

# SOUTH AFRICAN JUDICIAL EDUCATION JOURNAL

VOLUME 1, ISSUE 1, 2018



*Enhancing Judicial Excellence*



# **SOUTH AFRICAN JUDICIAL EDUCATION JOURNAL**

VOLUME 1, ISSUE 1, 2018



This journal is published under the auspices  
of the South African Judicial Education Institute.

Published: April 2018

ISSN: 2616-7999

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Office of the Chief Justice, 188 14th Road, Noordwyk, Midrand, 1687

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The South African Judicial Education Journal is published by the South African Judicial Education Institute (SAJEI), Office of the Chief Justice. The mandate of SAJEI is to provide judicial education to aspiring and serving Judicial officers in order to enhance judicial accountability and transformation of the Judiciary.

The Journal is intended to consist of contributions, articles, case notes and book reviews. The views expressed by the authors or contributors do not reflect the views of SAJEI and Editorial Board.

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All submissions should be made online to [SAJEJournal@judiciary.org.za](mailto:SAJEJournal@judiciary.org.za). Articles must be original in content. Any idea or quotation from another source must be fully acknowledged. All articles will be checked for originality through the use of a software. Details of the author/s: title, name, institutional affiliation, email address, postal address and telephone number should be included.

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VOLUME 1  
ISSUE 1  
2018

# THE SOUTH AFRICAN JUDICIAL EDUCATION JOURNAL

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*SAJEI: A VEHICLE FOR THE SPEEDY  
DELIVERY OF QUALITY JUSTICE TO ALL  
OUR PEOPLE*

MOGOENG MOGOENG  
*Chief Justice of the Republic of South Africa*

## I INTRODUCTION

The vision of the South African judiciary is the speedy delivery of quality justice to all our people, rich and poor.

This assumes that the South African judiciary administers justice with the independence required of it by the Constitution. And that assumption extends to a comfortable grasp, by judicial officers, of constitutional and legal concepts and a commitment to uphold acceptable professional and ethical standards. A well-developed judgment-writing skill is also an essential for the efficient and effective functioning of this justice-dispensing machinery. Also crucial is a properly adapted case-management system bench-marked on those that are known to have enhanced court-performance immensely in the best performing jurisdictions around the world.

Coming from an era where a substandard teaching of law to most of us was as institutionalised as the frustration of the effective development of some practitioners' forensic skills, the imperatives of judicial transformation demand that education and training be offered to South African judges and magistrates much more than is the case in many western jurisdictions. And that explains why the establishment of the South African Judicial Education Institute (SAJEI) was an absolute necessity.

## II THE ESTABLISHMENT OF SAJEI

When I became a High Court judge a little over twenty years ago, judicial education was offered through a somewhat loose arrangement. Judges did not have a judicial academy. The Canadian government provided funding that enabled our judiciary to provide training for aspirant, newly appointed and long-serving judges. In anticipation of the drying up of this fixed-term funding, negotiations commenced in earnest between the judiciary and the executive about the establishment of a statutory and state-funded training institute for judges and magistrates. It is that collaborative exercise that gave birth to the South African Judicial Education Institute. This was meant to also end the undesirable practice of magistrates being trained under the auspices of Justice College which was and is still run by the Department of Justice and Constitutional Development.

The need for the judiciary to handle all its educational responsibilities became apparent to all arms of the state. This necessity is foreshadowed in s 180(a) of the Constitution, which provides:

*National legislation may provide for any matter concerning the administration of justice that is not dealt with in the Constitution including—*

*(a) Training programmes for judicial officers.*

And the Act envisaged in this section is the South African Judicial Education Institute Act<sup>1</sup> (the Act).

## III THE PURPOSE

Both the Act's long title and preamble capture the essence of what is sought to be achieved through the establishment of the Institute. They do so crisply, admirably and almost completely. The long title records the purpose as being:

*To establish a South African Judicial Education Institute in order to promote the independence, impartiality, dignity, accessibility and effectiveness of the courts by providing judicial education for judicial officers; to provide for the administration and management of the affairs of that Institute and for the regulation of its activities; and to provide for matters connected therewith.*

This purpose is reinforced by the preamble which endorses the need for the training of judicial officers as is the case with other jurisdictions around the globe.

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<sup>1</sup> 14 of 2008.

The establishment of SAJEI is meant to enhance judicial independence and accountability and promote transformation of the judiciary, regard being had to our disgraceful apartheid legacy now sought to be erased through our current constitutional dispensation. SAJEI thus exists to promote the implementation of the values foundational to our Constitution.<sup>2</sup> It is also enjoined to offer appropriate transformational education and training to aspiring and newly appointed judicial officers and continuing education to experienced or long-serving ones.<sup>3</sup>

#### IV COMPOSITION OF COUNCIL

In terms of s 7(1) of the Act, SAJEI is governed by a Council which is constituted as follows:

- (a) the Chief Justice as chairperson, the Deputy Justice as deputy chairperson and the following other members:
- (b) the Minister or her or his nominee;
- (c) a judge of the Constitutional Court, designated by the Chief Justice;
- (d) a judge or any other person designated by the Judicial Service Commission from among its ranks;
- (e) the President of the Supreme Court of Appeal;
- (f) two Judges President and two other judges, at least one of whom must be a woman, designated by the Chief Justice after consultation with the Judges President;
- (g) five magistrates, designated by the Magistrates Commission, and of whom-
  - (i) at least two must be women; and
  - (ii) two must be Regional Court Magistrates;
- (h) a judge who has been discharged from active service as contemplated in the Judges' Remuneration and Conditions of Employment Act 47 of 2001, designated by the Chief Justice in consultation with the Minister;
- (i) the Director;

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<sup>2</sup> Section 1 of the Constitution of the Republic of South Africa, 1996.

<sup>3</sup> Section 2 of the Act.

- (j) one advocate designated by the General Council of the Bar of South Africa;
- (k) one attorney designated by the Law Society of South Africa;
- (l) two university teachers of law, designated by the South African Law Deans Association;
- (m) two other members who are not involved in the administration of justice, designated by the Minister after consultation with the Chief Justice; and
- (n) one traditional leader designated by the National House of Traditional Leaders referred to in the Traditional Leadership and Governance Framework Act 41 of 2003.

The Council is thus a widely representative structure. It boasts a fair representation of the judiciary at all levels. The Executive, the Judicial Service Commission,<sup>4</sup> the organised legal profession, those not involved in the administration of justice, university teachers of law and royalty are also represented. Presumably, all this is intended to ensure that, drawing from this rich diversity of experiences, every important aspect of a truly fair and just dispute-resolution process is factored into the educational and training programmes of judicial officers. And that can only bode well for our justice system and our young democracy.

The responsibility to develop a curriculum that helps traditional leaders, magistrates and judges to cultivate and broaden the capacities necessary for a more effective and efficient execution of their adjudicative responsibilities, wheresoever they might be somewhat challenged, lies with the Council. Education and training programmes are generally developed, driven and led by judicial officers. The governance of the Institute is therefore firmly in the hands of the judiciary, in partnership with structures represented in the SAJEI Council.

## V THE ADMINISTRATION

Governance is ably facilitated by the administration led by SAJEI's Chief Executive Officer.<sup>5</sup> The judiciary would, as a first prize, have preferred to have a judge at the helm of SAJEI's administration as is the case with the academies of a vast majority of jurisdictions around the world. And that is the objective that would perhaps have to be pursued when resources

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<sup>4</sup> Established in terms of s 178 of the Constitution.

<sup>5</sup> Section 11 read with s 12(3).

and other circumstances permit, until it is realised.<sup>6</sup> The CEO works with a team of staff that helps her provide the administrative capacity, without which SAJEI would not have been able to perform as well as it has, in making appropriate arrangements for workshops and training programmes.

SAJEI has its own budget, Budget and Finance Committee, Curriculum Planning and Development Committee and a range of other committees comprising members of the Council.

## VI FUNCTIONS

The functions of SAJEI include research on best training practices by similar institutions. Some of its core functions include enabling or promoting the provision of high quality and efficient services in the administration of justice. The Act is no doubt a legislative measure envisaged in s 165(4) of the Constitution to ‘assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts’. This assertion finds support in s 5(e) of the Act which requires of the Institute ‘to promote the independence, impartiality, dignity, accessibility and effectiveness of the courts’.

Particularly striking is the recognition of the sad reality that not all jurisdictions, particularly in Africa, are necessarily adequately resourced to establish and sustain their own judicial academies. And provision has thus been made for South Africa to bear the responsibility to assist where she can. This finds expression in s 5(f) of the Act which empowers the Institute ‘to render such assistance to foreign judicial institutions and courts as may be agreed upon by the Council’. As stated later in this article, that has already happened and additional requests have since been received from other jurisdictions.

The virtual exclusion of black people from participating in the economy of South Africa and the consequential paucity of high quality work for black and women legal practitioners, worsened by their virtual exclusion from judicial office, necessitated transformation of the judiciary on a massive scale. It thus became necessary to appoint magistrates and judges who did not necessarily have to be the very best legal practitioners

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<sup>6</sup> It has not been possible – not desirable even – to enlist the services of a judge as the administrative head of the Institute. This is because the remuneration package is low and – in terms of the Act – the administrative head has to account to the Executive, something that is at odds with the separation of powers doctrine. Thus the designation of head has been kept at Director who, in terms of s 12(3), is the chief executive officer. In time, and with the impediments I have mentioned out of the way, it may be possible to appoint a judge as the administrative head of the Institute.



available for judicial office.<sup>7</sup> They need only be fit and proper.<sup>8</sup> And this basically means that a demonstrable potential to discharge core judicial functions well constitutes adequate qualification for appointment. And this is the basis on which a sizeable number of the previously marginalised South Africans were appointed. The Institute's approach to education and training must be alive to this reality which has as its primary source the supreme law of the land itself, which requires that '[t]he need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed'.<sup>9</sup>

Capacity-building is thus necessary to ensure that all our judicial officers, those appointed on the basis of demonstrable potential as well as those who were already highly experienced, serve the nation very well. All this is done to give practical expression to litigants' legitimate expectation and entitlement to have a judiciary that is able to deliver quality justice to all our people expeditiously and without fear, favour or prejudice.

## VII ACHIEVEMENTS AND NECESSARY IMPROVEMENTS

The work done by SAJEI, from the inception of its educational and training programmes for traditional leaders, magistrates, judges, and those aspiring for judicial office in January 2012, is commendable. By all standards, SAJEI has long become what it was established to be – an agency that facilitates the speedy delivery of quality justice to all our people, rich and poor. As alluded to above, some jurisdictions like Namibia and Botswana have already sent some of their judges to participate in our educational and training programmes. A few more jurisdictions have enquired whether we could allow their judges to participate in the SAJEI programmes and the Council has in principle responded in the affirmative. But this humbling progress is no reason to be complacent. We owe it to the judiciary and the public we serve to always be on the lookout for areas of improvement. Best practices that have been beneficially employed by other jurisdictions demand our urgent attention and appropriately modified incorporation.

Several areas that jurisdictions like Germany have prioritised for attention over the years need to be introduced or incorporated into our educational and training programmes. They relate to political orientation, economics and the development of skills and capacities in areas like communication and stress management.

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<sup>7</sup> Although appointments are made even from academia, legal practitioners continue to be the main source of judicial appointments.

<sup>8</sup> Section 174(1) of the Constitution.

<sup>9</sup> Section 174(2) of the Constitution.

Many decisions that courts take are political or polycentric in nature. But not everybody appointed a judicial officer necessarily has a sense of the political and economic nuances that often feature, at times significantly, in some of the cases we adjudicate. At times it really is on these nuances that a proper and truly just decision ought to turn. Without insight, a travesty of justice could occur. Matters that traverse policy would generally be better handled by judges who have been appropriately familiarised with the dynamics around policy development, the authority responsible for that and policy implementation. Also necessary and somewhat urgent would be issues around budgets. When orders are made that require that financial resources be deployed to address what might not have been budgeted for, how much understanding judicial officers possess of the implications of that order on the budget, and targeted deliverables to inform their decision, is at times central to the proper or just determination of the issues.

It bears emphasis that, unless the judiciary has an appreciable grasp of how politics, policy, business and the economy that create jobs for our people and generate the much-needed revenue, without which the State would find it difficult to function effectively and efficiently, a lot of damaging unintended consequences could flow from its decisions. Insight into matters economical would therefore go a long way to enhance the capacity to adjudicate with greater understanding and yield just and realistic outcomes. A judgment by a judicial officer who is not well-rounded or grounded in these critical areas could dent significantly or even shipwreck the business sector or the economy and the reputation of the judiciary as an institution. This underscores the urgency and critical need to introduce a measure of orientation on politics, policy, business and economics as our German counterparts have so successfully done. It is very difficult to adjudicate properly when one has not even been introduced to key aspects of the subject-matter of determination.

Equally important is the impartation or acquisition of skills for effective communication. A transfer of these skills to judicial officers to facilitate better or more constructive engagement with litigants, witnesses, legal representatives and even with one's colleagues and staff, is an urgent must. Properly imparted and employed, that skill would enable a judicial officer to communicate a crisp and yet clear message through a judgment. And that could even help us to appreciate that what one says does not necessarily get better understood when it is too long. Some judgments are rejected, appealed against or considered to be offensive because of the words used to communicate or communication skills that cry out for refinement or radical change. Skillful communication is an essential art or tool for the proper execution of judicial responsibilities. And a court environment is generally intimidating to an average user, especially a first

time user. Not all frequent users are necessarily immune to unintended intimidation. That somewhat unfriendly nature of the environment is often exacerbated by judicial officers whose words, tone, conduct and general manner of communicating with court-users render the court far from welcoming or friendly.

Additionally, judicial work could be stressful. Some cases, particularly of a criminal nature, do have a traumatic effect on some judicial officers. They relate to offences like rape, murder and vicious assaults. Evidence often includes some exhibits in the form of pictures that are too spine-chilling to view, but must be viewed to adjudicate properly. Similarly, witnesses' and complainants' gruesome accounts of how the offence was committed often have the effect of traumatising judicial officers. Some acrimonious divorces and related custody issues as well as unavoidable decisions that nevertheless have highly negative or disastrous consequences for the lives of spouses, children, business people or employees, as the case might be, could have a highly stressful and harmful effect on a judicial officer. The pressure of work could also have a stressful effect which could in turn have a highly negative impact on the health of a judicial officer and seriously undermine his or her longevity or productivity at work.

It is thus necessary that SAJEI makes a decisive break from the traditional and rather narrow parameters within which judicial education and training has been offered. It cannot just be about substantive and procedural law. For, there is much more about judgeship or adjudication than legal principles or facts detached from a meaningful and prior familiarisation with the discipline central to the dispute or litigation or a reasonable degree of readiness by the judiciary to handle stressful situations. Jurisdictions such as Australia and Singapore have introduced very successful stress-management programmes for judicial officers that are facilitated by judges as well as social workers and psychologists. This in my view is an improvement that must be factored into our curriculum development programme.

Given our ugly past, which is emphatically about institutionalised racial oppression and a wanton disregard for black people's and women's rights to equality, social context or sensitivity training is a necessity. Racial or gender stereotyping, prejudice and subjugation were the hallmarks of apartheid. And barring the introduction of reorientation or conscientisation programmes, these mindsets could unconsciously be kept alive and operational to the detriment of the delivery of real as opposed to contorted justice, as was often the case during apartheid. Similarly, the anger-borne resentment towards white people by some black people who happen to be judicial officers could, from the subconscious, find expression in the prejudice of the resented litigants.

The feedback received from some of our colleagues, who attended SAJEI's eye-opening workshops that sharpen super-alertness to subliminal prejudice, is that virtually all these sensitivity programmes or workshops have helped to expose unconscious bias where it existed. They drove home to colleagues the need to be super-alert or more alive to the possibility of harbouring subtle bias that one might not have been sharply aware of. We have had a strong enough pointer or a value awakening to the absolute necessity of the social context programme especially in the South African judiciary in recent times. It has thus become apparent that all judicial officers in this country would do well to participate in these workshops more than once, considering our history and recent reminders of crass racism by some in the judiciary and society at large. After all, you cannot even begin to address the problem you are not even aware you have.

Judicial case management, which encapsulates best practices and tools for the efficient management of cases and courts, is an essential element of regular judicial education under the auspices of the Institute. This is enhanced by the Norms and Standards that were gazetted and became operational with effect from 28 February 2013. The enhancement of court performance requires that it features regularly in our educational and training programmes.

Apart from the proposed innovations, our somewhat regular educational programmes are similar to those offered by other judicial academies around the world. They range from judgment writing, aspects of constitutional law, tax law, company law, copyright, civil procedure, judicial independence, ethics, to mention but some. Cyber-crime, environmental law, aspects of human trafficking and refugee law have also been presented on.

## VIII CONCLUSION

In conclusion, SAJEI is a resource at our disposal that all judicial officers and traditional leaders must be encouraged to take full advantage of. They must take ownership of it and advise the Council on how best to structure its operations and curricula to ensure that it remains relevant and that the key objectives for its establishment are realised. We would all do well to desist from being less available for SAJEI programmes. For, that has the unintended consequence of undermining SAJEI's constitutional and statutory mandate. After all, SAJEI's failure would be the judiciary's failure.

May we all join hands to make the most of what we have, and as we see faults try to look for solutions that would propel our Institute to the level of excellence that we can all be proud of.

Just as important is this journal. For, it is a resource that will add impetus to the realisation of the strategic objective of delivering quality justice to

all our people without undue delay. It will shed much-needed light on what SAJEI is about. It will serve as a platform for sharing or exchanging ideas on how best to demonstrate the relevance of SAJEI for capacity building, deepen our understanding and enhance SAJEI's effectiveness and efficiency. It is also a platform from which colleagues can suggest additional programmes or workshops that could help SAJEI deal more effectively with various areas of challenge or pay closer attention to areas of particular interest to some or all colleagues. It serves as a tool for communicating effectively the essence of our future or past programmes, their relevance to our core mandate, their usefulness and mutually enriching effect. Hopefully, articles published in this journal will generate more interest in SAJEI's educational and training programmes, give colleagues a clearer sense of ownership and quicken our individual responsibility to contribute to the success of SAJEI and its journal.

My gratitude goes to the editor-in-chief of this historic journal, Justice Mbuyiseli Madlanga, and his editorial team comprising colleagues from the judiciary, the legal profession and academia for agreeing to be pioneers of this difficult project and for the sterling work they have done that has yielded this journal – a resource and treasure of inestimable value.

I urge all of us to please stand ready to cooperate with them and contribute articles whenever called upon to do so.

# JUDICIAL TRAINING AND THE ROLE OF JUDGES IN A CONSTITUTIONAL DEMOCRACY

HEINZ KLUG

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## I INTRODUCTION

The goal of judicial training across the globe is to enhance the three central features that are expected of judiciaries in the modern era: that they will be independent, competent and impartial. In addition to these basic principles the Constitution requires that when judicial officers are appointed in South Africa consideration must be given to the ‘need for the judiciary to reflect broadly the racial and gender composition’ of the country.<sup>1</sup> This requirement reflects both the history of exclusion prior to the democratic era and an understanding that only a judiciary that reflects the population for whom it is asked to sit in judgment will have the breadth of experience and legitimacy that will enable it to be truly independent, competent and impartial. Given the significant advances made in the last twenty years in both appointments to the bench in South Africa as well as in the development of the infrastructure of judicial training this essay will focus on the relationship between the expected characteristics of the judiciary – independence, competence and impartiality – and the specific roles expected of judges in a constitutional democracy. As the Consultative Council of European Judges noted ‘the training of judges should not be limited to technical legal training, but should also take into account the fact that the nature of the judicial office often requires the judge to intervene in complex and difficult situations.’<sup>2</sup> This insight is even more pertinent in a constitutional democracy.

In order to explore the relationship between judicial training, the expected characteristics of a modern judiciary and the role of the judiciary in a constitutional democracy such as South Africa this essay will first highlight how this relationship – between judicial training and the role of judges – emerged as a global standard. With this background the essay will

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<sup>1</sup> Section 174(2) of the Constitution of the Republic of South Africa, 1996.

<sup>2</sup> X Ronsin ‘The principles of judicial training: Towards international recognition?’ (2016) 5 *Journal of the International Organisation for Judicial Training* 14.

then focus on the evolution of this relationship in the context of South Africa. The third section of the essay explores more explicitly how the imperatives of our constitutional democracy have interacted with the idea of judicial restraint within the Constitutional Court's jurisprudence and how this interaction both reflects and serves to reinforce the structural relationship between the role played by the judiciary in our constitutional democracy and the international standards of judicial independence, competence and integrity that have been accepted as common principles of judiciary training around the globe. Finally, the essay concludes by emphasising the relationship between these common principles and the role of the judiciary in a constitutional democracy.

## II TRAINING IN CONTEXT: JUDICIAL INDEPENDENCE AND THE EMERGENCE OF GLOBAL STANDARDS FOR JUDICIAL TRAINING

Since the adoption of the United Nations General Assembly Resolution on the Basic Principles on the Independence of the Judiciary<sup>3</sup> in 1985 there has been increasing attention paid to establishing common principles of judicial training as one means of securing these ideals. The Council of Europe began to formulate its own principles on the organisation of justice in democratic states by holding meetings to discuss the 'recruitment, training, career and responsibilities of judges, as well as the disciplinary system governing them.'<sup>4</sup> This process culminated in the adoption by the Council of Europe of a European Charter on the Statute for Judges in 1998. Two years later the Consultative Council of European Judges (CCJE) was created as an organ of the European Council and on its tenth anniversary this body adopted the Magna Carta of Judges (fundamental principles) which includes the principle that 'Initial and in-service training is a right and a duty for judges . . . [and] [t]raining is an important element to safeguard the independence of judges as well as the quality and efficiency of the judicial system.'<sup>5</sup> In a parallel development the European Judicial Training Network, formed as a private organisation of the national judicial training schools of the member states of the European Union, produced a set of Judicial Training Principles that were adopted at the

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<sup>3</sup> UNGA Res 40/32 of 29 November 1985 and Res 40/146 of 13 December 1985.

