2020, the topic is red hot; and a moving target for a Constitutional Law researcher.

Moving target

As an example, Dent refers to events in July this year when the Constitutional Court upheld the rule of law and integrity of the country's Constitutional system by holding former president Jacob Zuma in contempt for refusing to appear before the Zondo Commission. He was sentenced to 15 months in jail.

"And then I watched as this triggered a complete breakdown of law and order," the KwaZulu-Natal resident added. "I watched my hometown burn; I watched Defence Force trucks roll through the streets as destructive looting and rioting went on for days. The Constitutional Court did its duty – far too many South Africans did not."

The court's only source of power is its moral authority; its ability to have its rulings accepted, respected and duly implemented, Dent added. "But over the past decade its rulings are increasingly being met with non-compliance, from the very top of the ruling party down."

The PhD thesis expands on her master's dissertation, a critical appraisal of the "counter-majoritarian dilemma".

"This is a line of thought in jurisprudence that questions the legitimacy of a court 'usurping' the will of the people when it overrides the decisions of a democratically elected majority." It's one that shouldn't find footing in a nation with a supreme Constitution, said Dent, but one that is emerging, nonetheless.

"It is at times in pejorative undertones and at times explicitly dangerous, in criticism of the High Courts and Constitutional Court. In 2012 President Zuma stated, 'You have more rights because you are a majority, you have less rights because you are a minority – that is how democracy works'."

That statement shook her to the core, she said, but it lit a keen interest in exploring the tensions between judicial review and democracy and law and politics. These have always been intricately bound in South Africa, and the Constitutional Court is a powerful political actor.

Void in government accountability

An overview of the country's judicial history highlights the duality to lawfare, said Kate. It can be both an abusive manipulation of the law or a constitutional bulwark; a last line of defence in ensuring accountability and justice when political checks and balances have failed.

The latter is the nub of the problem: the void in government accountability, particularly the failure of the legislative branch to hold the executive accountable. Loyalty is to party, not the people, so ordinary citizens are unable to hold their elected representatives accountable.

"There is an increasing distance between members of Parliament and the people they claim to serve," Dent explained. "With a concentration of power, particularly power of appointment, in the executive, the ruling party and State are one and the same. This allows government functionaries and agencies and the president to respond with impunity to non-judicial mechanisms for oversight, anti-corruption and discipline. There is no balance, and the courts must fill the accountability vacuum."

Institutional imbalance in a dominant-party democracy means that opposition parties and civil society organisations are left with little recourse but to appeal to the Courts.

"Judicialisation of politics leads to the politicisation of law with political power refocused on the courts, exposing them to political aggression and attack by the dominant party," she warned. "The time when the court is most needed to ensure executive oversight is the very time it is the most dangerous for the court, because of the ease with which a hostile executive in a dominant-party democracy can implement measures that may undermine the independence of the judiciary."

Dent said that despite these challenges the Constitutional Court had shown "a remarkable ability to navigate this era of lawfare, remaining resolute under fire".

Widen lens

The problem demands broadening boundaries to observe the courts' influences on the political environment, and the political environment's influence on the judicial role and its legitimacy. "Widening the boundaries highlights the connection between dependence and independence for judicial legitimacy. There must be social cohesion and the upliftment of social values if the integrity of the constitutional system and the rule of law is to be sustained, and the court must try to ensure this in its rulings.

"Revealing this interconnectedness shows that the court adopting a role of 'judicial statesmanship' is not an illegitimate departure from the rule of law and the separation of powers doctrine but is in fact trying to preserve constitutional normativity and the system within which the rule of law exist."

But Dent's thesis does not argue for a breach of the separation of powers. By showing sensitivity to political forces, legal-sociological dynamics, and the consequences of its judgments is not suggesting that the court is buckling to political pressure bending to populist impulse.

"The old adage that the courts must 'apply the law even if the heavens fall' is too narrow a view of saying that the court shouldn't be swayed by consequences. Should it be swayed by the potential for rioting and looting when a contempt charge against a former president comes before it? Absolutely not.

"Should it factor into its remedial order the potential for millions of the most vulnerable South Africans to be without a grant a distribution system when that grant distribution contract is ruled unlawful? Yes."

Lonely burden

Dent is concerned about the position in which the court finds itself; carrying a heavy burden and one it should not heft alone.

"Upholding the rule of law cannot be the sole responsibility of the court. The court can point us in the right direction, but it is institutionally incapable of walking with us every step of the way. A normative commitment, an internalisation of constitutional norms, must permeate through all levels of government, non-judicial oversight mechanisms, the Judicial Services Commission, administrative agencies, the lower courts, law enforcement, and every corner of civil society. And most crucially, educational spheres."

She also moots for transparency in the roles and responsibilities of government functionaries and agencies, so accountability can be assigned correctly and democratically ensured.

“What is needed is civic understanding and a civic education that align with the national story, fostering constitutional norms and a comprehension of democracy and what democracy asks of us.”

Dent added, “The Constitution should not be viewed as a saviour but as framework, a roadmap for how we save ourselves. And yet, it is the Constitution that is being painted as the reason why conditions for the people cannot be made better. When the governing party is dysfunctional, blame is deflected, specifically on the Constitutional Court and the Constitution.

“The Constitution is being painted as an obstructionist force to progress, poor socio-economic conditions and failure to deliver on the promises of the new South Africa. When there is growing disenchantment and frustration, misplaced blame can cause us to lose faith in our rule of law institutions and democracy-supporting structures.

As disenchantment grows, the more challenges to the constitutional settlement by opportunistic politicians are finding voice.

“Encouragingly, however, it is precisely because the Constitutional Court is seen as the last great hope, the last sure bulwark, that the apex court is provided greater reverence and protection. In this sense, the institutional failures that have precipitated the judicialisation of politics may have reached such a stage that civil society can become reinvigorated through rallying to protect the court.”

In this, South Africa’s specific judicial-political dynamics can offer the world valuable lessons, she concluded.

Story by Helen Swingler

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Issued by: UCT Communication and Marketing Department

Ridovhona Mbulaheni

Media Liaison Assistant
Communication and Marketing Department
University of Cape Town
Rondebosch
Tel: (021) 650 2333
Cell: (064) 905 3807
Email: ridovhona.mbulaheni@uct.ac.za
Website: www.uct.ac.za