<sup>4</sup> Council of Europe, European Charter on the Statute for Judges, DAJ/DOC (98) 23 (1998).

<sup>5</sup> Consultative Council of European Judges, Magna Carta of Judges (Fundamental Principles), adopted in Strasbourg, November 2010, Principle 8.

organisation's General Assembly in Amsterdam in June 2016. Significantly, these principles emphasise that '[i]n accordance with the principles of judicial independence the design, content and delivery of judicial training are exclusively for national institutions responsible for judicial training to determine'.<sup>6</sup>

Judicial training is of course not a new development either in South Africa or globally. What is of more recent vintage is the understanding that judicial independence requires this training to be under the control of the judiciary itself. In fact, the first schools explicitly established for training judges only opened in the mid-twentieth century. In France, the National School for the Judiciary was opened in 1959, while the Dutch Training and Study Centre for the Judiciary (SSR) opened in the Netherlands in 1960 and the National Judicial College in the United States was only established in 1963.<sup>7</sup> Founded by the American Bar Association the National Judicial College is a non-profit educational corporation that operates a residential training centre for judges on the campus of the University of Nevada. Parallel to this training institution is the Federal Judicial Center (FJC) that was created by the United States Congress in 1967.<sup>8</sup> The FJC serves as the research and educational arm of the federal judiciary with its Board chaired by the Chief Justice of the United States and comprised of seven judges elected by the Judicial Conference and the director of the Administrative Office of the US courts.<sup>9</sup> On its website the Center states that it 'supports the efficient, effective administration of justice and judicial independence'.<sup>10</sup>

While at first glance it might be argued that these global developments are quite distinct from the transformational imperatives that have been driving the process of judicial training in South Africa, a closer examination will demonstrate that there is an important symbiosis between the global emergence of principles of judicial organisation and training and the development of judicial training in post-apartheid South Africa. Before the democratic transition the Department of Justice played a direct role in the appointment and training of personnel for the magistrates' courts, the level of courts in which most South Africans experienced the law. During the transition to democracy the Justice College, now in

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<sup>6</sup> European Judicial Training Network, *Judicial Training Principles*, Amsterdam 2016, Principle 5.

<sup>7</sup> Ronsin (note 2 above) 11.

<sup>8</sup> See 28 U.S.C. ss 620-629.

<sup>9</sup> See <https://www.fjc.gov/node/12506>.

<sup>10</sup> See note 9 above.



the Department of Justice and Constitutional Development, was tasked in terms of regulations adopted under the Magistrates Act 90 of 1993 with the training of magistrates who could not be appointed unless they 'successfully completed an applicable course (the duration, content and extent of which shall be specified by the Chief of the Justice College after consultation with the [Magistrates] Commission) to the satisfaction of the Chief of the Justice College or a person designated' by them.<sup>11</sup> In contrast to the magistrates, judges for the higher courts, in the pre-constitutional era, were almost invariably appointed from the ranks of Senior Counsel. Given their experience before the courts and recognition of their status in the profession by the executive, it was generally assumed then that Senior Counsel required little additional training to assume the judicial role. With the creation of a constitutional order in which courts are empowered to uphold a supreme constitution the question of judicial training and its relationship to the executive branch became an important issue in the debate over the administration of justice.

### III JUDICIAL TRANSFORMATION, TRAINING AND THE INDEPENDENCE OF THE POST-APARTHEID JUDICIARY

It is in this context, in which debates over the transformation of the South African judiciary, control over the administration of the courts and judicial independence were major subjects of debate, that the creation of the Office of the Chief Justice and the South African Judicial Education Institute (SAJEI) emerged as solutions.<sup>12</sup> As a result, the Department of Justice and Constitutional Development no longer controls the budget and administration of the courts and the Justice College within the Department is no longer a judicial training body and instead is tasked with providing legal training to public servants throughout the civil service. Both functions, the administration of the courts and judicial training, are now separated from the Department of Justice and Constitutional Development thus ensuring a greater separation from the executive in functions and funding. In the case of judicial training the SAJEI was created by the South African Judicial Education Institute Act 14 of 2008 (the Act) as a statutory body led by a

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<sup>11</sup> KD Kruger 'Justice College: Training judicial officers' (August 2002) *Advocate* 45.

<sup>12</sup> See, Department of Justice and Constitutional Development 'Discussion document on the transformation of the judicial system and the role of the judiciary in the developmental South African state' (2012) available at <http://blogs.sun.ac.za/seraj/files/2012/12/Discussion-document-on-the-transformation-of-the-judiciary.pdf>.

Council chaired by the Chief Justice and made up predominantly of judges from the various layers of the judicial system as well as an appointee of the Minister of Justice, representatives of the private bar (both the attorneys and advocates), the law schools, and from the National House of Traditional Leaders.<sup>13</sup> The Act provides that the Institute has a number of functions, including: 'to establish, develop, maintain and provide judicial education and professional training for judicial officers; to provide entry level education and training for aspiring judicial officers to enhance their suitability for appointment to judicial office; [and] . . . to promote the independence, impartiality, dignity, accessibility and effectiveness of the courts'.<sup>14</sup>

Judicial training has thus become an important dimension of post-apartheid justice. This is however not only a statutory requirement but rather an imperative of the Constitution which requires that the 'courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice'.<sup>15</sup> Furthermore, judges are individually required by the Constitution to 'swear or affirm' that they will as a judge be 'faithful to the Republic of South Africa, will uphold and protect the Constitution and the human rights entrenched in it, and will administer justice to all persons alike without fear, favour or prejudice, in accordance with the Constitution and the law'.<sup>16</sup> These constitutional imperatives do not however provide the guidance necessary for judges who are required to intervene in what the Consultative Council of European Judges termed 'complex and difficult situations'. These difficulties and complexities are no more evident than in the realm of the courts' constitutional jurisdiction where they 'must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency'<sup>17</sup> and 'may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President' although such orders by courts have 'no force unless . . . confirmed by the Constitutional Court'.<sup>18</sup> This introduction of constitutional review as a key element of the new post-apartheid constitutional order which came into force with the interim and final Constitutions in 1994 and 1997 respectively made the training of

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<sup>13</sup> Section 7(1)(a)–(m) of the South African Judicial Education Institute Act 14 of 2008 (the Act).

<sup>14</sup> Section 5(a), (b) & (e) of the Act.

<sup>15</sup> Section 165(2).

<sup>16</sup> Schedule 2, item 6(1).

<sup>17</sup> Section 172(1)(a).

<sup>18</sup> Section 172(2)(a).

the judiciary all the more necessary in order to skill it in navigating these uncharted waters.

Given this reality, the goals of judicial training to ensure the independence, competence and integrity of the judiciary can only be achieved by ensuring that judges have at their disposal the means to balance the tensions between fulfilling their constitutional duty and protecting the institutional capacity of the judicial branch. This is particularly the case when courts are increasingly sought out to resolve conflicts between different factions within the political sphere – what has been characterised as lawfare. In practical terms judges have specific jurisprudential tools which they can apply in their efforts to manage these tensions. However, these tools of judicial restraint can only be relied upon so long as judges are still able to fulfil their constitutional duties without fear, favour or prejudice, a task which at times will lead them to directly confront the failures of other organs of the government, including the executive. In the relatively short history of our constitutional democracy the judiciary has performed this role with distinction despite often intense criticism by elements within the government and ruling party. This has not been without raising serious separation of powers concerns. The structure of the Constitution provides for the separation of powers between the different branches and spheres of government. While all '[o]rgans of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts'<sup>19</sup> as a matter of institutional and sociological fact, the courts however remain the weakest branch of government – having to rely on the legislature and executive for their funding and the enforcement of their orders.

#### IV TRAINING FOR JUDICIAL RESTRAINT AND THE INDEPENDENCE, COMPETENCE AND INTEGRITY OF THE JUDICIARY

While some have suggested that the courts should adopt some equivalent of the American political question doctrine<sup>20</sup> as a means for courts to

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<sup>19</sup> Section 165(4).

<sup>20</sup> The doctrine was most clearly stated by US Supreme Court Justice Brennan when he defined a political question as one where there was: a 'textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a

avoid becoming embroiled in politically difficult situations, the obvious differences between the South African and United States Constitutions suggest that adopting this doctrine would not conform to the text or spirit of the 1996 Constitution. On the one hand the South African Constitution, in its founding provisions, declares the Constitution the supreme law and later explicitly empowers the courts to interpret and apply that law. On the other hand the power of judicial review had to be read into the United States Constitution and remains contested as an expression of what is termed ‘countermajoritarianism’. Nevertheless, there are other well-established jurisprudential tools available to judges to manage the inevitable tensions of constitutional conflict. First and most important is the fact that the courts, and especially apex courts such as the Constitutional Court, are only called upon to address those issues that are correctly brought before them. Second, there exists a range of doctrines and constitutionally mandated options which ensure that the courts have the capacity to resolve even the most controversial and difficult issues within their limited powers. Unlike a strategy of direct avoidance that characterises the political question doctrine, these other methods range from the jurisdictional doctrines of standing, ripeness and mootness, to the remedial options of ‘limiting the retrospective effect of a declaration of invalidity’<sup>21</sup> or even ‘suspending the declaration of invalidity for any period or on any conditions, to allow the competent authority to correct the defect’.<sup>22</sup> Training in these principles will be an important means to ensure the independence, competence and integrity of the judiciary.

The core principles of judicial restraint in this arena may be divided into three categories. First, there is the broad principle that a court should resolve any issue, if possible, either without reaching the constitutional question or by adopting an interpretation of law that resolves the issue without finding a constitutional violation. Second, there are the traditional jurisdictional doctrines of standing, mootness and ripeness which control who may bring a case and when it is appropriate for the court to hear and resolve the relevant issues. Finally, there is the principle of integrity, which not only requires a judge to ensure the integrity of the adjudication

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court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.’ *Baker v Carr* 369 US 186 (1962) 217.

<sup>21</sup> Section 171(1)(b)(i) of the Constitution.

<sup>22</sup> Section 171(1)(b)(ii).

process itself but also includes a duty to manage the courts' powers in constitutional matters in such a way as to ensure respect for the other constitutional branches of government through a conscious approach to the separation of powers. Each of these three categories is based on different textual, doctrinal and practical grounds yet together they provide a set of tools that may be relied upon by judges in managing their own authority and the structural implications of that authority within the constitutional order.

The first principle of judicial restraint – constitutional avoidance – requires the court to avoid the constitutional issue if possible. Often referred to as the 'classic avoidance canon' this principle holds that '[i]f there are two plausible interpretations of a statute, and one is unconstitutional but the other constitutional, a straightforward understanding of the rule of law suggests that the judge should choose the second interpretation' just as judges 'must choose the Constitution over statutes if there is a direct conflict.'<sup>23</sup> This principle was first articulated in South Africa in *S v Mhlungu* in which the Constitutional Court held that 'where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed.'<sup>24</sup> Former Chief Justice Pius Langa who argued that 'if there is an interpretation of the impugned provision that is reasonably capable of being read consistently with the Constitution, such interpretation should be adopted' later articulated a more nuanced version of avoidance.<sup>25</sup> In *Islamic Unity Convention v Independent Broadcasting Authority* Langa DCJ (as he was then) went on to warn that such 'interpretation must . . . not be unduly strained' and that 'a balance must be struck between the duty of a judicial officer to interpret legislation in conformity with the Constitution in so far as it is reasonably possible, and the duty of the legislature to pass legislation that is reasonably clear and precise, enabling citizens to understand what is expected of them'.<sup>26</sup> While potentially a powerful strategy for avoidance, Langa J makes it clear that there are substantive limits to this form of judicial restraint in that any interpretation of constitutionality cannot be 'unduly strained.'

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<sup>23</sup> WN Eskridge Jr *Interpreting Law: A Primer on How to Read Statutes and the Constitution* (2016) 310.

<sup>24</sup> *S v Mhlungu* 1995 (3) SA 867 (CC) para 59.

<sup>25</sup> *Islamic Unity Convention v Independent Broadcasting Authority* 2002 (4) SA 294 (CC) para 40, citing *Investigating Directorate, Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd* 2001 (1) SA 545 (CC).

<sup>26</sup> *Islamic Unity Convention v Independent Broadcasting Authority* 2002 (4) SA 294 (CC) para 40.

Excessively strained interpretations and an overbroad use of this form of restraint would surely undermine judicial legitimacy.

In a recent decision, *Jordaan v City of Tshwane*, the court disavowed the first version of the avoidance doctrine making it clear that the statement in *Mhlungu* that ‘where it is possible to decide any case without reaching a constitutional issue, that course should be followed’ must be placed in ‘its proper perspective’ which is the specific constitutional jurisdiction of the Constitutional Court under the interim Constitution.<sup>27</sup> This context changed under the final Constitution when the court became the country’s ‘apex Court on all matters’.<sup>28</sup> Under these changed jurisdictional conditions the particular approach adopted in *Mhlungu*, the court now argued, ‘has long since been abandoned’ and that today ‘constitutional approaches to rights determination must generally enjoy primacy’.<sup>29</sup> As a result, Cameron J argued in *Jordaan*, on behalf of a unanimous Court, that ‘[f]ar from avoiding constitutional issues whenever possible, this Court has emphasised that virtually all issues – including the interpretation and application of legislation and the development and application of the common law – are, ultimately, constitutional’.<sup>30</sup> In applying this approach however the court first carefully reviewed the long common law and statutory history of the meanings of the challenged legislation and its relation to the fundamental conceptions of property rights found in the common law. However, Cameron J states that the ‘position under the common law provides but a useful backdrop to the process of interpreting’ the relevant section of the statute under review ‘in accordance with and in the light of the Constitution’ and notes that ‘it has been ‘gold-plate doctrine’ in this Court that, if a meaning conformable with the Bill of Rights can reasonably be ascribed to legislation, that meaning must be embraced, rather than one that offends the Constitution’.<sup>31</sup> If in the United States it is a ‘canon of interpretation’<sup>32</sup> that an understanding of a statute or common law rule that conforms with the Constitution should be preferred over one that conflicts with the Constitution, in South Africa this approach to constitutional avoidance has become a settled rule.

A second category of doctrines in the tool bag of judicial restraint are the traditional jurisdictional limits imposed by the doctrines of standing,

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<sup>27</sup> *Jordaan v City of Tshwane Metropolitan Municipality* [2017] ZACC 31 para 6.

<sup>28</sup> At para 7.

<sup>29</sup> At para 8.

<sup>30</sup> At para 8.

<sup>31</sup> At para 44.

<sup>32</sup> Eskridge (note 23 above) 310.

ripeness and mootness. While these doctrines are traditionally understood as being closely related they each address a particular concern and serve different functions that have different consequences within the realm of judicial restraint. Standing serves to ensure that the correct parties are before the court yet the doctrine as applied in many contexts, and especially in the United States and during the pre-constitutional era in South Africa, has the effect of severely restricting access to the courts. On the one hand, this prevents what some fear would be a flood of litigation, which of course may be of less concern in a younger democracy in which the citizenry's capacity to run to court is limited by both a lack of resources and experience with constitutional review, but on the other hand, it also slams the door in the face of many litigants or those who would take up the cause of litigants less well positioned to defend their own rights. Ripeness and mootness by contrast are doctrines that serve different functions in litigation and only operate to a limited extent as forms of judicial restraint. In the case of ripeness, the purpose is to ensure that the issues are in fact ready for adjudication by the particular forum and the doctrine serves as a form of judicial restraint to the extent that higher courts may prefer that issues be thoroughly canvassed in lower courts so that all aspects may be fully explored before the litigation reaches the apex court. Mootness by contrast is a means of cutting off litigation when the actual issue is no longer relevant to the specific parties before the court because it has either been resolved between them or no longer applies to their circumstances. This means that an issue which might have a broader significance to the community would have to wait until another similar case arises and thus enables the court to avoid having to address the legal question – a limited but at times significant form of judicial restraint.

Standing has historically served as a serious limit on the ability to bring constitutional matters before the courts in the United States. Using the 'cases and controversies' requirement of the United States Constitution, Scalia J took a very narrow view of standing, arguing that '[f]irst, the plaintiff must have suffered an "injury in fact" – an invasion of a legally protected interest which is (a) concrete and particularized; and (b) "actual or imminent, not 'conjectural' or 'hypothetical,'" [s]econd, there must be a causal connection between the injury and the conduct complained of – the injury has to be "fairly trace[able] to the challenged action of the defendant, and not th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision".'<sup>33</sup>

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<sup>33</sup> *Lujan v Defenders of Wildlife* 504 US 555 (1992) 560-561. Internal citations omitted.

In comparison to this narrow approach to standing in the United States and a similarly restrictive attitude taken by the South African courts prior to 1994,<sup>34</sup> the Constitution today is much less restrictive, at least in cases where there is an allegation that a right in the Bill of Rights has been infringed. The range of persons who may approach a court includes: (a) anyone acting in their own interest; (b) anyone acting on behalf of another person who cannot act in their own name; (c) anyone acting as a member of, or in the interest of, a group or class of persons; (d) anyone acting in the public interest; and (e) an association acting in the interest of its members.<sup>35</sup> As a result the use of standing as a principle of judicial restraint is limited to those few circumstances when there is no claim of a violation of the Bill of Rights although this mechanism may remain quite significant as a means of avoiding some of the claims that might arise from internal conflicts among different factions in political parties who may turn to the courts with claims based on financial or other internal conflicts over party rules and disciplinary procedures.

Aside from standing, the rules of ripeness and mootness, which address the timing of a case, are well developed in US jurisprudence as doctrines that enable courts to refrain from going forward in particular cases, although there are noted exceptions such as the US Supreme Court's decision to go ahead in *Roe v Wade* despite the fact that the appellant was no longer pregnant.<sup>36</sup> In the pre-constitutional era in South Africa the courts employed the doctrine of ripeness more as a restrictive form of standing while mootness, according to Cheryl Loots, 'does not appear to have been applied' because 'even where an issue had become moot, the court usually decided the merits for the purpose of determining which party was to pay costs'.<sup>37</sup> Today questions of ripeness are largely enveloped within two broader concerns: first, the Constitutional Court's turn away from granting direct access has been justified by a need to see the issues first developed

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<sup>34</sup> C Loots 'Standing, ripeness and mootness' in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* 2 ed (2007) (Original Service 02-15) 7-2.

<sup>35</sup> Section 38(a)-(e).

<sup>36</sup> *Roe v Wade* 410 US 113 (1973). Justice Blackmun noted that 'the normal 266-day human gestation period is so short that the pregnancy will come to term before the usual appellate process is complete. If that termination makes a case moot, pregnancy litigation seldom will survive much beyond the trial stage, and appellate review will be effectively denied. ... Pregnancy provides a classic justification for a conclusion of non-mootness. It truly could be "capable of repetition, yet evading review."'

<sup>37</sup> Loots (note 34 above) 7-20.



fully in the courts below; and second, in the more traditional sense when cases are simply brought too early. While our context is clearly different from a jurisdiction such as the United States, the notion that an ‘issue is not ripe for adjudication ordinarily emphasizes a *prospective* examination of the controversy which indicates that future events may affect its structure in ways that determine its present justiciability, either by making a later decision more apt or by demonstrating directly that the matter is not yet appropriate for adjudication’<sup>38</sup> by a court. Mootness, by contrast, has taken on a greater role in the constitutional era although the court has drawn a significant distinction between issues that are moot between the parties as opposed to mootness relative to society at large. In a classic application of the mootness doctrine Didcott J argued in *J. T. Publishing* that there could be no ‘clearer instance of issues that are wholly academic, of issues exciting no interest but an historical one, than those on which our ruling is wanted . . . [since the] repeal of the Publications Act has disposed altogether of the question pertaining to that. And any aspect of the one about the Indecent or Obscene Photographic Matter Act which our previous decision on it did not answer finally has been foreclosed by its repeal in turn. I therefore conclude that we should decline at this stage to grant a declaratory order on either topic.’<sup>39</sup> Critics have pointed out that it took another year for the new law to enter into force and so the old obscenity law which was to be replaced by the new legislation remained in place – and thus the issue was not as moot as the Constitutional Court had assumed.<sup>40</sup>

Finally, the third principle relevant to the role of judges pertains to the duty of judges to ensure the integrity of the judicial process. While widespread accusations and concerns about corruption in government in recent times have not been directed at the judiciary, the question of integrity has arisen in the face of claims for the recusal of judges and of bias. In the case of *De Lacy v South African Post Office*<sup>41</sup> the Constitutional Court was faced with an appeal that included ‘grave accusations against the Supreme Court of Appeal’ including an assertion that ‘its judgment [was] a gross miscarriage of justice and attribut[able to] actual bias’.<sup>42</sup> The applicants accused the Supreme Court of Appeal (SCA), ‘and Nugent JA in particular of “deliberate” distortion of the facts [claiming] . . . that in no fewer than 114 separate instances it [the SCA] willfully ignored or sought

<sup>38</sup> LH Tribe *American Constitutional Law* 2 ed (1988) 77.

<sup>39</sup> *JT Publishing (Pty) Ltd v Minister of Safety and Security* 1997 (3) SA 514 para 17.

<sup>40</sup> Loots (note 34 above) 7–22.

<sup>41</sup> *De Lacy v South African Post Office* 2011 (9) BCLR 905 (CC).

<sup>42</sup> At para 4.

to interpret the evidence in a manner and to an extent inconsistent with the record'.<sup>43</sup> Furthermore, the applicant's Counsel, in his written arguments to the Constitutional Court 'charge[d] that the applicants' complaint is not a matter relating to "findings of fact" but rather one where the judgment [was] not . . . delivered impartially and that the integrity, probity and impartiality required of the judicial function were not displayed when the Court decided the appeal'.<sup>44</sup> While the Constitutional Court had originally dismissed the appeal 'for lack of prospects of success'<sup>45</sup> the claim of judicial bias had not been made in the first appeal. Moseneke DCJ noted that while the appeal was based on claims of judicial bias, 'the bulk of its papers [was] devoted to an exhaustive critique of the factual findings of the Supreme Court of Appeal' and thus their 'grievance had all the hallmarks of a mere dissatisfaction with factual findings'.<sup>46</sup>

Nevertheless Moseneke DCJ noted that a 'complaint of perceived judicial bias is a constitutional matter. . . . [as] [j]udicial authority is an integral and indispensable cog of our constitutional architecture'.<sup>47</sup> Pointing out that the Constitution 'vests judicial authority in the courts' and 'commands that courts must function without fear, favour or prejudice'<sup>48</sup> Moseneke DCJ argued that not only must judicial authority be exercised constitutionally, but '[a]t a bare minimum this means that courts must act not only independently but also without bias, with unremitting fidelity to the law, and must be seen to be doing so'.<sup>49</sup> As a result, 'when a litigant complains that a judicial officer has acted with bias or perceived bias he is in effect saying that the judicial officer has breached the Constitution and her oath of office' since 'courts are final arbiters on the meaning of the Constitution and the law'.<sup>50</sup>

Having identified the constitutional dimension of this attack on the justices of the Supreme Court of Appeal, Moseneke DCJ turned to the behaviour of the applicant's lawyers who, 'as they settled their clients' affidavits and, in written argument authored by counsel, they rehashed word for word the unwarranted accusations of their clients'.<sup>51</sup> Furthermore, after their clients recanted they accepted 'that their clients' charges were baseless

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<sup>43</sup> At para 5.

<sup>44</sup> At para 7.

<sup>45</sup> At para 28.

<sup>46</sup> At para 28.

<sup>47</sup> At para 47.

<sup>48</sup> At para 47.

<sup>49</sup> At para 47.

<sup>50</sup> At para 48.

<sup>51</sup> At para 119.

and that they owe[d] an unqualified apology to the judges concerned'.<sup>52</sup> However, as Moseneke DCJ noted, the unanswered question 'is whether these legal representatives had breached the ethical duty they owe to a court as its officers'.<sup>53</sup> Defining the aspect of this duty relevant to the case Moseneke DCJ stated that '[a]n officer of the court may not without more convey to a court allegations or claims by a client when there is reason to believe that the allegations are untruthful or without a factual basis'.<sup>54</sup> In a situation 'where imputations of dishonesty and bias are directed at a judicial officer who ordinarily enjoys a presumption of impartiality' this duty is even higher and lawyers should carefully examine 'complaints of judicial bias and dishonesty and the facts, if any, upon which the accusations rest'.<sup>55</sup> Concluding that 'it is doubtful whether these legal representatives did so'<sup>56</sup> Moseneke DCJ directed the Registrar of the Constitutional Court 'to furnish a copy of this judgment to the Society of Advocates, Johannesburg, and to the Law Society of the Northern Provinces' for these professional bodies 'to consider whether their conduct amount[ed] to a breach of any ethical rule'.<sup>57</sup>

## V CONCLUSION

Judicial training in a constitutional democracy is concerned with the independence, competence and impartiality of judges for both the *per se* value of these goals and to empower judges to fulfil their designated constitutional role. The supremacy of the constitution establishes the judiciary as the ultimate interpreters and guardians of the Constitution. To fulfil this role effectively, the judiciary must ensure its own legitimacy as a decision-maker yet also ensure that the system of democratic government created by the Constitution functions smoothly. The result of these imperatives is that the judiciary must work simultaneously to ensure the integrity of the judicial system and those within it but also use the jurisprudential tools at its disposal to restrain its own interventions ensuring that the coordinate branches of government are able to fulfil their respective constitutional roles as laid out in the text and structure of the Constitution.

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<sup>52</sup> At para 119.

<sup>53</sup> At para 119.

<sup>54</sup> At para 120.

<sup>55</sup> At para 120.

<sup>56</sup> At para 120.

<sup>57</sup> At para 122.

# JUDICIAL EDUCATION IN A TRANSFORMATIVE CONTEXT

DM DAVIS

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The training of judges is a relatively recent phenomenon. The first institute focusing on judicial education was the French National School for the Judiciary founded in 1959, which was followed by similar institutes established in the Netherlands in 1960 and the National Judicial College in the United States of America in 1963.<sup>1</sup>

Ronsin suggests that, after almost sixty years of judicial training, certain principles have crystallised around the training of judges; of particular importance is the following observation:

*The guiding principles of judicial training are indeed closely related to the particular position occupied by judges and prosecutors in our democratic societies. The principle of separation of powers places them at the heart of society, engaged with its issues and debates, in a position of independence constituting both a guarantee and a duty. This particularity must necessarily reflect upon their training, which must guide them sufficiently to enable them to perform their functions competently, while not undermining the impartiality and independence they must demonstrate.<sup>2</sup>*

If, as is correctly suggested, the purpose and scope of judicial education should be directed to the particular context in which the recipients of the judicial education are located, then South Africa poses particular challenges to the judicial educator. The context is the country's sorry racist and sexist past. A transformed judiciary, one able and willing to break from this past, is a critical part of the engine needed to propel the country along its constitutional journey. This means an interrogation of a particular notion of merit which dominated the profession in general from the time of the Cape Colony, together with a focus upon the need for recognition of the privileged education and lives of white male legal practitioners and the criteria which characterised judicial appointment under apartheid. White males to the exclusion of other races and women had, and continue to have, a monopoly on a range of legal areas, including commercial law:

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<sup>1</sup> X Ronsin 'The principles of judicial training: Towards international recognition?' (2016) 5 *Journal of the International Organisation for Judicial Training* at 11.

<sup>2</sup> At 12.

tax law, company law and intellectual property and competition law. Manifestly, given this history, judicial education which is targeted to ensure that talented black and women lawyers would be able to develop skills in these subjects, and thereby decolonise islands of exclusively white male domination, is necessary. That however is a topic which raises a number of questions which fall beyond the scope of this contribution.

This essay seeks to deal with the second of the specific challenges posed, the mandate to transform the South African legal system away from an apartheid past toward a democratic future.

Chief Justice Pius Langa captured this imperative succinctly when he wrote the following:

*The Constitution demands that all decisions be capable of being substantively defended in terms of the rights and values that it enshrines. It is no longer sufficient for judges to rely on the say-so of Parliament or technical readings of the legislature providing justifications for their decisions. Under a transformative Constitution, judges bear the ultimate responsibility to justify the decisions not only by reference to authority, but by reference to ideas and values.*<sup>3</sup>

Chief Justice Langa also warned that:

*We can no longer teach the lawyers of tomorrow that they must blindly accept legal principles because of the authority. No longer can we responsibly turn out law graduates who are unable to critically engage with the values of the Constitution and who are unwilling to implement those values on all corners of their practices.*<sup>4</sup>

This demand for change must be contrasted to a conservative legal culture, inherited from apartheid, and which follows predominantly a formalistic and technical approach to law. The vast majority of the South African judiciary would have been educated and later practised within this particular legal culture, in which law was presented as neutral and objective. The reality that law invariably expresses a particular politics and enforces a singular conception of society would rarely have formed even a small part of the dominant legal education in South Africa.<sup>5</sup>

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<sup>3</sup> P Langa 'Transformative constitutionalism' (2006) 17 *Stellenbosch Law Review* 351 at 353.

<sup>4</sup> At 356.

<sup>5</sup> K Klare 'Legal culture and transformative constitutionalism' (1998) 14 *South African Journal on Human Rights* 146; D Moseneke 'The fourth Bram Fischer memorial lecture: Transformative adjudication' (2002) 18 *South African Journal on Human Rights* 309.

Recently, the Constitutional Court has sought to embrace these challenges fully and enthusiastically in *Daniels v Scribante*<sup>6</sup> in dealing with s 25(6) of the Constitution which provides that a person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.

Madlanga J noted, after carefully referring to a range of important historical texts,<sup>7</sup> that the mischief that this section sought to address was ‘also about affording occupiers the dignity that eluded most of them throughout the colonial and apartheid regimes’.<sup>8</sup>

In the founding of a carefully articulated account of a sorry past dealing with land disposition Madlanga J went on to examine the question as to whether private persons bear positive obligations under Chapter 2 of the Constitution. Madlanga J found that the appellant was living under conditions that were clearly incongruent with human dignity. He rejected an argument that – because s 13 of the Extension of Security of Tenure Act 62 of 1997 makes it possible for a court to order an owner to pay compensation for improvements made by an occupier upon eviction of the latter – such an order would indirectly have the effect of imposing a positive constitutional obligation on a private individual, something the respondents contended was constitutionally unsound. Madlanga J said ‘to the extent that my interpretation does impose a positive obligation on an owner, I am not in the least deterred in adopting it’.<sup>9</sup>

This judgment presents a dramatic break from the technical and formalistic legal culture which previously dominated both legal education and the legal profession.<sup>10</sup> Significantly, it seeks to give content to the provisions of the Constitution as well as legislation by way of recourse to indigenous history, and hence represents a move away from previous excessive reliance on English and European sources.<sup>11</sup>

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<sup>6</sup> 2017 (4) SA 341 (CC).

<sup>7</sup> See for example his reference to Sol Plaatje *Native Law in South Africa* (2007).

<sup>8</sup> *Daniels v Scribante* (note 6 above) para 23.

<sup>9</sup> At para 53.

<sup>10</sup> Cameron J, in a concurring judgment, warned against the use of historical text not cited by counsel. While I accept the force of the warning, the opening up of the judicial perspective is what is to be welcomed.

<sup>11</sup> See for example *Ferreira v Levin* NO 1996 (1) SA 984 (CC) where Ackermann J in an extremely careful and learned judgment refers exclusively to Kant (para 52), Isaiah Berlin (paras 52-3); and Karl Popper (at footnotes 36, 56, and 69) as the basis to renovate the concept of freedom as it appears in the Constitution.

Froneman J also provided further transformative direction in his concurring judgment in *Daniels*. In dealing with the question of ownership he said:

*Before we can make substantial and lasting progress in making the ideals of the Constitution a reality at least three things must happen:*

- (a) an honest and deep recognition of past injustice;*
- (b) a reappraisal of our conception of the nature of ownership and property;*  
*and*
- (c) an acceptance, rather than an avoidance or obfuscation of the consequences of constitutional change.<sup>12</sup>*

These three requirements are simply expressed but they raise profound challenges for a judiciary located within the South African context. Apart from a sustained and rigorous enquiry into history, what it calls for is a clear examination of legal concepts as they exist at present, their deconstruction pursuant to this enquiry and a consequent reconstruction in the light of an engagement with the normative framework of the constitution. For many judges, their own experience of egregious racism and sexism ensures a recognition of past injustice which was perpetrated throughout South African society. However, no matter the particular experience of a judge the critical examination of existing legal concepts and their reconstruction in the light of the normative framework of the Constitution will prove to be a difficult task, particularly as a result of the existing influence of a conservative legal culture. It is here, more than in the technical expertise which undoubtedly is important, that judicial education is required.

After nineteen years on the Bench, I am yet to participate in a rigorous judicial encounter with the challenges that a democratic society in general and the Constitution in particular pose for the development of our jurisprudence, whether it be in public or even more important in private law. To be sure, some discussion has taken place in corridors of the academy but judicial education cannot eschew a focus on these vital questions. They raise profound challenges for the long-term success of constitutional democracy.

Take, for example, the issues of equity and fairness as they apply in the law of contract. From the time of the decision in *South African Forestry Company Ltd v York Timbers Ltd*<sup>13</sup> and *Barkhuizen v Napier*,<sup>14</sup> a vigorous

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<sup>12</sup> Para 115.

<sup>13</sup> 2005 (3) SA 323 (SCA).

<sup>14</sup> 2007 (5) SA 323 (CC).

academic debate has been waged regarding the place of equity, fairness and good faith in the law of contract. To be sure there had been attempts to engage with these values, perhaps most notably in recent times in *Botha v Rich NO*<sup>15</sup> but the jurisprudence is hardly coherent and the kind of process of deconstruction advocated by Froneman J in *Daniels* is yet to be comprehensively undertaken.

As an indication of the power of a contrary position, the following passage penned by a retired judge of the Supreme Court of Appeal, Fritz Brand, is illuminating:

*If we say that the principles regarding the role of fairness and equity in our contract law, as formulated, for example, in York and Bredenkamp, offend the spirit, purport and objects of the Bill of Rights, why do we say that; and to what extent do they so offend? Where exactly does the deficiency lie? If we are to formulate exceptions to these principles where will we draw the line? For instance, if a contract provides for payment on a specified future date, would it be a sustainable defence that, payment on that date would be severely prejudicial to the debtor, while the creditor does not really need the money? Furthermore, if we are to recognise exceptions to these established principles, what would happen in equally well established remedies based on concepts of equity and fairness, such as misrepresentation, rectification, undue influence and so forth? Will they retain their independent existence? Or will they be subsumed by these undefined exceptions? I believe that unless and until questions such as these can be satisfactorily answered, the rule of law requires that the established principles be protected by our highest court.*<sup>16</sup>

Whatever the merits of these observations, they should be employed as part of initiating a comprehensive engagement of whether the existing rules of contract meet the demands of a South Africa of the twenty-first century, with its grotesque patterns of inequality and power imbalances. It is here that judicial education can assist in a rigorous examination, not only of challenges but to possible solutions and methodologies for future development.

In similar fashion, the elusive doctrine of separation of powers, as noted by Ronsin,<sup>17</sup> poses an equal challenge for judicial education. It is trite to observe that there is scarcely a political question that does not require resolution by our courts.

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<sup>15</sup> 2014 (4) SA 124 (CC) paras 45–6.

<sup>16</sup> FDJ Brand ‘The role of good faith, equity and fairness in the South African law of contract: A further instalment’ (2016) 27 *Stellenbosch Law Review* 238 at 253.

<sup>17</sup> See note 1 above.



It is to be expected therefore that the role of the judiciary in these controversial cases prompts considerable reaction from the executive and the legislature. Retired Israeli Chief Justice Aharon Barak captures the point:

*Several questions therefore arise: Is this enhanced judicial status appropriate? Have judges taken on too much power? Has the separation of powers become blurred? Indeed, some claim that in recent years the gap has widened between the practices and public expectations of democratic courts, on the one hand, and the intellectual normative principles that are supposed to guide the courts on the other. This gap is dangerous, because over time, it will likely undermine public confidence in the judiciary.*<sup>18</sup>

In conclusion, this contribution should not be read as an argument against judicial education which provides an opportunity for judges to gain access to technical areas of law from which they were excluded in practice or to those judges who wish to be updated in respect of the latest developments in fields where they might once have claimed significant expertise because of the nature of their legal practice prior to their elevation to the Bench. But these particular demands for judicial education transcend national boundaries and speak to judicial institutions in most parts of the world.

In South Africa we face particular challenges as indicated in this article. It is high time that judicial education in this country allows the judiciary to pause and jurisprudentially reflect on the kind of legal system which it wishes to construct for future South Africans. Failure to do so can only lead to a form of legal nihilism which is already beginning to percolate through the halls of the legal academy.<sup>19</sup>

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<sup>18</sup> A Barak *The Judge in a Democracy* (2006) at xii. See also F Cachalia 'Separation of powers, active liberty and the allocation of public resources' (2015) 132 *South African Law Journal* 285; DM Davis 'Separation of powers; juristocracy or democracy' (2015) 133 *South African Law Journal* 258; K Klare 'Self-realisation, human rights and separation of powers: A democracy seeking approach' (2015) 26 *Stellenbosch Law Review* 445.

<sup>19</sup> See for example T Madlingozi 'Social justice in the time of neo apartheid constitutionalism' (2017) 28 *Stellenbosch Law Review* 123; MB Ramose 'In Memoriam: sovereignty in the new South Africa' (2007) 16 *Griffiths Law Review* 310.

# TO GIVE AND TO GAIN: JUDICIAL INVOLVEMENT IN ADVOCACY TRAINING

OL ROGERS

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There is a direct relation between the quality of counsel and the quality of judicial output. Competent counsel can be expected to make responsible submissions about the evidence and to direct attention to the relevant legal principles and authority, whether for or against their case. They will use court time efficiently by focusing on the important issues and by ensuring that evidence unfolds coherently. All of this helps the bench to administer justice promptly and reliably. In due course some of these competent counsel can be expected to join the bench. The judiciary thus has a very real interest in the training of advocates. In this article I wish to give an overview of the bar's training methodology for the benefit of members of the judiciary who may be unfamiliar with it and explain how judges can involve themselves in advocacy training for the mutual benefit of counsel and themselves.

Although some advocates practise independently, most counsel who appear in the courts are members of bar societies affiliated to the GCB. No practical training was provided for advocates until the requirement of four-month pupillage was introduced by the GCB in the mid-1970s. In 1980 the passing of a national bar examination became a further requirement for membership of constituent bars. The syllabus focused (and still does) on procedural law, motion court practice, legal writing and ethics. The extent of formal instruction on these topics varied from bar to bar. In 1998 the period of pupillage was extended to six months and then in 2004 to one year to enhance the training of pupil members, to stem high failure rates and to comply with the one-year's vocational training which the Legal Practice Bill was expected to prescribe. At the same time bars introduced annual intake limits, which required the formulation of selection criteria. Formal training in the syllabus for the bar examination was improved.

Until the mid-1990s the GCB did not have a formal programme for training their members in advocacy skills though the Black Lawyers Association had offered such training to its members under the auspices of the United States' National Institute of Trial Advocacy. In 1994 the then chairperson of the GCB, Malcom Wallis SC, made contact with colleagues in the United Kingdom who were involved in advocacy training. The bars in the United Kingdom and Australia had a unique training methodology

which was, as a result of Advocate Wallis' initiatives, introduced into South Africa with the help of trainers from those countries.<sup>1</sup>

Advocacy training in accordance with this methodology is provided to pupil members by experienced practitioners from their bars who have been trained in the use of the methodology. In addition, the GCB's training committee annually organises national and regional training courses pitched at various levels (beginner; intermediate; advanced; appellate advocacy). The flagship national courses are held at the Wallenberg conference facility in Stellenbosch.

A typical intermediate training course spans four days (an advanced course might be a full week). It is a residency course – teachers and trainees have accommodation near the conference facility. The trainees are divided into groups ideally containing eight members each. Each group has a dedicated teacher. Other teachers float between the groups. There are two or three plenary sessions but most of the time is spent in the groups. Well before the commencement of the course the trainees are provided with a set of papers relating to a trial action (pleadings, documents and statements) and a set of papers relating to expert evidence (a briefing document and expert reports for the plaintiff and defendant). Trainees must prepare thoroughly for these exercises and submit written work (an advice on evidence and closing submissions). Over the four days the trainees undergo intensive training in case analysis and in the opening address, the leading and cross-examination of witnesses and closing submissions, as well as training in the leading and cross-examining of expert witnesses. Junior members of the bar volunteer to act as witnesses in the trial action. Some of them turn out to be quite good actors, deliberately throwing curveballs to test the ability of trainees to recover from unexpected answers. In the expert exercise used in recent years (involving the evidence of accountants in a claim for damages for breach of warranty in the sale of a business), accountants from Deloitte have acted as the expert witnesses. The course is hard work for teachers and trainees alike. Proceedings start at 08h30 and sometimes end as late as 19h00. There are, however, adequate breaks for tea and lunch and for socialising over dinner.

I should now say something about the training methodology (usually styled, somewhat cultishly, 'the Method'). The focus is training by doing rather than training by instruction. Each trainee is required to make an opening address, to lead a witness, to cross-examine a witness and to make closing submissions. There is a similar process for the leading and

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<sup>1</sup> For a fuller account of the history, see Timothy Bruinders SC 'Advocacy training – 20 years later' (2014) 27(2) *Advocate* at 37–40.

cross-examining of the expert witnesses. All of this occurs in the trainee's group. The exercise is overseen by the group's dedicated teacher and one or two floating teachers. For each performance by a trainee, one of the teachers acts as the judge and one of the teachers conducts a review of the performance. The trainee is allowed to proceed with the exercise uninterrupted for about four to five minutes. The reviewer then calls a halt and begins the review. The review methodology comprises five steps: (i) the headline; (ii) the replay; (iii) the problem; (iv) the solution; and (v) the demonstration. A review must focus on only one issue, even though the trainee's performance may exhibit multiple shortcomings. The 'headline' is a pithy summation of the issue on which the reviewer has chosen to focus. The 'replay' is a verbatim playback by the reviewer of the trainee's performance or the part of it where the problem manifested itself. In order to do the replay, the reviewing teacher must keep an accurate note of what the trainee and witness say. After the replay, the reviewer identifies the problem presented by the selected issue and offers a solution. The final step is for the reviewer to demonstrate the solution by doing the relevant part of the exercise herself.

Where facilities permit, each performance is video-recorded. Upon completion of the review (which is done in front of the group), the trainee takes a memory stick to a breakaway room where another teacher plays through the recording with the trainee to make sure that the latter has understood the issue and to reinforce the solution provided by the reviewer. Once an entire round of an exercise has been completed, the trainees each have a brief opportunity to demonstrate what they have learnt by performing the relevant part of their exercise again.

There are varying reactions from senior practitioners when they first encounter the Method. Some are sceptical about its rigidity. In time, though, most become convinced of its efficacy. What is singularly unhelpful for trainees is a generalised discussion of how they might have done the exercise better, accompanied by 'war stories' of the teacher's own court experiences. The idea is not for the teacher to tell the trainee how she would have done the exercise – that might involve jettisoning the trainee's performance altogether and demonstrating a new performance at a level beyond the trainee's current abilities. In the demonstration the reviewer as far as possible uses the trainee's own words, tweaking here and there to demonstrate the solution. The intention is to help the trainee make her own performance better in one respect. The single focus is important, since solutions to multiple issues are less likely to be absorbed, particularly given time constraints. Because the trainees observe the performances and reviews of the other members of their group, they learn not only from their own reviews but also from the reviews of their peers.

In selecting an issue for review, the teacher needs to bear in mind that the issue should be one which can be demonstrated. Often the teacher may think that the trainee's most obvious shortcoming was to ask one too many questions in cross-examination or to pursue an unprofitable or dangerous line of enquiry. Since the solution to such a shortcoming is to ask one less question or not to pursue the line, the solution cannot be demonstrated effectively. That type of problem should rather be discussed briefly at the end of a session. More profitable matters for review are assisting trainees to control their witness in chief by keeping questions specific, to ask open or closed questions (depending on whether they are leading or cross-examining a witness), to signpost where they are going (for the benefit of the witness and the judge), to use everyday language rather than legalese, to make effective use of documents and so forth.

In South Africa the current approach is to confine the review to substance, not style. Stylistic aspects of the performance (posture, voice production, hands) are dealt with separately by a voice coach. However, the trainee has relatively little dedicated time with the voice coach. In some of the jurisdictions which use the Method, trainers are encouraged to select a style point in addition to the substance point (for example, unnecessary shuffling of papers, a failure to look the judge in the eye).

The Method can be stressful for teachers at first. In advance of the course the teachers must thoroughly familiarise themselves with the case materials and should ideally map out how they would go about each of the exercises. When conducting a review the teacher needs to keep a verbatim note of the trainee's exercise while simultaneously trying to identify the most suitable issue for the review and settling upon a suitable headline. If a suitable headline is identified, the replay, problem and solution stages of the review are generally straightforward. But then there is the demonstration. The reviewer may be anxious that her own performance, given in front of the whole group and one or two other teachers, will not be up to scratch. If the teacher is dissatisfied with her demonstration, she may be tempted to salvage things by adding a further explanation at the end of her demonstration, but this is discouraged. The review, culminating in the demonstration, should speak for itself. All teachers from time to time give dud reviews. Sometimes this can be remedied by the teacher who does the video review. Otherwise one can speak with the trainee afterwards. I always say to trainees at an early stage that the teachers are there to help them improve but are not themselves perfect – we can all learn from each other. New teachers can also prepare 'crib sheets' with appropriate headlines for the common failings encountered during advocacy training.

Apart from the intrinsic merits of the Method, there is another advantage from its use in South Africa. Because the same methodology is

used in other countries (England, Scotland, Ireland, Australia, New Zealand, Hong Kong, Singapore and Malaysia), teachers from one jurisdiction can participate in training courses offered in other jurisdictions. From time to time South African teachers travel abroad to participate in foreign training courses. And invariably there are teachers from foreign jurisdictions who participate in the GCB's national training courses. Local teachers and trainees benefit greatly from exposure to and social interaction with colleagues from other countries. As far as I am aware, there are no advocacy training programmes elsewhere in Africa using the Method, but lawyers from other African countries occasionally attend courses hosted by the GCB.

Trainees pay a fee to attend intermediate and advanced courses but the fee does not cover the full cost, the balance being covered by the GCB. Teachers provide their services without remuneration and foreign teachers pay their own way to get to South Africa. Where outside professionals such as members of Deloitte assist, they too do so free of charge.

Racial and gender diversity among trainees is excellent. The majority of trainees is made up of black advocates. Men and women are more or less evenly represented. Things are not so good when it comes to teachers. At the January 2017 national course held in Stellenbosch, there were fifteen teachers from the bar of whom eleven were men and only three black. At the same course in July 2017 there were thirteen teachers from the bar of whom nine were men and three black. And whereas there was considerable change in the composition of the white teachers, the same three black teachers were involved on both occasions. There is greater diversity when it comes to the training of pupils at local bars but the GCB still needs to focus on attracting more black and female teachers. As will be apparent from what I say later, greater diversity is also needed among judicial teachers, the current cohort being predominantly white men.

The burden of advocacy training, as with formal instruction on the syllabus, falls on members of the bar who sacrifice many hours for no remuneration. However judges can make a significant contribution and their involvement is welcomed by the GCB. The most significant and time-consuming contribution would be as teachers. There are a number of current or retired judges who have qualified as teachers – Malcom Wallis (Supreme Court of Appeal), Ivor Schwartzman, Sharise Weiner, Roland Sutherland and Colin Lamont (Gauteng), Trevor Gorven, Graham Lopes and Rashid Vahed (KwaZulu-Natal), Glen Goosen (Eastern Cape) and Ashley Binns-Ward and I (Western Cape). Most of these were already involved in training while at the bar but a few, of whom I am one, only underwent training after judicial appointment. Retired Constitutional Court Justice Johann Kriegler is a keen supporter of advocacy training

and still participates regularly. Judges from foreign jurisdictions who have qualified as teachers and who have participated in South African courses include Glenn Martin (a judge of the Supreme Court of Queensland), Frank Clarke (formerly a High Court judge in Ireland, now Chief Justice), Geraldine Andrews (a High Court judge of the Queen's Bench in England) and Audrey Campbell-Moffat (a judge of the Court of First Instance in Hong Kong).

The GCB usually conducts training courses for teachers in parallel with intermediate advocacy training courses. Judges would be welcomed as candidates to undergo training as teachers. The candidate teachers are taught the use of the Method and given the opportunity of practising it by conducting mock reviews. Junior members from the local bars act as trainees (or 'guinea pigs' as they are affectionately known) for this purpose, using the same trial papers as in the intermediate course. A qualified teacher then discusses the candidate's review, suggesting improvements. By the end of the course a judicial candidate is likely to be approved as a teacher and added to the list of trainers invited to participate in actual training, probably starting at the beginner or intermediate level.

Where the candidate teacher is a judge, there may be sensitivities about having him or her trained by a member of the South African bar – this could be awkward both for the judge and the teacher. This problem can easily be accommodated by allocating a trained judge (South African or foreign) or a senior foreign barrister to perform the review of the candidate's performances. The GCB is also giving consideration to holding dedicated teacher training courses for judges.

Judges who were not court practitioners prior to their appointment may be apprehensive about becoming teachers in advocacy skills. I think such reticence would be misplaced. Judges learn a good deal about effective advocacy from presiding in trials. The best teachers are not necessarily the best court lawyers. At the beginner and intermediate levels, the skills which are taught are at a fairly basic level. A judge without prior advocacy experience is unlikely to find reviews, and demonstrations in particular, unduly challenging. You may have a teaching gift which should not go to waste.

Why should judges become involved in advocacy training? From the perspective of trainees, exposure to a diverse range of skills and insights is enormously beneficial. Since advocacy is ultimately directed at a presiding judge, the perspective of the judiciary is important. A judge may identify an unexpected issue for review and offer a different insight into the solution. Judge Campbell-Moffat from Hong Kong remarked that when she became a judge, after having been a trainer all over the world for more

than twenty years, she was surprised to discover that she had not fully understood what a judge wants:

*I think that is our most valuable contribution as members of the judiciary – to explain our mindset. Counsel needs to be ready to communicate with the judge; to listen to what the judge wants; to be flexible and have the ability to ask if they do not understand where the judge is coming from. Nothing is gained from ploughing on regardless. Everything is to be gained by reading the judge and engaging the judge in dialogue.*

Quite apart from this, trainees, who are usually young members of the bar, hold judges in high esteem and are almost in awe of them. Judicial involvement lends a heightened sense of importance and seriousness to the whole enterprise. It conveys the message that advocacy skills are important to judges. The training course also affords young members of the bar an opportunity to socialise with teachers, including judges, on a more easy footing than is usually possible in other settings. Judges will be surprised at how thrilled young advocates may be to have sat at the same dinner table with them or to have chatted to them over a cup of tea. Invariably judges will be asked at the end of the course to be photographed in the company of those trainees with whom they had particular contact. I have been told by those in charge of the GCB's training programmes that there is overwhelmingly positive feedback from trainees about the involvement of judges. Trainers from the bar also find encouragement in judicial involvement.

However it is not only about what judges can give. I believe judges can also gain by involving themselves in advocacy training. Apart from the ultimate goal of benefiting from better advocacy in court, it is valuable for judges to see matters from the advocate's perspective and to understand the challenges and difficulties many of the youngsters experience. Although judges are not in the business of leading and cross-examining witnesses, it is no bad thing for them to maintain or learn the skills required to do these things effectively. These skills can be useful in keeping proper control of a trial, handling objections, assisting inexperienced advocates and asking clarificatory questions of witnesses. And judges who have experienced the occasional difficulty in demonstrating an aspect of forensic performance (and we all do) are likely to have more sympathy when counsel appearing before them seem to be somewhat bumbling. The social aspect of participation in training is also beneficial for judges. It is a way of getting to know new members of the bar and to understand their varying backgrounds.



For those judges who do not see their way clear to becoming teachers, a less time-consuming form of involvement is to offer their services as presiding judges in the mock trials and mock motion court exercises which pupils and trainees are required to conduct. Judicial involvement of this kind is required both in the training of pupils by local bars and in the training courses offered by the GCB. In the intermediate course, for example, the trial action exercise culminates in a mock trial in which the plaintiff and the defendant are each represented by two counsel. This normally happens on the Saturday afternoon, lasting about two-and-a-half hours. The GCB always tries to get judges to preside over these mock trials, preferably judges who have not been involved in the course as teachers. This creates a heightened sense of the trial being the 'real thing'. It is truly not the same for the trainees if they are conducting a trial before a senior advocate with whom they have been rubbing shoulders for four days. At the end of the mock trial, the presiding judge is invited to make comments on the performances (encouraging remarks, if possible, since the trainees will by then have been through the wringer) though there are teachers present to provide a more formal assessment. The trainees are likely to press the judge to say who won the case. This is not obligatory but some judges do give a short *ex tempore* judgment. There is a gala dinner on the Saturday night to which the presiding judges are invited.

A third way in which judges can contribute is by identifying or devising exercises for use in mock trials and mock motion court work. It is surprisingly difficult to compile an effective trial exercise comprising pleadings, witness statements and exhibits. At the intermediate level the same exercise has been used for several years (an insurance non-disclosure case) and regular teachers have no doubt wearied of it. Although High Court trials are usually more complex, every now and again there will be a relatively simple action in which there is one key witness for each side and a handful of important documents. Such a case could become a model exercise by recasting the evidence given by the two witnesses as witness statements and by substituting fictionalised names for those of the parties. Judges could also identify motion court papers which illustrate typical problems which young advocates should be able to deal with.

I hope that some judicial readers of this article will be persuaded that the sacrifice of time and the potentially stressful components of the Method are outweighed by the benefits which would flow from their involvement in advocacy training. Those who wish to convert good thoughts to action are welcome to contact me or Anna Annandale SC of the Durban Bar who is the convener of the GCB's training committee, having recently taken over from Tim Bruinders SC of the Johannesburg Bar who rendered sterling service for a number of years.

# JUDICIAL SOCIAL CONTEXT EDUCATION IN SOUTH AFRICA

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*[The] Bill of Rights is the cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.<sup>1</sup>*

It is the duty of the state, through its various arms of government, to respect, protect, promote and fulfil the rights provided for in the Bill of Rights.<sup>2</sup> Chapter 8 of the Constitution provides that the role of the judiciary is the administration of justice.<sup>3</sup> For justice to be seen to be done it is critical that the judiciary be impartial. Judicial independence is the means through which judicial impartiality is achieved. However, mere independence does not, on its own, guarantee the effective administration of justice. The judiciary must also be seen to be legitimate. Accountability is key for a legitimate judiciary. It ensures that the judiciary does not use its independence to avoid public scrutiny. It also promotes resonance between the decisions of judicial officers and generally recognised laws. It is in this context that judicial social context education is seen as essential to legitimate judicial decision-making.

In essence, the term ‘social context judicial decision-making’ refers to the theory that judging is grounded in the human condition and the society in which it takes place. For that reason laws made by people<sup>4</sup> must adjust to peculiarities of a given community and its changing circumstances. Judicial decision-makers must therefore be aware of the social context(s) from which legal norms emanate and changes that occur to those contexts. The information available to judges on the social context in which they operate affects their judging. And those who direct judicial education must ensure that authentic information is developed for judicial use, so

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<sup>1</sup> Section 7 of the Constitution of the Republic of South Africa, 1996.

<sup>2</sup> Section 7(2) of the Constitution.

<sup>3</sup> See in particular s 165 of the Constitution, which vests the judicial authority of the Republic in the courts.

<sup>4</sup> This is a conscious avoidance of ‘man-made laws’.

that judging is relevant to the needs of society.<sup>5</sup> In this sense social context education is aimed at ‘increasing awareness and understanding principles of equality and fairness in an era of rapid change within the society in which the judicial duties are performed’.<sup>6</sup>

On the other hand, in opposition to those advocating judicial social context education as essential to legitimate judicial decision-making, the theory aligned to legal positivism asserts that laws and legal rules are, in themselves, a complete means to the attainment of justice.<sup>7</sup> This theory postulates that, as norms made by the legislator, laws are a sufficient means to the attainment of justice because they are enacted by legitimate authority and are accepted by society as such. Their applicability does not depend on compatibility with social norms and it is improper to go beyond them and to have regard to moral or natural law in judicial decision-making. Moreover, so the argument goes, laws and rules made by people ensure legal certainty, such that members of society are able to regulate their conduct accordingly.

It can hardly be denied that in all societies laws are embedded in the history and way of life of the people. In the case of South Africa, society has elected to have the founding pillars of our Constitution drawn from that history. The express guarantee and protection of rights in our Bill of Rights is rooted in the history and experiences of the people of South Africa. There is little doubt that, in this context, the administration of justice requires that laws be applied to reduce poverty and inequality, to promote fairness and to enhance human dignity. There is general acceptance and understanding, even if in the abstract, amongst judicial officers and lawyers in general of the duty to administer justice in accordance with the prescripts of the Constitution. The Constitution obliges judges to interpret and even

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<sup>5</sup> MA Munir ‘Judging in Social Context: A New Dimension in Judicial Education in Pakistan’ *Proceedings of National Conference of Judicial Academies on Key Issues and Challenges in Judicial Education, Punjab Judicial Academy* (2014).

<sup>6</sup> RI Martin *The Most Dangerous Branch: How the Supreme Court of Canada Has Undermined Our Law and Our Democracy* (2005) 200.

<sup>7</sup> BA Garner *Black’s Law Dictionary* (2004). Legal positivism is a theory of law that was developed during the nineteenth century by British legal philosopher John Austin. The theory arose in opposition to the classical natural law theory according to which moral constraints necessarily form part of laws made by people. According to the philosophy of legal positivism the law consists only of positive norms made by the legislator together with common law and case law. It does not incorporate ethical justification for the content of the law. Legal positivism is opposed to sociological jurisprudence, which considers the societal circumstances prevailing in the context within which statutes are interpreted.

make law according to the values set out in it. But there is uncertainty as to the practical realities of this responsibility, particularly regarding the extent to which judges should have regard to social context which is not formally presented as evidence in a particular case, or the extent to which such context may be considered.

In this country, as in many other jurisdictions, not all judges and legal scholars readily embrace the idea of social context judicial education as a means to bolster effective administration of justice. Concerns include fears that social context considerations are an unwarranted indoctrination whose value only lies in political correctness. The result, it is said, is incoherent jurisprudence. A further cause for discomfort is that judges may, as part of social consideration, manipulate the law in order to achieve results which accord with their social preferences. Moreover, judges will be lobbied into special interest groupings and thus lose their independence.

Hesitation in embracing judicial decision-making grounded in social context is more pronounced in relation to commercial law, more specifically contract law. The argument is that the Constitution reaffirms the concept of freedom to contract. There is therefore no basis for considering moral or ethical philosophy. This approach was adopted by the Supreme Court of Appeal in *Brisley v Drotzky*<sup>8</sup> where a defaulting party sought to enforce an alleged oral term of the contract in the face of a written non-variation clause. She asserted that the non-variation clause was in conflict with the principles of good faith and public policy. The Supreme Court of Appeal re-affirmed the validity of the non-variation clause holding that discretion to invalidate it for reasons of perceived inequality would undermine the principle of sanctity of contract and legal certainty. The court held that public policy considerations should only prevail in rare cases, which that case was not.

In a critique of a book published in honour of the widely respected South African legal scholar JC de Wet, J Froneman remarks:

*The conceptual framework constructed by De Wet is not in its construction value free or neutral, nor can it be in its application. It proceeds from the moral premise that personal autonomy and individual responsibility in private affairs like contracts is sufficient guarantee for ethically acceptable results and that judicial interference with that is unnecessary and uncalled for. And in the formulation of the conceptual framework open ended norms of the reasonable man, public policy and good faith are inevitable. De Wet himself was reticent in openly articulating the moral philosophy underlying his work (as many of his contributions in the book recognise) and, as Lubbe notes in a footnote ... he was, in Kontraktereg*

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<sup>8</sup> *Brisley v Drotzky* 2002 (4) SA 1 (SCA).

*also less than enthusiastic for the application of open-ended norms to determine outcomes where more certain and rigid concepts were unable to do the job.*<sup>9</sup>

Even in jurisdictions in which structured judicial social context education has been in place for decades, criticism of judicial decision-making based on the social context remains firm. Canada is one such jurisdiction.<sup>10</sup> Martin<sup>11</sup> criticises the judges of the Supreme Court of Canada for undermining democracy in their interpretation of laws pertaining to abortion, assisted suicide, homosexuality and succession in Quebec. He suggests that judges have, through decisions guided by social values (which, as unelected representatives of Canada, they had no right to impose), abandoned established principles, disregarded statutes, and invented new doctrines.<sup>12</sup> He writes that, whilst purporting to be concerned with the plight of the oppressed, these judges have, in fact, shown condescension and a denial of objectivity about human behaviour, and have subverted the rule of law and democracy. And the relationship on which they purport to rely (between natural law or moral philosophy and the Constitution) is non-existent.

The South African Constitution is founded on our history. Hence it –

*provides a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex.*<sup>13</sup>

<sup>9</sup> J Froneman A review of *A Man of Principle. The life and legacy of J C de Wet / 'n man van Beginsel. Die lewe en nalatenskap van J C de Wet* (J du Plessis and G Lubbe (eds)) (2014) 131 *South African Law Journal* 474 at 478.

<sup>10</sup> The Canadian National Judicial Institute, which was created in 1988, facilitates, amongst others, a course on 'Context of Judging' in which judges explore topics on social context. These encompass safety and security of women, the realities of incarceration, indigenous law, understanding of mental health, assessing and building intercultural competence and many others. See T Brettel Dawson 'Judicial education on social context and gender in Canada: Principles, process and lessons learned' (2015) *International Journal of the Legal Profession* 259.

<sup>11</sup> Martin (note 6 above) 200.

<sup>12</sup> Martin (note 6 above) 27.

<sup>13</sup> Words taken from the postscript to the interim Constitution of the Republic of South Africa Act 200 of 1993. Section 232(4) of the interim Constitution provided that, for the purposes of interpreting the interim Constitution, this postscript shall be deemed to be part of the substance of the Constitution and shall not have lesser status than any other provision in the Constitution.

This does not mean that judicial decisions must necessarily echo public opinion. In determining whether the death sentence constituted cruel and inhuman punishment as envisaged in s 11(2) of the Constitution, the Constitutional Court, in *S v Makwanyane*,<sup>14</sup> held that the question was not what the majority of South African people believed a proper sentence for murder should be. The question was rather whether the Constitution allowed that sentence. Chaskalson P put it thus:

*Public opinion may have some relevance to the enquiry, but in itself, it is no substitute for the duty vested in the Courts to interpret the Constitution and to uphold its provisions without fear or favour. If public opinion were to be decisive there would be no need for constitutional adjudication. The protection of rights could then be left to Parliament, which has a mandate from the public, and is answerable to the public for the way its mandate is exercised, but this would be a return to parliamentary sovereignty, and a retreat from the new legal order established by the 1993 Constitution. By the same token the issue of the constitutionality of capital punishment cannot be referred to a referendum, in which a majority view would prevail over the wishes of any minority. The very reason for establishing the new legal order, and for vesting the power of judicial review of all legislation in the courts, was to protect the rights of minorities and others who cannot protect their rights adequately through the democratic process. Those who are entitled to claim this protection include the social outcasts and marginalised people of our society. It is only if there is a willingness to protect the worst and the weakest amongst us, that all of us can be secure that our own rights will be protected.*

*This Court cannot allow itself to be diverted from its duty to act as an independent arbiter of the Constitution by making choices on the basis that they will find favour with the public.*<sup>15</sup>

Our Constitution requires more than a formalistic, technical approach to judicial decision-making from a judicial officer. In *Makwanyane* the Constitutional Court set out its decision-making methodology as follows:

*[S]ection 11(2) of the Constitution must not be construed in isolation, but in its context, which includes the history and background to the adoption of the Constitution, other provisions of the Constitution itself and, in particular, the provisions of Chapter 3 of which it is part. It must also be construed in a way which secures for 'individuals the full measure' of this protection.*<sup>16</sup>

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<sup>14</sup> *S v Makwanyane* 1995 (3) SA 391 (CC).

<sup>15</sup> *S v Makwanyane* (note 14 above) para 88.

<sup>16</sup> *S v Makwanyane* (note 14 above) para 10.

Given the uncertainty as to the approach, can we be comfortable that our judicial officers are adequately prepared for their Constitutional role? The efforts by the South African Judicial Education Institute (SAJEI) on certain aspects of judicial education are encouraging.<sup>17</sup> And the fact that the judiciary is assuming the primary responsibility for judicial education and training augurs well for our democracy. Considerations of judicial independence dictate that judicial social education must be judiciary led, but specialist assistance should be enlisted to ensure proper content and instructional approach. However, a lot of work still needs to be done. South African jurisprudence has developed, and is embedded, in its own social context. The laws, rules and legal principles bear the imprint of the history and way of life of the period during which they were crafted. The hybrid Roman Dutch/English legal framework continues to be the bedrock of our legal system. That bedrock is tempered by our constitutional imperatives which reign supreme. Against this background, the results for our jurisprudence of a purely formalistic adjudication methodology are not difficult to imagine.

In the context of a society balkanised over centuries of discrimination, the fundamental rights enshrined in the Constitution are intended to facilitate equality, dignity, freedom and justice for our nation. The judiciary is tasked with translating these abstract rights into concrete benefits for millions of members of South African society who continue to be marginalised as a result of our history. On the other hand judges must, at the same time, give meaning to the abstract protection of individual rights. Confronted with competing interests, the courts must 'reconcile merit with social justice, individual rights with collective good, economic growth with distributive justice' to achieve substantive rather than formal equality.<sup>18</sup>

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<sup>17</sup> The Democratic Governance and Rights Unit located at the University of Cape Town has also been significantly active in the area of judicial education and support, although its core focus is in influencing democracy and human rights in the southern African region.

<sup>18</sup> NRM Menon 'Social context adjudication for social justice adjudication' (2005) 1 *Journal of the National Judicial Academy* 241 at 246. Prof Menon advocates social context education as a central theme in curriculum development and training methods of judicial education institutions, particularly in developing multicultural countries such as India. The examples from which he draws relating to challenges confronting the judiciary in India as a result of discrimination through the hierarchical caste system and feudal economic order are closely comparable to the problems confronting the South African judiciary.

If we accept that our legal rules derive their legitimacy from the moral rules, ideals and principles expressed in our Constitution we should be comfortable that awareness of those ideals and principles and the context which forms their foundation is more likely to enhance than detract from the judicial decision-making process. Such awareness should guide judicial officers towards a principled decision-making methodology. It is from embracing those ideals and principles and being aware of the social context which formed their bedrock that the Constitutional Court was guided in *Makwanyane* to declare the death penalty unconstitutional despite significant public opinion to the contrary.

We should also be mindful that, apart from the history of the foundations of the South African legal system, the reality is that generally, under the cloak of judicial impartiality, individual judicial officers bring with them personal experiences that become part of their decision-making process. Consequently religion, education, history, financial circumstances, physical and psychological attributes, gender and many other factors also become part of the social context within which decision-making happens in courts. Thus the suggestion that judicial social context education would foster trust and legitimacy in the eyes of society seems to make sense.<sup>19</sup>

In post-apartheid South Africa, the temptation may be to view judicial social context consideration as undue legal activism on the understanding that ethical considerations are already built into our legal framework, which is required to be constitutionally compliant. However, the fact that we continue to see constitutional challenges to our laws supports the argument for deliberate social context judicial education. It is also a fact of life that over time society and social context changes. Judicial interpretation cannot disregard this reality. Moreover, substantive justice goes beyond the resolution of a single dispute based purely on the facts and legal principles limited to it; it requires a comprehensive understanding of fairness and equality concepts which cannot be construed out of context, even in private law.

For the same reasons discussed above, more effort needs to be put into training our young legal practitioners and scholars. Previously South African university legal education was largely built on the understanding

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<sup>19</sup> Conventionally 'judicial education' refers to teaching judges substantive law whilst 'judicial training' involves instruction on 'judgecraft', court procedure or skills for leadership and judging. See TS Goldblach 'From the court to the classroom: Judges' work in international judicial education' *Cornell International Law Journal* (2016) 621.



of law as a humanities discipline.<sup>20</sup> The emphasis on the close relationship between legal education and the humanities has diminished considerably.

Following an LLB summit held in May 2013, the South African Law Deans Association (SALDA), the legal profession (the General Council of the Bar and the Law Society of South Africa) and the Council on Higher Education (CHE) conducted a national review on the adequacy of the LLB qualification. Concerns had been expressed that the current formalistic LLB programme, which presents law as a self-generating and coherent body of rules, does not sufficiently prepare graduates for a career in the legal profession.<sup>21</sup> The results of the comprehensive review conducted pursuant to that summit are not yet available. There is therefore no indication as yet that our system of basic legal training is about to fuel a significant change in the psyche of future judicial decision-makers.

There has been minimal social context education in South Africa post 1994. Between 1994 and 2005 the Law, Race and Gender Unit of the University of Cape Town teamed up with the Swedish International Development Cooperation Agency to offer social context training for magistrates. The programme was aimed at enhancing social context knowledge and skills and to foster a comprehensive understanding of the Constitution by magistrates for just decision-making in a transforming society. However, from about 2005 there has been no social context training. A report on an evaluation of that programme shows valuable lessons from its training programmes. For example, magistrates in the Eastern Cape began to be more aware of the intricacies in the custom of male initiation in the Xhosa culture. They also had to reflect on how they addressed witnesses, and many were made aware of their inadvertent use of racist and sexist language. Further, it became apparent that social context training must be recognised and classified as ongoing professional development for magistrates and that the peer training method is the most preferable.

There can be no dispute, however, that despite the absence of (or minimal) deliberate social context education over the past two decades in South Africa, the Constitutional Court has made significant strides in leading the judiciary towards the re-alignment of judicial decision-making methodology. Its judgments in cases such as *Grootboom*<sup>22</sup> and *Treatment*

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<sup>20</sup> J Modiri 'The crises in legal education' (2014) *Acta Academica* 15.

<sup>21</sup> See for example N Manyathi 'Concerns about the quality of the LLB degree' (2012) *De Rebus* 8.

<sup>22</sup> *Government of The Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC).

*Action Campaign*<sup>23</sup> have earned that court and our judiciary wide respect as a contributor to social justice.

In this way the Constitutional Court has led the way in the development of substantive justice. But that is not where the matter ends. The role of a judge continues to be challenged by social, economic, racial and gender nuances. More peculiar to South Africa is its cultural diversity. Therefore not only magistrates but also judges need support and skill-enhancing measures. Adjudicating in isolation from the social substratum is more likely to detract from judicial accountability and legitimacy. Social context awareness, on the other hand, means that judicial officers have a sense of the factors attendant in the daily lives of the people who appear before them. The result is the interrogation of relevant social context issues before reaching a decision. The decision will be anchored in a holistic inquiry. This exercise does not necessarily mean that social context considerations will always justify a departure from black letter law.

Currently the South African judiciary is experiencing heightened, perhaps even unprecedented, levels of respect. To sustain and even enhance its legitimacy, judicial officers must demonstrate awareness of and sensitivity to the social context within which disputes over which they preside arise. The exercise is by no means easy.

The majority of the current crop of judicial officers, lawyers and legal scholars lived through apartheid. Perhaps it is for this reason that, despite lack of directed social context education, the judiciary has made respectable strides in administering social justice. It may be that first-hand experiences fuelled the critical reasoning methodology that was necessary to redirect judicial decision-making. In time such lived experiences will be a thing of the past. It is critical that they be harnessed even further to form the foundation of deliberate social context judicial education, which is to sustain a legitimate, independent judiciary.

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<sup>23</sup> *Minister of Health v Treatment Action Campaign* 2002 (5) SA 721 (CC).

# *JUDGING ACCORDING TO PERSONAL ATTRIBUTES, OUTLOOK ON LIFE AND LIFE EXPERIENCE: ANY PRACTICAL VALUE?\**

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## I INTRODUCTION

The oath of office requires judges to ‘administer justice to all persons alike without fear, favour or prejudice’. The central theme of the discussion will be whether there is any functional value in judges exercising their adjudicative function in accordance with personal attributes, including life experiences. In dealing with this theme I will touch on a few issues: the role of well-reasoned judgments in upholding the rule of law, the moral authority of our courts and whether the requirement of administering justice without fear, favour or prejudice poses any potential conflict for judges who cannot – indeed, who do not wish to – detach themselves from the rich and complicated web of their life experiences; of who they are as individual beings.

At the outset I must declare that this discussion relies copiously on anecdotal material that relates to me.

## II THE RULE OF LAW AND REASONED JUDGMENTS

The law and – by extension – adjudication on legal matters by courts touch all fields of human endeavour and activity. It reaches you and me in our little corners. It has an overarching presence in Dimpho and Zola’s private wedding ceremony. It informs the complex contract between powerful magnates. It does not spare the President in the Union Buildings. Indeed, it is omnipresent and omnipotent.

With this much power, judges must be accountable. And indeed they are. They are accountable to the general public. This is an incident of the rule of law. The rule of law is of particular importance in South African constitutionalism as it is one of the founding values of our Constitution.<sup>1</sup>

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\* Adapted for publication from the Clynes Chair Lecture delivered at the University of Notre Dame, USA in April 2016.

<sup>1</sup> Section 1(c) of the Constitution of the Republic of South Africa, 1996.

In accordance with the rule of law, all state institutions – including courts – must account for their exercise of public power. That they must do through the justification of their actions or decisions.<sup>2</sup> The judiciary primarily accounts for and justifies its decisions by giving timeous and well-reasoned judgments, setting out the basis for its findings and conclusions.<sup>3</sup>

### III MORAL AUTHORITY OF COURTS

In contrast with the executive – which may call upon the police and the military to coerce obedience with its behests – the judiciary’s authority stems not from force, but solely from an ability to persuade; an ability to craft judgments that inspire confidence in the minds of right-thinking people. The judiciary is limited to the power of the pen. In *Mamabolo Kriegler J* said:

*In our constitutional order the judiciary is an independent pillar of state, constitutionally mandated to exercise the judicial authority of the state fearlessly and impartially. Under the doctrine of separation of powers it stands on an equal footing with the executive and the legislative pillars of state; but in terms of political, financial or military power it cannot hope to compete. It is in these terms by far the weakest of the three pillars; yet its manifest independence and authority are essential. Having no constituency, no purse and no sword, the judiciary must rely on moral authority. Without such authority it cannot perform its vital function as the interpreter of the Constitution, the arbiter in disputes between organs of state and, ultimately, as the watchdog over the Constitution and its Bill of Rights – even against the state.<sup>4</sup>*

Court pronouncements will have this moral authority if judges act with integrity, honesty, impartiality and unquestionable independence from external influences, be they corruptive or intimidatory. At all times judges must scrupulously ensure compliance with the highly demanding ethical norms of their office. Of course, even the crooked, the dishonest, the corrupt do not walk about with a badge of these ignoble characteristics

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<sup>2</sup> E Mureinik ‘A bridge to where? Introducing the interim Bill of Rights’ (1994) 10 *South African Journal of Human Rights* 31 at 32.

<sup>3</sup> H Corder ‘Judicial accountability’ in C Hoexter & M Olivier *The Judiciary in South Africa* (2014) 232 where reference is made to the common law tradition of giving a reasoned judgment, which was codified by art 9(a)(iii) of the Code of Judicial Conduct for South Africa published in GG 35802 of 18 October 2012, available at [http://www.gov.za/sites/www.gov.za/files/35802\\_rg9841\\_gon865a.pdf](http://www.gov.za/sites/www.gov.za/files/35802_rg9841_gon865a.pdf) (accessed 12 April 2016).

<sup>4</sup> *S v Mamabolo* [2001] ZACC 17; 2001 (3) SA 409 (CC) para 16.

prominently emblazoned on them. However, it may not always be possible to justify a decision which is not dictated by what accords with the law and justice in the circumstances, but is rather the result of impropriety. In time, the discerning will question the decisions of those amongst us lacking in integrity. In sum, for as long as judges execute the adjudicative function properly and with the necessary competence, the judiciary is more likely – than not – to enjoy the greatest possible public confidence.

#### IV LIFE EXPERIENCE AND PERSONAL ATTRIBUTES IN THE ADJUDICATIVE PROCESS

As a crucial preface, let me first touch on judicial impartiality. This concept is a bedrock value, firmly embedded in legal systems and human rights instruments throughout the world.<sup>5</sup> It is fundamental not only to the rule of law but, equally importantly, to the protection of individual rights.<sup>6</sup> A judge should not be biased towards any party; she or he must ‘finally reach a decision at the place which, in correct application of the law and rules of jurisprudence, marks the just solution’.<sup>7</sup> Adjudicating on the basis of personal prejudice is a gross violation of this principle. A judge must always be able to justify her or his reasoning in purely legal terms, irrespective of personal sympathy for the parties or emotional response to the subject matter. To stray from this is to betray one’s oath.

This is a stringent standard, and one to which judges are rightly held. Partiality can take many forms.<sup>8</sup> For instance, a judge may have a personal interest in the outcome of a case. Examples of this category of partiality can be found in almost every era and culture, ranging from the Indian King Shudraka’s warning in the second century BC that judges must be ‘untouched by avarice’,<sup>9</sup> to the corrupt judge in Shakespeare’s *Measure for Measure* who tried to extort sexual favours in exchange for a decision,<sup>10</sup> to the 2010 impeachment and removal of US District Judge G Thomas

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<sup>5</sup> FX Bangamwabo ‘The right to an independent and impartial tribunal: A comparative study of the Namibian judiciary and international judges’ in N Horn & A Bosl *The Independence of the Judiciary in Namibia* (2008) 243.

<sup>6</sup> At 247.

<sup>7</sup> S Trechsel *Human Rights in Criminal Proceedings* (2005) vol XII/3, quoted approvingly in Bangamwabo (note 5 above).

<sup>8</sup> For some manifestations of partiality, see CG Geyh ‘The dimensions of judicial impartiality’ (2013) 65 *Florida Law Review*, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2016522](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2016522).

<sup>9</sup> Geyh (n 8 above).

<sup>10</sup> Geyh (n 8 above).

Porteous by the United States Congress for – amongst others – soliciting money from an attorney in a pending case.<sup>11</sup> A judge may also have a pre-existing relationship with one of the parties to a case, such as Wisconsin Supreme Court Justice Annette Ziegler, who was reprimanded for presiding over cases in which her husband's business was a party while she was a judge in the appellate court.<sup>12</sup> These categories of partiality – actual or perceived – are clear and unambiguous.

How far does the notion of impartiality go in the adjudicative process? This takes me to a related question: Does administering justice impartially require a judge to forget or extricate herself or himself from who she or he is? I will not pretend to be the one coming up with an answer to this question. It has been answered by many, including our own Constitutional Court. Just under a century ago, Justice Benjamin Cardozo answered the question with a resounding 'no'. He said:

*There is in each of us a stream of tendency, whether you choose to call it philosophy or not, which gives coherence and direction to thought and action. Judges cannot escape that current any more than other mortals. All their lives, forces which they do not recognise and cannot name, have been tugging at them – inherited instincts, traditional beliefs, acquired convictions; and the resultant is an outlook on life, a conception of social needs. ... In this mental background every problem finds it[s] setting. We may try to see things as objectively as we please. Nonetheless, we can never see them with any eyes except our own.<sup>13</sup>*

The South African Constitutional Court endorsed these remarks in *South African Rugby Football Union (Sarfu)*.<sup>14</sup> Justice Cardozo's words are as apposite in the twenty-first century as they were when he articulated them so long ago. One does not and simply cannot cease to be oneself just because one has ascended the bench. A judge's make-up, outlook on life and indeed entire being follow her or him. Judges cannot be expected 'to entirely jettison all of their biases and perspectives about the world upon stepping into their judicial roles because meeting such a standard would be a super-human feat'.<sup>15</sup> I would qualify 'their biases' by referring to 'subconscious biases'. Some may view this proposition with suspicion.

<sup>11</sup> Geyh (n 8 above).

<sup>12</sup> Geyh (n 8 above).

<sup>13</sup> BN Cardozo *The Nature of the Judicial Process* (1921).

<sup>14</sup> *President of the Republic of South Africa v South African Rugby Football Union* [1999] ZACC 9; 1999 (4) SA 147 (CC) para 42.

<sup>15</sup> RK Lee 'Judging judges: Empathy as the litmus test for impartiality' (2014) 82 *University of Cincinnati Law Review* 145, available at <http://scholarship.law.uc.edu/cgi/viewcontent.cgi?article=1166&context=uclr>.

But what is the alternative? No individual can function other than in accordance with who they truly are.

Let me be practical. Imagine a man of extremely limited means. He shares a small apartment with his family: his wife, his mother, his sister and his two small children, one of whom suffers from cystic fibrosis. His wife stopped working because of her pregnancy, and is now focused on caring for their sick child. The man was fired from his job as an insurance agent when the insurance premiums he collected were stolen from his home. When he was unable to make up the sum, his former employer filed a claim against him. Although he has since diligently looked for work, the bad reference from his former employer has made it impossible for him to find another steady job. His family survives entirely on public assistance; his only assets are the clothes he wears, some essential household goods and a couch in storage. This man desperately seeks to file for bankruptcy – including discharge of the debt he owes to his former employer – so that he and his family can make a new start in life. Due to his poverty, however, he cannot afford the filing fee.<sup>16</sup> He cannot pay it as a lump sum; he cannot pay it in instalments; he cannot borrow money to pay it. He is utterly without options.

This is not a hypothetical set of facts. This is what was before the US Supreme Court in *United States v Kras (Kras)*.<sup>17</sup> At issue was whether insistence on payment of the filing fee in Mr Kras's circumstances was consistent with the due process and equal protection guarantees of the Fifth Amendment.<sup>18</sup> The court said it was. Writing for the majority, Justice Harry Blackmun held that the filing fee amounted to–

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<sup>16</sup> The filing fee is something comparable to the revenue stamp that used to be a requirement when filing summons or an application.

<sup>17</sup> *United States v Kras* 93 S Ct 631 (1973).

<sup>18</sup> The Fourteenth Amendment is more generally associated with equal protection than the Fifth Amendment. The Fourteenth Amendment expressly requires the states to provide 'the equal protection of the laws' to every person under their jurisdiction; the Fifth Amendment guarantees that no person 'shall be deprived of life, liberty, or property, without due process of law', but contains no express equal protection wording. The Supreme Court of the United States, however, has held that due process and equal protection are 'associated' concepts and that '[i]t may be that they overlap, that a violation of one may involve at times the violation of the other . . . [Due process] tends to secure equality of law in the sense that it makes a required minimum of protection for everyone's right of life, liberty and property, which the Congress or the legislature may not withhold.' *Truax v Corrigan* 257 US 312 (1921) at 331.

*a sum less than the payments [Mr] Kras makes on his couch of negligible value in storage, and less than the price of a movie and a little more than the cost of a pack or two of cigarettes. If, as [Mr] Kras alleges in his affidavit, a discharge in bankruptcy will afford him that new start he so desires, and [his former employer] then no longer will charge him with fraud and give him bad references, and if he really needs and desires that discharge, this much available revenue should be within his able bodied reach.<sup>19</sup>*

Justice Potter Stewart noted dryly in dissent that the court appeared to have found ‘that some of the poor were too poor even to go bankrupt’.<sup>20</sup> In a separate dissent Justice Thurgood Marshall remarked scathingly:

*[N]o one who has had close contact with poor people can fail to understand how close to the margin of survival many of them are. A sudden illness, for example, may destroy whatever savings they may have accumulated, and by eliminating a sense of security may destroy the incentive to save in the future. A pack or two of cigarettes may be, for them, not a routine purchase but a luxury indulged in only rarely. The desperately poor almost never go to see a movie, which the majority seems to believe is an almost weekly activity. They have more important things to do with what little money they have – like attempting to provide some comforts for a gravely ill child, as [Mr] Kras must do.*

*It is perfectly proper for judges to disagree about what the Constitution requires. But it is disgraceful for an interpretation of the Constitution to be premised upon unfounded assumptions about how people live.<sup>21</sup>*

Surely, Justice Marshall’s analysis must have been influenced by his background, whether it be growing up as an African-American and witnessing poverty in close proximity or possibly in his many years of litigating civil rights cases on behalf of the Legal Defence and Education Fund of the National Association for the Advancement of Coloured People.<sup>22</sup> His clients were African-Americans who – then as now – were among the poorest and most systemically disadvantaged sections of the United States’ population. His intimate knowledge of the challenges facing poor people, and his anger at the majority’s ‘unfounded assumptions’<sup>23</sup> about their lives, shines through every word of his dissent.

<sup>19</sup> *Kras* (note 17 above) at 640.

<sup>20</sup> At 644.

<sup>21</sup> At 645–6.

<sup>22</sup> On Justice Marshall, see generally GL Starks & EF Brooks *Thurgood Marshall: A Biography* (2012).

<sup>23</sup> *Kras* (note 17 above) at 646.



## V DIVERSITY OF THE BENCH

Justice Marshall's understanding of people's lives is not something to be learnt at schools, colleges and universities. It comes about from living life. Our Constitutional Court has pondered this link between judges' life experiences and fair outcomes. In *Sarfu* a litigant applied for the recusal of several Justices of the Constitutional Court on the grounds of alleged bias. The court unequivocally held that 'it is appropriate for [j]udges to bring their own life experience to the adjudication process'.<sup>24</sup>

This links up with what for me is quite crucial. That is, judiciaries of constitutional democracies should be diverse. The importance of diversity on the bench can hardly be overstated. Only just over two decades ago, South Africa's judiciary was predominantly white and male. To the black<sup>25</sup> majority courts could not always be trusted to dispense justice, particularly in matters where white and state interests were at issue. Also, because of the near homogeneity of the bench, the black majority could not be blamed for – at times – thinking that cases were decided on mere racial stereotypes and outright racism. It may sound like urban legend today to repeat the story that a judge actually made a finding that black people see better at night than white people. In his own words:

*[i]t is well known from the experience of this Court that Natives can, and do, recognise people they know in comparative darkness which, for a European, would make recognition quite impossible.*<sup>26</sup>

In its own strange way, this reasoning may well have been meant to be complimentary. Fortunately it was rightly rejected by the then Appellate Division.<sup>27</sup> But that does not detract from the fact that more stereotypes

<sup>24</sup> *Sarfu* (note 14 above) para 42.

<sup>25</sup> In this article I am using 'black' in the sense of progressive anti-apartheid politics which includes Africans, so-called Coloureds and Indians. In this regard, see G Williams & B Hackland *The Dictionary of Contemporary Politics of Southern Africa* (2016) 33.

<sup>26</sup> *R v Tusini* 1953 (4) SA 406 (A) at 411. For a more egregious example see *S v M* 1965 (4) SA 577 (N), a rape case, where a magistrate, in dealing with evidence that the victim had not screamed to raise an alarm said:

'One cannot apply the same standards to Bantu [an otherwise innocuous term but used derogatorily by whites for blacks] women that one would ordinarily in the case of a European woman. It is a fact that very often these women do indeed submit when they are threatened.'

<sup>27</sup> *R v Tusini* (n 26 above).

must have influenced many other outcomes. And the Appellate Division itself could not have been immune from the stereotypes.

This demonstrates that many a decision was influenced by a specific outlook on life. Because of the sameness of race and gender and similarity in background, this outlook on life must have been generally similar. There was generally no differing voice to counter the stereotypes; this particular outlook on life; these life experiences. Parliamentary supremacy aside, the black majority could not justifiably be criticised for being suspicious of the white judiciary and even questioning the very existence of justice under it, particularly where white and state interests were at issue.

Diversity in the composition of the bench serves at least two purposes. The first is functional. The second concerns the legitimacy of the judiciary as a public institution.

From what I have said, you would have had glimpses of the functional value that diversity serves. A homogenous bench may – because of similar life experiences and a similar outlook on life – be completely oblivious to a factor that is crucial to the resolution of a dispute before it and which would have been quite obvious to a judge of a different background. At the risk of being criticised for being no more than anecdotal, let me again be practical. I am reminded of my early days in legal practice when I used to do a fair amount of trial work. I particularly recall my annoyance at what I would witness not infrequently before some white judges in cases where the decisive facts had taken place at night in a room only lit by candlelight.

Annoyed by the questions that would be asked in trying to establish whether a witness could really have been able to identify the culprit, I would often think back to my early days growing up in the impoverished village of Njijini in the rural town of Mount Frere in the Eastern Cape. The entire village did not have electricity. At night people relied on candles and – at very few homes – paraffin lamps. During my entire primary schooling, I studied under candlelight.<sup>28</sup> I communed with my parents, siblings and many cousins who lived with us under candlelight. Of course, I could see them. Of course, I could see, read and understand the letters, words and sentences in my books when studying; if it were otherwise, I would not be sitting on the Constitutional Court bench today. This makes one wonder: are dinners by candlelight meant for you not to see your date?

This one example of my own personal experiences in court demonstrates how a particular outlook on life or life experiences may influence how justice is meted out. Somebody with my experience would

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<sup>28</sup> In the Roman Catholic high school I attended afterwards we had electricity.

approach evidence of identification in this context differently. I should not be understood to suggest that identity – where it is contested – should not be tested thoroughly. What I am quarrelling with is the exaggeration that one virtually cannot see in a candlelit room.

A last anecdote to emphasise the point. As a young advocate I represented an accused who contested the admission of a confession he was alleged to have made freely and voluntarily. His basis was that the confession had been extracted by means of severe torture by the police. In the ensuing trial – within-a-trial my client told a heart-wrenching story of the gruesome and prolonged torture he was subjected to. At some point whilst he was giving details of the torture, the judge, who could be quite dramatic, stopped him dead in his tracks and asked in his high pitched voice, ‘Did you die?’ The subtext was obviously that there was no way someone could be subjected to that much torture and survive to tell the tale. And yet – on my assessment – from the countless accounts of apartheid era torture that many of us used to hear, the torture that my client was describing did not in any way stand apart. It seemed to me that the judge lived in another world.<sup>29</sup> I should not be misunderstood. It was perfectly within the judge’s remit to determine the veracity of the accused’s story. But it was quite another for him to appear to proceed from the premise that torture of that magnitude did not occur at all or – if it did – that nobody could survive it. This again illustrates how one’s exposure to certain experiences or lack of it may influence one’s approach to adjudication.

A proper response to a lived or intimately observed experience comes more readily and naturally than where the experience is learnt fleetingly or encountered in the context of litigation. In fact, where the experience has not been lived or observed intimately, one may not even be alive to the fact that the situation calls for a particular response. The opinion of Justice Thurgood Marshall in the *Kras* matter illustrates this very point. As we all know, Sir Sydney Kentridge was appointed to act in the Constitutional Court when it was first established. He says of the diversity of the first intake of that Court:

*This diversity illuminated our conferences especially when competing interests, individual, governmental and social, had to be weighed. I have no doubt that this diversity gave the court as a whole a maturity of judgment it would not otherwise have had. Yet no-one, black, white, male or female was representing any constituency.*<sup>30</sup>

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<sup>29</sup> On torture and the extent to which it could be meted out by security police in apartheid South Africa, see generally D Foster *Detention & Torture in South Africa* (1987); R Suttner *Inside Apartheid’s Prison* (2017).

<sup>30</sup> S Kentridge ‘The highest court: Selecting the judges’ (2003) 62(1) *Cambridge Law Journal* 55 at 60.

Diversity also serves to legitimise the bench. In a society that is not homogenous, no matter how well-meaning and how admirably a homogenous bench may dispense justice, I would be surprised if that bench would enjoy legitimacy in the eyes of those segments of the population that have no representation on it. They are unlikely to own it and – worse still – they may view its decisions with suspicion. It is in this context that the words of South Africa’s world acclaimed statesman, President Mandela, commonly referred to as his ‘first speech from the dock’, bear relevance. He famously said:

*Why is it that in this courtroom I face a white magistrate, am confronted by a white prosecutor, and escorted into the dock by a white orderly? Can anyone honestly and seriously suggest that in this type of atmosphere the scales of justice are evenly balanced? ... Why is it that no African in the history of this country has ever had the honour of being tried by his own kith and kin, by his own flesh and blood? ... It makes me feel that I am a black man in a white man’s court.<sup>31</sup>*

My proposition here is, of course, not confined to race. More on the reach of diversity later.

The question of the legitimacy of the bench assumes even greater importance in the context of South Africa’s history where apartheid-era judges – subject to some exceptions – were viewed as applying apartheid laws too readily.<sup>32</sup> Hoexter says:

*Much has been written about the inability or refusal of most South African judges, for much of the twentieth century, to stand up to the increasingly oppressive tactics of the government. Major studies have recorded the judges’ submission or capitulation to the legislature and executive at various stages of our history. These studies have recorded moral and legal victories too, for there were some inspiring cases in which the courts refused to knuckle under, or came courageously to the aid of oppressed people. However, there is no denying the pervasive tendency, particularly from the mid-1950s, towards extreme judicial restraint and undue deference to both legislature and executive – an executive-mindedness that was especially evident in administrative law.<sup>33</sup>*

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<sup>31</sup> Extracts from the court record of the trial of Mandela held in the Old Synagogue Court, Pretoria, from 15 October to 7 November 1962, available at: <https://www.nelsonmandela.org/omalley/index.php/site/q/03lv01538/04lv01600/05lv01624/06lv01625.htm> (accessed 12 April 2016).

<sup>32</sup> J Dugard *Human Rights and the South African Legal Order* (1978) at 280.

<sup>33</sup> C Hoexter ‘The transformation of South African administrative law since 1994 with particular reference to the Promotion of Administrative Justice Act 3 of 2000’ PhD thesis, University of the Witwatersrand, 2009 12–13.

Surely then, the new democratic order had to make sure that the judiciary was legitimised. There was a recognition that the judiciary would be enormously empowered<sup>34</sup> by the new constitutional order that was to do away with parliamentary sovereignty and usher in a new power of constitutional review: a power to invalidate Acts of Parliament. Given its track record, however, the largely white, male and conservative judiciary could not be trusted to wield such a power. This was one of the reasons for the establishment of a new Constitutional Court.<sup>35</sup>

It is against this backdrop that I say – even purely at the level of legitimacy – there is a need for a diverse and transformed judiciary in contemporary South Africa. That, to me, is axiomatic.

Unsurprisingly, s 174(2) of the Constitution provides that '[t]he need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed'. Based on the above thesis, this is not a mere numbers game. It is a means to an end, that end being the attainment of at least the twin purposes I have dealt with: namely, functional value and legitimacy. Sir Sydney Kentridge said:

*Diversity in a court of final appeal is in my view a good in itself. This does not mean that a woman judge on the panel or a judge from a different ethnic background will necessarily decide a case differently from a white male judge. But their presence could enrich the court.*<sup>36</sup>

What Sir Sydney says here underscores a point that I should perhaps make. In courts of first instance, diversity plays a more significant role in the second of the two purposes I have mentioned: that of legitimising the judiciary as a single institution. The functional purpose of diversity plays a lesser role in courts of first instance. That is so because at first instance – with the exception of those very few occasions where a Full Court comprising three judges may be constituted<sup>37</sup> – there can only be one judge. That judge will come with her or his individual attributes and bring them to bear in her or his decision-making. There will be no colleague to

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<sup>34</sup> I Currie & J de Waal *The New Constitutional and Administrative Law Volume 1 Constitutional Law* (2001) 274.

<sup>35</sup> At 274-5.

<sup>36</sup> S Kentridge (note 30 above).

<sup>37</sup> Section 14(1) of the Superior Courts Act 10 of 2013 provides: '[a High Court] must be constituted before a single judge when sitting as a court of first instance for the hearing of any civil matter, but the Judge President . . . may at any time direct that any matter be heard by a court consisting of not more than three judges.'

test or question her or him. In a *Kras*-type case,<sup>38</sup> for example, that judge's outlook on life may be exactly like that of the majority in *Kras*. If a litigant happens to appear before a judge who belongs to a categorisation other than hers or his, whether it be one of race, gender, or any other, of course she or he cannot legitimately complain and seek the judge's recusal purely on the basis of the difference in categorisation.<sup>39</sup> A litigant must be content with the judge he or she has drawn.

## VI WHAT IS THIS DIVERSITY?

Of course, s 174(2) of the Constitution refers to gender and race only. But that does not mean South Africa's Judicial Service Commission – which interviews and recommends candidates for judicial appointment by the President – would necessarily limit itself to considerations of race and gender. Diversity – in a much broader sense – may be of relevance. What then is the fuller import of this notion? This is not an easy question to answer. But, for a bench to be truly diverse, it must – as far as possible – comprise as many of the readily identifiable categories of people in a population. The categories may be along the lines of race, gender, ethnicity, language, culture, religion and sexual orientation. This is by no means meant to be exhaustive. And the relevance of each of these may differ according to the context and legal system of a given nation. The idea is to ensure that the bench is so representative as to give a sense of ownership and comfort to the general populace when it tackles all manner of issues, be it issues relating to race, homophobic laws and practices, patriarchy<sup>40</sup> or any other.

## VII LIMITS TO JUDGING ACCORDING TO LIFE EXPERIENCE

A word of caution. In the words of Kriegler J<sup>41</sup> and Sir Sydney Kentridge,<sup>42</sup> a judge has or represents no constituency. He or she must never take an *a priori* position in favour of a particular party or interest. A judge must never say, 'Having grown up poor, I will decide this case in favour of this poor plaintiff' or 'I will seize this chance to decide in favour of my

<sup>38</sup> *Kras* (note 17 above).

<sup>39</sup> *Sarfu* (note 14 above) 104.

<sup>40</sup> See M Hunter, TF Hodgson & C Thorpe 'Women are not a proxy: Why the Constitution requires feminist judges' (2015) 30 *South African Journal of Human Rights* 579.

<sup>41</sup> *Mamabolo* (note 4 above) 16.

<sup>42</sup> S Kentridge (note 30 above).

fellow black man’ or ‘I must strike a blow for this woman because I too am a woman’. Finding reasons for a pre-determined outcome makes a mockery of judging. It amounts to judicial dishonesty and breaches the oath of judicial office. That is emphatically not what I am advocating. What I am talking about is more the instinctive response to a situation brought about by one’s entire make-up; the subconscious influence of one’s life experience in the adjudicative process. Indeed, to demonstrate that this is not about consciously allowing oneself to be prejudiced by one’s life experience or outlook on life, the words of Justice Cardozo bear repetition:

*Deep below consciousness are other forces, the likes and the dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and convictions, which make the [person], whether [she or he] be litigant or judge.<sup>43</sup>*

The operative words are ‘below consciousness’.

## VIII CONCLUSION

I have endeavoured to show that there is no conflict between the oath that each judge takes on assuming office and drawing on her or his life experience and personal attributes in the adjudicative process.<sup>44</sup> If we accept this – as indeed we must – then we have a duty to constitute our benches such that they are as diverse as is reasonably possible. In doing so, we broaden the range of voices that contribute to the ‘maturity of judgment’ that Sir Sydney described about the Constitutional Court. As long as judges adhere firmly to the requirements of judicial independence, integrity and accountability, judging according to their own make-up and life experience does not imperil the administration of justice.

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<sup>43</sup> BN Cardozo (note 13 above). These words were quoted with approval by the Constitutional Court in *Safu* (note 14 above).

<sup>44</sup> The majority in *Kras*, for example, must have drawn upon its life experience in assuming that weekly savings of less than \$2 were easily attainable (*Kras*, note 17 above).

# POLITICAL PARTIES: THE MISSING LINK IN OUR CONSTITUTION?★

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## I INTRODUCTION

The Constitution of the United States of America has fewer than 5 000 words. Nowhere does it mention political parties. And that was not because the question did not arise. James Madison, in *The Federalist* No 10, characterised 'factions', his reference to political parties, as a dangerous vice that tainted public administration.<sup>1</sup> In his farewell address, George Washington too warned against the 'baneful effects' of political parties and advised against their 'insinuation' into American democracy.<sup>2</sup>

Nevertheless, by the third presidential election in 1796 (George Washington stood unopposed for the first two), two political parties had emerged: the Federalist Party led by Alexander Hamilton and John Adams; and the Democratic Republican party led by James Madison and Thomas Jefferson. John Adams won the election in 1796 but in 1800 Thomas Jefferson won (well, after an intervention by Congress to resolve the status of Aaron Burr's candidacy) and the Federalist Party never won another election. The election year of 1800 saw the first transfer of political power from one party to another in the United States. In the more than 200 years since, it is accurate to say that two political parties (albeit not the same political parties) have dominated the politics of the United States.

The United States Constitution is not alone in the manner in which it treats political parties. Many democratic constitutions pay little attention to the role of political parties, despite the fact that it is now widely accepted that political parties play a crucial role in modern democracies. A significant exception is the German Constitution, which I shall discuss a little later.

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\* An earlier draft of this article was delivered as a keynote address at a conference on Political Parties in South Africa: The interface between law and politics at the University of Cape Town in August 2015.

<sup>1</sup> C Rossiter & J Madison *The Federalist* No. 10 (1961) 77–8, cited in S Issacharoff 'Private parties with public purposes: Political parties, associational freedoms and partisan competition' (2001) 101 *Columbia Law Review* 274 at 276.

<sup>2</sup> At 276.



The South African Constitution does mention political parties, but it cannot be said to regulate them exhaustively. It starts firmly, in s 1, by asserting that a multi-party system of democratic government is a founding value of our Constitution, to ensure accountability, responsiveness and openness. Right up front, then, is the assertion that South Africa's democracy will be a multi-party democracy. A second key provision is s 19 of the Bill of Rights, which entrenches the rights of citizens to form political parties and participate in their activities, including campaigning.

Thereafter, however, there are only a few provisions that refer to parties and they do so in what can perhaps best be described as piecemeal fashion. The key provisions are the following:

- minority parties must be represented in the committees of Parliament, provincial legislatures and Municipal Councils 'in a manner consistent with democracy';<sup>3</sup>
- three of the six members of the National Assembly members who are to serve as members of the Judicial Service Commission must be members of minority parties;<sup>4</sup>
- when appointing the Chief Justice and Deputy Chief Justice, the President of the Supreme Court of Appeal and Constitutional Court judges, the President must consult the leaders of the parties represented in the National Assembly;<sup>5</sup>
- appointment of members of some chapter 9 institutions<sup>6</sup> by the President is on the recommendation of a parliamentary committee that is proportionally composed of each political party represented in the Assembly;<sup>7</sup>
- each province's delegates to the second chamber of Parliament, the National Council of Provinces, are determined broadly on the basis of political-party representation in each province;<sup>8</sup>

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<sup>3</sup> Sections 57(2)(b), 70(2)(c) & 160(8)(b) of the Constitution of the Republic of South Africa, 1996.

<sup>4</sup> See s 178(1)(h) of the Constitution.

<sup>5</sup> See sub-ss 174(3) & (4) of the Constitution.

<sup>6</sup> The Auditor-General, the Public Protector, the South African Human Rights Commission, the Commission for Gender Equality and the Electoral Commission.

<sup>7</sup> See s 193(5)(a) of the Constitution. Appointment of the Public Protector and Auditor-General requires 60 per cent support in the committee (s 193(5)(b)(i)) but of the South African Human Rights Commission, the Commission for Gender Equality and the Electoral Commission only 50 per cent support is required.

<sup>8</sup> See s 6 of the Constitution & Schedule 3, Part B to the Constitution.

- members of Parliament and provincial legislatures lose their seats if they cease to be a member of the political party on whose list they were elected (the prohibition on floor-crossing);<sup>9</sup>
- the leader of the largest opposition party in the National Assembly and provincial legislatures is ‘the leader of the Opposition’;<sup>10</sup>
- the Constitution provides that the rules of Parliament and the provincial legislatures may provide for financial and administrative assistance to political parties in proportion to their representation in the relevant chambers;<sup>11</sup>
- members of the security services may not prejudice or further the interests of a political party in the performance of their functions;<sup>12</sup> and
- to enhance multi-party democracy, national legislation must provide for the funding of political parties at both national and provincial levels on an equitable and proportional basis.<sup>13</sup>

Many of these provisions support the system of multi-party democracy which is a founding value of the Constitution, but there are no explicit rules in the Constitution that regulate how political parties should function, whether their internal systems should be democratic, how they should appoint leaders and office bearers, how they should manage their relationship with their members, nor does the Constitution require auditing or disclosure of their finances. Section 6 of the Public Funding of Represented Political Parties Act 103 of 1997, however, does require political parties to account for the moneys provided to them from the state purse.

As stated above, South Africa’s Constitution is not unusual in its relatively scant provision for political parties. What explains this relative ‘absence’ of regulation of political parties in democratic constitutions?

There are several possible explanations: first, there is arguably a lack of fit between the role political parties actually play in modern democracies, on the one hand, and current widely shared understandings of democratic theory, premised on the idea that democracy means government of the people, by the people and for the people, on the other. Where in this

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<sup>9</sup> Sections 47(3)(c), 62(4)(d) & 106(3)(c) of the Constitution.

<sup>10</sup> Sections 57(2)(d) & 116(2)(d) of the Constitution.

<sup>11</sup> Section 236 of the Constitution.

<sup>12</sup> Section 199(7) of the Constitution.

<sup>13</sup> Section 236 of the Constitution.

classical formulation of democracy is the space for the intermediary organisation that is a political party? So, thinking about political parties might unsettle our safe certainties about what democracy is, and may also give rise to intense contestation, so the response is to leave well alone.

A second related explanation for the failure to regulate parties more thoroughly may arise from the fact that it may seem to many that the way in which the law regulates political parties in most democracies, albeit somewhat odd, as I shall explain in a minute, seems to work and so on the 'if it ain't broke, don't fix it' notion, we leave well alone.

Third, it may be that we think that the nature of political parties is transient and contingent, and that regulating political parties in a constitution will – given their evanescent quality – inevitably be unsuccessful and any attempts to regulate political parties is therefore flawed.

A final consideration might be that those who have the most to lose by rethinking the manner in which constitutions and law regulate political parties are those who would have to take steps to address the problem (that is, senior members of political parties and members of legislatures) and therefore there is no incentive for reconsideration and change to happen. It may well be, as with many political phenomena, that all these reasons have a role to play in the decision not to regulate political parties in the Constitution.

In this article, I am going to consider the role of political parties in modern democracies, and I am going to conclude, as most political theorists do, that political parties are, generally speaking, important players in contemporary democracies. Then I am going to describe briefly the general approach to the legal regulation of political parties in South Africa, which, as I shall say, is the approach adopted in many Commonwealth countries. Third, I am going to describe very briefly what is arguably the leading alternative constitutional model, the one adopted in Germany. Fourth, I am going to consider the lessons that we might draw from the German model, particularly in relation to rules relating to the disclosure of party finances, and the requirement of internal party democracy.

Rather than drawing conclusions, I outline the arguments for and against different approaches on these key issues. I think it is important to explore the principles that should inform our thinking as we consider what the answers to these questions should be. From a constitutional design perspective, how to regulate political parties raises difficult questions with many cross-cutting considerations as I hope my discussion will illustrate.

It is important to note that the question of disclosure of political party funding is particularly topical at the moment; first, because there is draft

legislation before Parliament on the question of political-party funding<sup>14</sup> and, second, because there is a case on its way to the Constitutional Court on a related issue.<sup>15</sup> Although I should add that the question before the courts is somewhat different to the question I am addressing as it is concerned with the meaning of our constitutional text whereas I am looking at the issue from the perspective of broad constitutional design.

## II THE ROLE OF POLITICAL PARTIES

Political parties, operating at their best, make democratic government possible in large, complex and heterogeneous societies. In the classical formulation by the political theorist Schattschneider – ‘political parties created democracy and ... modern democracy is unthinkable save in terms of the parties ... [Political] parties are not therefore merely appendages of modern government: they are in the centre of it and play a determinative and creative role in it.’<sup>16</sup>

In analysing and understanding the role of political parties, it is important to realise that a successful political party operates at three levels: within the party itself, within the broader community and within the structures of government.<sup>17</sup>

At an organisational level within the party itself (again when operating optimally), a political party recruits, selects and trains potential political

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<sup>14</sup> See the Political Party Funding Bill 2017.

<sup>15</sup> See the recent judgment of the Western Cape High Court *My Vote Counts NPC v President of the Republic of South Africa* 2017 (6) SA 501 (WCC) handed down on 27 September 2017, and available at <http://www.saflii.org/za/cases/ZAWCHC/2017/105.pdf> in which the High Court (*per* Meer J) declared that information about the private funding of political parties and independent ward candidates in municipal elections ‘is reasonably required for the effective exercise of the right to vote’ and declaring the Promotion of Access to Information Act 2 of 2000 to be inconsistent with the Constitution and invalid to the extent that it does not allow for the recordal and disclosure of such information. The order of invalidity was suspended for eighteen months to allow Parliament to remedy the defect, and that order of invalidity must be considered by the Constitutional Court before it can take effect. See s 172 of the Constitution. This case had a forerunner, see the Constitutional Court decision in *My Vote Counts NPC v Speaker of the National Assembly* 2016 (1) SA 132 (CC).

<sup>16</sup> EE Schattschneider *Party Government* (1942) 1, cited in WP Cross & RS Katz ‘The challenges of intra-party democracy’ in WP Cross & RS Katz (eds) *The Challenges of Intra-Party Democracy* (2013) 2.

<sup>17</sup> There is a vast literature. See, eg, RJ Dalton, DM Farrell & I McAllister *Political Parties and Democratic Linkage: How Parties Organise Democracy* (2011), ch 1.

leaders so ‘socialising them into the norms and values of democratic governance and thereby contributing to political stability’;<sup>18</sup> and the party analyses policy choices and determines an appropriate electoral platform.

Within the broader population, both at election time and at other times, political parties mobilise members of the public to participate in elections and other political processes, educate the broader public about democratic processes and the values that underpin them and articulate and explain the policy choices that are at issue.

Within government, political parties seek to implement their identified policy choices, and to ensure that the administration of government works. Because, as classically understood, the electorate assesses a governing party on the performance of government, the party normally has a direct interest in ensuring that government works efficiently in implementing its policy choices, but also in carrying out the tasks of government that may be outside the areas of electoral competition, but nevertheless basic for a stable and successful state.

Of course, this is all something of an idealistic conception of the work of political parties. An ideal that is often not achieved. Indeed, in a recent study of political parties in emerging democracies, Thomas Carothers described what he called ‘the standard lament’ about political parties in new democracies across the developing world. The lament goes like this: Political parties are corrupt, self-interested organisations dominated by power-hungry elites who pursue their own interests or those of their wealthy backers, and not those of ordinary citizens; they do not stand for anything; their policies are vague and insubstantial; they spend too much time in meaningless squabbles with one another for political advantage rather than addressing real problems; they only become active at election time when they are seeking votes; and they are ill prepared for running the country and do a bad job at it.<sup>19</sup>

There will no doubt be readers who find some of Carothers’ ‘standard lament’ to have resonance in South Africa. I am not sure if it will be heartening or not to know that he studied political parties in a wide range of emerging democracies and found that elements of the ‘lament’ are to be heard in all of them. Nevertheless, Carothers himself concluded, ‘problematic, aggravating and disappointing though they are, political

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<sup>18</sup> At 6.

<sup>19</sup> See T Carothers *Confronting the Weakest Link: Aiding Political Parties in New Democracies* (2006) at 4.

parties are necessary, even inevitable. No workable form of democratic pluralism has been invented that operates without political parties.’<sup>20</sup>

Accordingly, a fundamental starting point of my discussion of whether our Constitution should regulate political parties is that political parties are an integral part of most if not all modern constitutional democracies. Another premise of my discussion is that political parties do not always operate optimally. The consequence is that an important aspect of any study of constitutional design and constitutional practice is how to structure a system to ensure that political parties operate optimally.

In thinking about these questions, we must start by acknowledging that the role of political parties differs from society to society and also within one society at different periods of time. There are many factors that determine the manner in which political parties function including the history and socio-economic circumstances of the country, the nature of its Constitution including whether it is a federal or unitary state, the number of political parties, and the ideological range of the political system.<sup>21</sup> One of the key factors that determine the character and role of political parties is the electoral system. In South Africa, we have a closed list system of proportional representation, which means that in effect, voters vote for parties (or for the lists of candidates produced by the parties) and not for individual candidates. The closed list PR electoral system is one of the factors that determine the role of political parties – an issue to which I shall return shortly.

Before doing so, I should like to describe the manner in which the law currently regulates political parties.

### III THE CURRENT REGULATORY FRAMEWORK

Political parties are viewed as associations in South African law (and in most of the Commonwealth, where they are generally considered to be ‘voluntary associations’).<sup>22</sup> In South Africa, most political parties in most circumstances are likely to be constituted as a *universitas personarum*,<sup>23</sup> what

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<sup>20</sup> At 213. There is a big literature on this too. The classic founding piece is by Schattschneider (note 16 above).

<sup>21</sup> See a similar point made in Cross & Katz (note 16 above) at 5.

<sup>22</sup> See G Orr ‘Private association and public brand: The dualistic conception of political parties in the common law world’ (2014) 17 *Critical Review of International Social and Political Philosophy* 332–49.

<sup>23</sup> See *African National Congress v Lombo* 1997 (3) SA 187 (SCA) at 195–6 (per Corbett CJ), but see the view expressed by Moseneke DCJ and Jafta J in the majority judgment in *Ramakatsa v Magashule* 2013 (2) BCLR 202 (CC) para 79

can loosely be called a voluntary corporation,<sup>24</sup> as opposed to a voluntary association.

As distinct from voluntary associations, voluntary corporations have a legal personality separate from their members and accordingly the capacity to acquire rights and incur obligations separate from their members, and the capacity to sue or be sued in their own names. They have what lawyers call perpetual succession in that they continue to exist regardless of changes in their membership.<sup>25</sup> Whether an organisation is a common law corporation rather than a voluntary association is primarily determined by its constitution.<sup>26</sup>

There are some very large and important associations in South Africa; some of them are voluntary corporations and others are merely voluntary associations that have no legal personality apart from their members. They include churches, trade unions, and, that perennial of the South African law reports, the Jockey Club.<sup>27</sup>

Generally our law has taken the view that associations (whether incorporated or not) have a duty to act fairly towards their members, at least in disciplinary proceedings conducted by in-house or domestic tribunals.<sup>28</sup> The extent to which the provisions of the Bill of Rights bind these different associations in their relationship with their members, or

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that the African National Congress is a 'voluntary association'. Rule 27 of the ANC Constitution stipulates that 'the ANC shall have perpetual succession and power, apart from its individual members, to acquire, hold and alienate property, enter into agreements and do all things necessary to carry out its aims and objects and defend its members, its property and its reputation.' This provision suggests that the ANC is an incorporated association, not a voluntary association. Similarly clause 1.6 of the Democratic Alliance Federal Constitution stipulates that it is 'a body corporate with perpetual succession', and capable of suing and being sued in its own name, as well as capable of owning movable and immovable property.

<sup>24</sup> See Du Bois (ed) *Wille's Principles of South African Law* 9 ed (2007) at 395–402.

<sup>25</sup> See *Interim Ward S19 Council v Premier, Western Cape Province* 1998 (3) SA 1056 (C) at 1059–1060.

<sup>26</sup> See *Ahmadiyya Anjuman Ishaati-Islam Lahore (South Africa) v Muslim Judicial Council (Cape)* 1983 (4) SA 850 (C) at 861H. And see details of relevant portions of the Constitutions of the African National Congress and Democratic Alliance, at note 24 above.

<sup>27</sup> See, eg, *Turner v Jockey Club of South Africa* 1974 (3) SA 633 (A).

<sup>28</sup> At 645–6; *Theron v Ring van Wellington van die NG Sendingkerk in Suid-Afrika* 1976 (2) SA 1 (A). See for a fuller discussion, DM Pretorius 'The defence of the realm: Contract and natural justice' (2001) 119 *South African Law Journal* 374–99.

with third parties, is less clear, although the provisions of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 would require them not to discriminate unfairly against members or others.

Apart from the requirement to act fairly in disciplinary proceedings, and the obligation to avoid unfair discrimination, the primary legal mechanism that regulates the relationship of associations with their members is contractual and the terms of the contract between them will be found in their constitutions.<sup>29</sup>

Although the Constitutional Court has stated that the constitutions of political parties must be consistent with s 19 of the Constitution (the right to form and participate in the activities of political parties), so far it has not had to provide guidance as to what is required of a constitution in order for it to conform to s 19.<sup>30</sup>

Save for the requirement of conformity with s 19, there is no explicit regulation of what an association's constitution should contain. It is a matter that is largely left to the association. When disputes arise, as they do from time to time, between members and the association, the dispute will turn in the first place on an interpretation of the relevant constitution. As a recent commentator observed –

*The common law brings with it no understanding of power relationships or imbalance. Instead a party's rules and internal workings may be open, inclusive and membership-driven, or entirely hierarchical and repressive of membership involvement.*<sup>31</sup>

As this remark suggests, the common law is agnostic as to the content of the constitutions of voluntary corporations. As the Constitutional Court suggested in *Ramakatsa*,<sup>32</sup> it may well be that s 19 of our Constitution will provide a value-based framework for assessing substantive provisions of the constitutions of political parties, but what they may be remains as yet unexplored.

In addition to the common law regulating voluntary corporations, there are special electoral rules that govern political parties, in so far as they seek to contest elections. To do so, political parties must register with the chief

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<sup>29</sup> See *Kahn v Louw* NO 1951 (2) SA 194 (C) at 211C–D (dealing with the question whether the Communist Party of South Africa had been properly dissolved before the Suppression of Communism Act 44 of 1950 came into force). See also *Ramakatsa* (note 23 above).

<sup>30</sup> See *Ramakatsa* (note 23 above) paras 73–74 (*per* Moseneke DCJ and Jafta J).

<sup>31</sup> See Orr (note 22 above) at 337.

<sup>32</sup> Note 23 above.



electoral officer (an official of the Independent Electoral Commission). They must have a name (and an abbreviation of the name of no more than eight letters), a constitution, a deed of foundation signed by 500 registered voters and a logo.<sup>33</sup> And that is about that.

#### IV AN ALTERNATIVE APPROACH: THE GERMAN MODEL

As mentioned above, there are some modern constitutions that regulate political parties and the leading example in this regard is the German Constitution. The German Basic Law was adopted after World War II, in the wake of the horrors of the Nazi regime. In this respect, the German Constitution shares a similar focus to the South African Constitution. Both are committed to the principle of ‘never again’, intent on turning their backs on the evils of the past, and trying to build a better future. Of course, the Nazi party was initially elected by popular vote, a fact that undoubtedly concerned the drafters of the Basic Law. With this history, it is not surprising that the German Constitution was the first to regulate political parties, by asserting that political Article 21(1) of the German Basic Law states –

*The political parties participate in the formation of the political will of the people. They may be freely established. Their internal organisation must conform to democratic principles. They must publicly account for their assets and of the sources and use of their funds as well as assets.*

Article 21(2) continues by providing that political parties that by reason of their aims or the behaviour of their adherents seek to impair or destroy Germany’s constitutional order or to endanger the existence of the Federal Republic of Germany are unconstitutional.

The German Basic Law thus confirms the right to form political parties, subject to the substantive limit that political parties may not endanger the constitutional order; and subjects political parties to two procedural requirements that can loosely be abbreviated as a requirement of internal democracy and a requirement of financial disclosure. The German model has been followed by several other constitutional democracies, including Spain and Portugal. The Portuguese Constitution goes further than Article 21 of the German Basic Law in providing that political parties must be governed by principles of transparency, democratic organisation and participation of all their members.

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<sup>33</sup> Section 15 of the Electoral Commission Act 51 of 1996. See also the IEC website – [www.elections.org](http://www.elections.org).

## V IS THERE ANYTHING TO BE LEARNT FROM THE GERMAN MODEL?

In the remainder of my remarks, I am going to consider whether there is anything we could learn from the German model, in relation to the express constitutional provision for the disclosure of party finances, and secondly the explicit obligation of internal democracy on political parties. My purpose is to outline the key arguments for and against so that you can make your own assessment.

In considering these issues, we need to start by recognising that there are at least three reasons to be cautious about proposals to regulate political parties by law. The first concern is about the issue of constitutional regulation rather than ordinary legislative regulation. A constitution is by its nature relatively fixed and inflexible. It is not easy to amend. Good constitutional design requires us to be careful to include in a constitution only what is necessary and appropriate. Issues that may require regular reconsideration or amendment are generally not suited for constitutional regulation. Moreover, where detailed rules are necessary, it is often better for those rules to be provided by legislation. A mixed approach is possible with a general principle in the constitution coupled with an express (or implicit) requirement that the issue be regulated by legislation in a more detailed fashion, as our Constitution does in the case of administrative justice and freedom of information, for example. In Germany, for example, there is detailed legislation that regulates the obligations imposed by Article 21 of the Basic Law.

A second concern that one must bear in mind in relation to any legal regulation of the affairs of political parties is the concern that such regulation should not inhibit the substantive policy debates that must happen in political parties. Democratic processes are vibrant, contested and pluralistic; and unwieldy constitutional or legal rules should not stifle them.

A third concern with any form of legal regulation is the need to avoid, where possible, the relocation of legitimate political contestation within political parties into courts. Some relocation of such disputes into courts is inevitable, but there are many political disputes that are not really suitable for adjudication. Finding the line between the ones that are suitable and those that are not, is not easy.

These caveats should influence our thinking about the regulation of political parties, both its content, and whether, if we consider some regulation might be appropriate, it would be fitting to include it in the Constitution or only in legislation, or in some mixed system. Accordingly, they all need to be borne in mind in the discussion.

I will consider separately the questions of campaign finance and internal party democracy. My purpose is to outline the arguments that might support, or gainsay, the introduction of obligations in relation to each of these two obligations.

## VI A DUTY TO DISCLOSE PARTY FINANCIAL STATEMENTS?

There are probably at least three reasons that would support the introduction of a duty to disclose financial statements by political parties. The first relates to the right to vote. In South Africa, political parties are the mechanisms through which citizens exercise their political choices.<sup>34</sup> Because we have a closed list proportional representation electoral system, the right to vote is yoked to political parties: citizens vote for political parties on the ballot paper. Political parties, of course, construct the lists of candidates who will be elected by those votes, but citizens have no right to be involved in the compilation of lists: that is a matter solely for political parties. The right to vote is thus effectively limited to the choice of a political party.

A conscientious voter choosing how to exercise her right to vote would find it useful to have access to all the material information relevant to making the choice between political parties. Key to that, of course, will be the parties' policy platforms, but in addition, a voter would find it helpful to know whether there are material considerations that might undermine the parties' relative abilities to carry out their platforms.

For example, a conscientious voter might well want to know whether there are conflicts of interest between the parties' expressed policy choices, and their organisational dependencies. If a party has expressed a policy preference in support of renewable energy, voters might find it relevant to know whether the party is dependent financially on a renewable energy company (which might have influenced its choice) or whether it is dependent on a fossil fuel company (which might limit its commitment to its expressed choice). Thinking about the relationship between voting and political parties suggests that provisions for disclosure of party funding may well be relevant to voting decisions.

The second argument in favour of a duty to disclose relates to building public confidence in the political system. Our own Parliament has recognised that public confidence in Parliament requires disclosure of its financial interests by Members of Parliament. As has happened in many

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<sup>34</sup> See the similar statement by Moseneke DCJ and Jafa J in *Ramakatsa* (note 23 above) paras 66 and 68.

other open democracies, Parliament has adopted a code of conduct that imposes an obligation upon its members to disclose such interests. The Code stipulates that its purpose is to ‘create public trust and confidence in public representatives and to protect the integrity of Parliament.’<sup>35</sup> Accordingly, Members of Parliament are required to register their financial interests annually, as well as the financial interests of their spouses, permanent companions and dependants. The Code thus recognises the harm that may result where legislators have a conflict of interest between their work as the representatives of the South African electorate and their personal financial interests. In addition to a duty to disclose personal interests, the Code requires legislators to resolve conflicts of interest in favour of the public interest.<sup>36</sup> It would seem to follow that, like the disclosure of the financial information of legislators, the disclosure of political party financial information might also contribute to building public trust and confidence in our political system, particularly given the close relationship between the vote and political parties under our electoral system. This would thus be a second reason to support duties of disclosure.

A third reason might arise from the growing international legal assertion of the importance of transparency in relation to political party funds as a key mechanism for tackling corruption. Article 7(3) of the 2003 United Nations Convention Against Corruption, which South Africa has ratified, provides that states parties should consider taking appropriate legislative measures ‘to enhance transparency in the funding of candidatures for elected public office and, where applicable, the funding of political parties’.

Even more important is Article 10(b) of the 2003 African Union Convention on the Prevention and Combating of Corruption, which South Africa has also ratified, which stipulates that each state party shall adopt legislative and other measures to incorporate the principle of transparency into funding of political parties. The legal consequence of South Africa’s ratifying of the African Union treaty, in particular, is that South Africa bears an international law duty to adopt measures to require transparency of political party funding. Our international law obligations, of course, do not necessarily impose a duty on government in terms of national law to observe our international obligations. In this regard, however, it is worth recalling the Constitutional Court decision in

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<sup>35</sup> Clause 2.3 of the Code of Conduct, available at [https://www.parliament.gov.za/storage/app/media/PRandNews/content/code\\_of\\_Conduct\\_for\\_MPs\\_adopted\\_13\\_March\\_2014\\_2.pdf](https://www.parliament.gov.za/storage/app/media/PRandNews/content/code_of_Conduct_for_MPs_adopted_13_March_2014_2.pdf)

<sup>36</sup> See clause 5.1.1 of the Code.

*Glenister* in which a majority of the court held that the Constitution is ‘the primal source for the duty of the government to fight corruption’.<sup>37</sup>

Combating corruption is thus potentially a third beneficial effect of introducing an obligation upon political parties to disclose their financial information. In this regard, I should note that in the last ten years (between 2004 and 2016) South Africa has slipped twenty places in Transparency International’s Corruption Perception Index from 44<sup>th</sup> to 64<sup>th</sup>.<sup>38</sup> This alarming slide needs to be arrested, and international experience suggests that a requirement of disclosure of political party finance might well assist in this.

Indeed, in India, as a direct result of concerns about corruption in politics, candidates for election are now required to provide an affidavit disclosing their educational and financial information, as well as whether they have a criminal record, or are facing criminal prosecution. In 2014, this information disclosed that 34 per cent of India’s MPs were facing criminal charges.<sup>39</sup> It is interesting that, in India too, in 2008 there was an important ruling under India’s Freedom of Information law that required parties to release their income and expenditure records publicly.<sup>40</sup>

To summarise, the three key reasons that support a requirement to disclose campaign funding would thus be the following: first, it would assist voters to make decisions, secondly, it might improve trust in the political system and, thirdly, it would assist in deterring and combating corruption. At least in relation to the last two, the result of the introduction of a duty to disclose finances might address some of the concerns that underpin the ‘standard lament’ – especially in so far as political parties are seen as serving the interests of senior members of a political party and their wealthy backers.

So those are the arguments in favour. There are, of course, arguments against: and they are arguments often raised by political parties. The first is the argument that donors and political parties will evade transparency requirements if they are introduced. Of course, the risk of evasion of legal rules is ever-present whether one is speaking of, for example, a duty to pay tax, or obligations to observe speed limits, or prohibitions on trade in abalone, ivory or rhino horn. As these examples illustrate, the likelihood of evasion on its own is not ordinarily a sufficient reason for not adopting a

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<sup>37</sup> *Glenister v President of the RSA* 2011 (3) SA 347 (CC) para 175.

<sup>38</sup> The Corruption Perception Index is available on the Transparency International website at [https://www.transparency.org/news/feature/corruption\\_perceptions\\_index\\_2016#table](https://www.transparency.org/news/feature/corruption_perceptions_index_2016#table).

<sup>39</sup> See P Norris & A van Es *Checkbook Elections: Political Finance in Comparative Perspective* (2015).

<sup>40</sup> Norris & van Es (note 39 above).

beneficial rule. The question remains whether there are substantive reasons to introduce the rule.

There are two main substantive arguments that are raised to resist a duty of transparency in relation to the finances of political parties. The first relates to the question whether imposing duties of disclosure on political parties is improper because political parties are, properly understood, private organisations.

An example of this proposition is to be found in an important 2010 set of guidelines for the regulation of political parties published by the Office for Security and Co-operation in Europe, which stated –

*[S]triking the appropriate balance between state regulation of parties as public actors and respect for the fundamental rights of party members as private citizens, including their right to association, requires well-crafted and narrowly tailored legislation.*<sup>41</sup>

The proposition is that because political parties are, in a sense, consortia that result from the exercise of ‘private’ political freedoms, legislation to regulate them must be narrowly tailored. Similar concerns are formulated by many political theorists: an example of such thinking informs the proposition that there is a tendency to consider political parties to be ‘legitimate objects of state regulation to a degree far exceeding what would normally be acceptable for private associations in a liberal society’.<sup>42</sup>

Are commentators right to assert that political parties are ‘private’ in some senses which should make us chary of regulating them? I am not at all sure. There is a conspicuous contrast between the manner in which the law regulates voluntary corporations and the manner in which it regulates companies. The new Companies Act 71 of 2008 has 225 sections and runs to over a hundred densely packed pages of Butterworths’ Consolidated Statutes. It provides for the formation, administration and dissolution of companies, takeovers and mergers, business rescue, shareholders rights, compulsory meetings, annual financial statements and the like. There is simply no comparable regulation of voluntary corporations and political parties.

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<sup>41</sup> OSCE and the Venice Commission *Guidelines on Political Party Regulation* (2010) 19. Available at [www.osce.org](http://www.osce.org).

<sup>42</sup> See RS Katz ‘Democracy and the legal regulation of political parties’ in Luther & Muller-Rommel (eds) *Political Challenges in the New Europe: Political and Analytical Challenges* (2002) 90, cited in I van Biezen ‘Party regulation and constitutionalization: Comparative overview’ in B Reilly & P Nordlund *Political Parties in Conflict-prone Societies: Regulation Engineering and Democratic Development* (2008) 27.

Corporations are, of course, the archetypal private institution. Lawyers grapple with the question where to draw the line between private and public and often fall back on inarticulate premises that, when exposed, lack coherence and principle. I would suggest that any general principle that political parties should not be regulated because they are in some sense 'private' does not on its own constitute a satisfactory reason for our refusal to regulate political parties more closely, particularly given how closely we regulate companies. It seems to me that the question requires a functional analysis of the role of political parties to determine what regulation is appropriate. In particular, what forms of regulation would be likely to produce the optimal performance of political parties, given their role and importance in any constitutional democracy.

In assessing the private nature of political parties, it seems to me that there may be a continuum of privacy, with some extremely private organisations on one end, and some semi-public organisations on the other. On one end might be a book club or a gardening society or a Sunday afternoon cricket club. On the other might be organisations like churches, the Jockey Club and political parties. As we have seen, political parties operate not only in the sphere of their internal affairs, but in the public sphere and in government. The question then remains whether we should require them to disclose their finances.

The second substantive argument relates to the risk of harassment of donors of minority parties, in particular by governments and ruling parties, with the consequence that minority parties might lose significant sources of funding. These arguments are raised in many democracies and they cannot be dismissed out of hand. Nevertheless, building a political culture based on principles of transparency and accountability probably requires us to be bold and open in civic affairs, and not too quick to support covert funding.

Before turning from the subject of disclosure, I should add that disclosure is not the only mechanism that is used in modern democracies to regulate campaign finance. Some democracies impose both bans and caps on campaign finance contributions, as well as caps on campaign spending. An example of a very common contribution ban is a ban on donations from foreign sources. Sixty-eight per cent of states have an absolute ban on foreign entities providing funding to political parties, while 51 per cent of countries ban foreigners funding individual candidates.<sup>43</sup> Anonymous

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<sup>43</sup> See Ohman *Political Finance Regulations Around the World: An Overview of the International IDEA Database* (2012) 13, available at [www.idea.int](http://www.idea.int).

donations are also banned by more than half of all countries.<sup>44</sup> South Africa does not ban either donations from foreign sources or anonymous sources.

Contribution and spending caps are another common form of campaign finance regulation. In the United Kingdom, there is an absolute cap on campaign spending. In the United States, of course, there is the complex situation where there are caps on both contributions and spending by candidates, but these caps do not apply to ‘political action committees’, the so-called PACs, and to the ‘independent expenditure-only committees’, the so-called SuperPACs, who are independent of candidates. Since 2010, as a direct result of the *Citizens United v Federal Election Commission* decision of the United States Supreme Court,<sup>45</sup> which held that corporations and trade unions may spend unlimited amounts of money to support or denounce individual candidates in elections, campaign spending by PACs and SuperPACs has soared. In the 2012 presidential election, non-party outside spending tripled to in excess of \$1 billion: of that SuperPACs spent \$600 million. SuperPACs raise the bulk of their money from a small group of wealth donors and corporations who make very large contributions.

There is no doubt that some of these additional mechanisms for the regulation of campaign finance are worth considering. Mechanisms like bans on foreign donors, as well as contribution and spending caps, may well enhance the integrity of our political system.

But the first question is whether we should introduce a duty of disclosure. I have outlined the arguments for and against, and will let you draw your own conclusions. I turn now to the question of internal party democracy.

## VII INTERNAL PARTY DEMOCRACY

As mentioned above, the German Constitution requires the internal organisation of political parties to conform to democratic principles, and several other European countries have followed suit by including requirements of internal party democracy within their constitutions. In addition to countries that have constitutional requirements of intra-party democracy, there are also a significant number that impose elements of intra-party democracy legislatively.

In considering the desirability of introducing a principle of internal party democracy into our constitutional order, we should bear in mind that there are already some legal requirements imposed upon the internal

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<sup>44</sup> Ohman (note 43 above).

<sup>45</sup> 558 US 310 (2010).



regulation of political parties, as I have explained above. In summary, political parties must act lawfully and consistently with their own constitutions; those constitutions must conform to s 19 of the Constitution, even though what such conformity requires remains uncertain; and political parties must act lawfully and fairly in relation to disciplinary proceedings against their members.

Although the principle that political parties should conduct their internal affairs democratically has intuitive appeal, consideration of how it would work in practice uncovers a range of intractably difficult questions. What do we mean by internal party democracy? Is it only party members who may participate in political party decision-making? Is there an inevitable tension between internal party democracy and democracy as a national project? How should we respond to the claim that internal democratic processes in political parties may empower a relatively small and unrepresentative group of citizens to make decisions that will be of national importance? How do we balance considerations of internal democracy with other important principles, like gender, race or regional representivity? All of these are difficult questions that a simple constitutional requirement of party political internal democracy does not answer.

The difficulties that may be encountered are highlighted by the recent 2015 Labour Party leadership campaign in the United Kingdom. How would we assess that process against a requirement of internal party democracy? Should we consider it inappropriate that thousands of people joined the Labour Party in order to vote in the leadership election? Did the dramatic increase in eligible voters enhance or weaken internal party democracy? These are matters upon which we might quite reasonably disagree, and it may be that these are issues best left to the political process.

The difficulties are also illustrated by the jurisprudence that has emerged in the United States around primaries. The introduction of compulsory primary elections had its origins in the attempts at the turn of the twentieth century to eradicate pork-barrel politics and to weaken the hold on power of 'corrupt, local boss-led party machines'.<sup>46</sup> In a short period of time, more than 40 states had enacted compulsory primary requirements for the selection of candidates for political office. Primaries can take different forms: closed primaries (open only to members of political parties); open primaries (non-members may vote but only for one selected party); and blanket primaries (in which non-members may vote in the primaries of all political parties). State laws compelling primaries appear not to have

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<sup>46</sup> See Issacharoff (note 1 above) at 275, footnote 3.

been challenged at the time,<sup>47</sup> and are now widely accepted as legitimate imposition of forms of intra-party democracy.

The doctrinal difficulties were exposed, however, in the decision of the Supreme Court in 2000, *California Democratic Party v Jones*,<sup>48</sup> in which the adoption of Proposition 198 by nearly 60 per cent of voters in California had resulted in the introduction of a compulsory blanket primary system.<sup>49</sup> The new law permitted voters to participate in the selection of candidates for office in all political parties, without having any prior institutional commitment to the parties. By a majority of 7:2, the court struck the requirement down on the basis that –

*In no area is the political association's right to exclude more important than in the process of selecting its nominee. That process often determines the party's positions on the most significant public policy issues of the day, and even when those positions are predetermined it is the nominee who becomes the party's ambassador to the general electorate in winning it over the party's views.<sup>50</sup>*

Can you hear the echoes of the British Labour Party debate? And one might well instinctively agree, but we should pause for there is room for reasonable disagreement too. And that disagreement runs deep. A blanket primary system allows ordinary voters, who have no party affiliation, to influence who should be nominated as leaders rather than just party members. Indeed, the arguments for Proposition 198 had stated that ‘the current closed primary system produces candidates at the ideological extreme who spend more time fighting with each other than addressing the state’s most pressing problems.’<sup>51</sup> Nevertheless, both the Democrats and the Republicans opposed Proposition 198. Is it so clear that the court was right? What is democracy after all, but the right of the people to participate in the choice of their leaders? Why should we privilege the party members in that choice over non-party members? And just when you think you have a different view, what of the effect of blanket primaries on small parties that are seeking to challenge the two dominant parties? The effect of Proposition 198 will in all likelihood be that supporters of the majority parties will select the leaders of small parties.<sup>52</sup>

<sup>47</sup> At 276.

<sup>48</sup> 530 US 567 (2000).

<sup>49</sup> See N Persily & B Cain ‘The legal status of political parties: A reassessment of competing paradigms’ (2000) 100 *Columbia Law Review* 775–812 at 786; and also results of Proposition 198 at [www.ballotpedia.org](http://www.ballotpedia.org).

<sup>50</sup> At 575.

<sup>51</sup> See [www.calvoter.org](http://www.calvoter.org).

<sup>52</sup> See Persily & Cain (note 49 above) at 800.

Now the terrain of the intractably contested is terrain commonly inhabited by constitutions, and constitutional courts. So the likelihood of intractable contestation is not on its own sufficient for us to conclude that the matter is not fit for constitutional regulation.

But we should also bear in mind that there are costs to legalising political processes, which as I mentioned above, are often contested and pluralistic. At times, it is better to leave contestation to be managed in the political process. After all, that is at root one of the reasons why we have a democracy. Not all problems can be determined by the application of neutral legal principles. There are thus arguments that run in both directions here, and again I leave it to your own evaluation.

## VIII CONCLUSION

The premises on which this article has been based are twofold: first, political parties are at least in most cases a necessary part of modern constitutional democracies; and secondly, political parties do not always operate optimally. These premises make clear that the question how political parties should be regulated in a constitution raises important questions of principle and constitutional design, questions that I have explored here. However I have not proposed firm conclusions as to how we should answer these questions in South Africa. At the time of writing in late 2017, it seems likely given the draft legislation before Parliament<sup>53</sup> that we are moving towards a legislative framework that will require political parties to disclose their sources of funding, and moreover, given the recent High Court judgment, the Constitutional Court may conclude that disclosure is a constitutional requirement as well.<sup>54</sup> It is less certain whether similar developments will arise in relation to the systems of internal democracy adopted within political parties. As I hope I have shown above, determining how we should proceed with regard to internal political party democracy raises a difficult debate, but it is a civic debate that we should have. A democracy, after all, depends for its success on civic engagement on matters of national importance.

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<sup>53</sup> Note 14 above.

<sup>54</sup> Note 15 above.

# THE RULE OF LAW: THE ROLE OF THE JUDICIARY AND LEGAL PRACTITIONERS

FRANK KROON

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In South Africa today we like to pride ourselves on the validity of our claim that we uphold the rule of law – s 1 of the Constitution<sup>1</sup> provides that our sovereign democratic state is founded, *inter alia*, on the supremacy of the Constitution and the rule of law. The present day claim certainly has more justification than the somewhat hollow boasts of earlier years in our history. This paper seeks to explore the role that the judiciary and legal practitioners can, and should, play to ensure that the claim continues to remain a valid one.

What is the importance of the rule of law? I borrow from the foreword in *Human Rights and the Rule of Law in Namibia*,<sup>2</sup> where the statement is made that while there are differences of opinion as to the definition of the concept of the rule of law, and hence differences in its application, what is ‘uncontroversial [is] that the rule of law plays a crucial role in the protection and promotion of human rights, democracy and transparent governance’.<sup>3</sup>

What does the concept of the rule of law embrace? In *Order and Liberty in South Africa*,<sup>4</sup> Mathews comments that the fundamental idea of the rule of law is ‘legality’, or government according to law; to be contrasted with government by arbitrary decree.<sup>5</sup> This principle is implicit in the statement by Dicey that ‘no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land’.<sup>6</sup> Translating these comments, the concept of the rule of law, in its very basic sense, may be said to convey that no-one is above the law: everybody in the land, individuals, corporate entities, the state and all its organs, is subject to the law, and all are equal under the law.

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<sup>1</sup> Constitution of the Republic of South Africa, 1996.

<sup>2</sup> N Horn and A Bösl *Human Rights and the Rule of Law in Namibia* 2 ed (2009).

<sup>3</sup> At 9.

<sup>4</sup> AS Mathews *Law, Order and Liberty in South Africa* (1972).

<sup>5</sup> At 3.

<sup>6</sup> AV Dicey *Introduction to the Study of the Law of the Constitution* 8 ed (1885) 110.

However, by reason of its basic nature the skeleton of this exposition must be fleshed out. The concept of the rule of law is in fact a many-faceted one embracing an array of considerations and applications. It is therefore not surprising that over time many definitions of the concept have been essayed by a variety of commentators. For convenience, I refer to a speech delivered by Justice Johann Kriegler at Gray's Inn Hall to the Bar of England and Wales.<sup>7</sup> Adapting what he referred to as the description of the 'core of the elusive concept' of the rule of law earlier propounded by Lord Bingham, Justice Kriegler said the following:

*In principle, I believe it means that all persons and authorities within the state, whether public or private, are bound by and entitled to the benefits of laws that have been publicly and prospectively promulgated and that are publicly administered by courts of law. In particular, every wielder of public power is constrained by the law to function strictly within the limits of the empowering instrument.*<sup>8</sup>

Again, however, aspects of this definition require some elaboration and qualification. First, the reference to laws that have been publicly and prospectively promulgated would be incomplete without a reference to the fact that South Africa is a constitutional state with a Constitution that is the supreme law, and which enshrines the various core values falling under the wide-ranging umbrella of fundamental human rights. It is also the *fons et origo* of a number of enactments providing for administrative recognition and implementation of those rights. The laws in Justice Kriegler's description are then promulgated laws that pass constitutional muster.

To illustrate: In days of yore there was an animal on our statute book styled the Native Administration Act 38 of 1927.<sup>9</sup> The Act contained a provision empowering the Governor-General, as the statutory paramount chief of all the Black peoples in the country, to banish, by decree, a Black person from one locality to another district designated in the

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<sup>7</sup> J Kriegler 'The rule of law in postcolonial Africa: A British legacy?' (Keynote address delivered at the second Annual Bar Council International Rule of Law Lecture, 3 December 2008) available at <http://www.sabar.co.za/law-journals/2009/april/2009-april-vol022-no1-pp32-39.pdf>.

<sup>8</sup> At 33.

<sup>9</sup> Subsequently renamed the Bantu Administration Act and thereafter the Black Administration Act 38 of 1927.

banishment order – with immediate effect.<sup>10</sup> It need hardly be said that the design behind the provision was the clipping of the wings of ‘politically troublesome’ Blacks. I recall having bumped my head against the proverbial brick wall in arguing, unsuccessfully, an application for an order setting aside the banishment of an East London attorney to the Herschel district. Other ‘security’ legislation commonly contained provisions ousting the jurisdiction of the courts to pronounce upon the validity of a restrictive administrative act constituting an invasion of fundamental human rights. Such rule by (arbitrary) decree is thankfully not possible today.

Section 33 of the Constitution provides:

- (1) *Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.*
- (2) *Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.*
- (3) *National legislation must be enacted to give effect to these rights, and must –*
  - (a) *provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;*
  - (b) *impose a duty on the state to give effect to the rights in subsections (1) and (2); and*
  - (c) *promote an efficient administration.*

In *South African Rugby Football Union*,<sup>11</sup> the following passage appears:

*The Constitution is committed to establishing and maintaining an efficient, equitable and ethical public administration which respects fundamental rights and is accountable to the broader public. The importance of ensuring that the administration observes fundamental rights and acts both ethically and accountably should not be understated. In the past, the lives of the majority of South Africans were almost entirely governed by labyrinthine administrative*

<sup>10</sup> Section 5(1) of the Act read:  
‘The Governor-General may–

...  
(b) whenever he deems it expedient in the general public interest, order the removal of any tribe or portion thereof or any Native from any place to any other place within the Union upon such condition as he may determine: provided that in the case of a tribe objecting to such removal, no such order shall be given unless a resolution approving of the removal has been adopted by both Houses of Parliament.’

<sup>11</sup> *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC) para 133.

*regulations which, amongst other things, prohibited freedom of movement, controlled access to housing, education and jobs, and were implemented by a bureaucracy hostile to fundamental rights or accountability. The new Constitution envisages the role and obligations of government quite differently.*

Section 33 spawned the Promotion of Administrative Justice Act 2 of 2000 (PAJA). This is not the occasion to discuss various shortcomings in the Act to which a number of commentators have drawn attention. Suffice it to say that, albeit imperfectly, the legislation gives the courts the sinews of war, via judicial review, against unconstitutional administrative excesses, and enables them, by appropriate intervention, more positively to develop an ethos conducive to the advancement of our founding constitutional values.

The second amplification of the content of Justice Kriegler's definition is two-fold in nature. It relates to the reference to the public administration of laws by courts of law. Two issues arise: access to the courts and the independence of the judiciary. In short, there can be no talk of the rule of law being supreme if either (a) the persons seeking the benefit thereof do not enjoy adequate access to the courts, or (b) the judiciary in the country is not truly independent. I will revert later to consider these two aspects in more detail.

Who are the role players in the drama of upholding the rule of law? In a sense, it would be a fair comment to say that, in fact, everyone in the country is involved, and should play whatever appropriate part comes their way. But for present purposes particular interest is focused on two branches of the broader group which is up against the coalface when an implementation of the rule of law bears on a dispute that has arisen over an alleged infraction of someone's fundamental rights. Included in that group, the rule of law's basic family, would be judges, prosecutors, legal practitioners (advocates and attorneys), court staff and all sections of the state's legal corps such as the police and prison service.

It would be acceptable to say that the courts, the final arbiters of any such dispute, are in the vanguard of the troops striving to uphold the rule of law. But legal practitioners are similarly indispensable foot soldiers in the crusade, and it is to their role that I now turn.

I indicated earlier that a *sine qua non* for the principle of the rule of law to prevail is adequate access to the courts. Section 34 of the Constitution provides that everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum. It is accordingly incumbent on the bar and the attorneys' profession to do what it can to promote such accessibility. In this regard I trust that I would

be preaching to the converted if I urged the bar (which will in due course have to operate under the dispensation to be introduced in terms of the Legal Practice Act<sup>12</sup> when it is put into force) to continue (a) in addition to its compliance with the Competition Act,<sup>13</sup> vigilantly to exercise such fee-review powers as will remain within its province, not only to prevent any particular client from being overreached, but also to obviate the situation where the bar, as an institution, generally places itself beyond the reach of our citizenry, (b) firmly to discipline members who charge improper fees, and in appropriate instances, to approach the court for a striking-off or suspension order, (c) to adhere to the ‘cab-rank’ rule,<sup>14</sup> where applicable, (d) to set aside time for *pro bono* work, (e) to waive fees, either wholly or in part, when that would be the proper course, (f) to undertake work for the Legal Aid South Africa. These remarks apply *mutatis mutandis* to the attorneys’ profession. It is especially in human rights litigation that representation by legal practitioners should be fostered.

A second *sine qua non* of a rule of law system worthy of the name is an independent judiciary. Section 165 of the Constitution provides:

- (1) *The judicial authority of the Republic is vested in the courts.*
- (2) *The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.*
- (3) *No person or organ of state may interfere with the functioning of the courts.*
- (4) *Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.*
- (5) *An order or decision issued by a court binds all persons to whom and organs of state to which it applies.*

It is only a judiciary that is truly independent, and decides matters (impartially and without fear, favour or prejudice) solely on the basis of the relevant facts and the applicable (constitutional) law, and is impervious and immune to extraneous influence, and more particularly that of the executive or other state organs, that can be equal to the demands exacted by the principle of the rule of law. That statement needs no further argument. Hence, the implicit enshrinement in the Constitution of the doctrine of

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<sup>12</sup> 28 of 2014.

<sup>13</sup> 89 of 1998.

<sup>14</sup> The cab-rank rule refers to the obligation of advocates to accept any work from any persons, and charge their usual rate, provided they are competent to practise in that field of law.



the separation of powers,<sup>15</sup> specifically embracing the independence of the judiciary and requiring all state organs to respect and advance same.<sup>16</sup> The doctrine recognises that in order to guarantee and protect the civil liberties of the individual, and to prevent dictatorship, absolutism and rule by decree, mechanisms must be in place capable of putting appropriate constitutional and legal restraints on the powers of government and the various organs of state.

However, there is real reason to apprehend that there is an apparently growing constituency in certain government circles which harbours less respect for the principle of the separation of powers, of which the independence of the judiciary is an integral and indispensable part. I instance *inter alia* the chant in those circles that the judiciary, with some of its decisions, is encroaching on the preserve of the politicians, who are elected, to determine policy, to which may be added the charge, for want of a better word, that the judges are ‘counter-revolutionaries’. I also advert to the well-publicised intention of the executive some years ago to commission an investigation into, and assessment of, the judgments of the two highest courts in the land, with a view thereafter to ‘influencing the courts in a positive way’. The judiciary’s decisions are not about making policy, but are informed by the law, and particularly constitutional precepts, which are the essence of the rule of law, and seeking to subject the judiciary to influence by the executive, however it may be dressed up, is inimical thereto. It is of course so that judges are not there to make policy, but there is a misapprehension on the part of the protestors as to what does not constitute policy-making. As former Chief Justice Chaskalson was quoted some years back: ‘Politicians who resent being reined in by the

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<sup>15</sup> See *South African Association of Personal Injury Lawyers v Heath* 2001 (1) SA 883 (CC); 2001 (1) BCLR 77 (CC) para 21. Here is how the Constitutional Court explained that there is no explicit provision for the separation of powers doctrine in the Constitution:

‘The constitutions of the United States and Australia, like ours, make provision for the separation of powers by vesting the legislative authority in the legislature, the executive authority in the executive, and the judicial authority in the courts. The doctrine of separation of powers as applied in the United States is based on inferences drawn from the structure and provisions of the Constitution, rather than on an express entrenchment of the principle. In this respect, our Constitution is no different.’

<sup>16</sup> See s 165 of the Constitution, quoted in the preceding paragraph.

Courts should weigh their fury against the precepts of the Constitution.<sup>17</sup> The quintessential manifestation of the rule of law is the upholding and implementation of the Constitution by the courts. The ultimate guardian of the Constitution is the Constitutional Court.<sup>18</sup> In carrying out this role the court does *not* make policy but protects the many values that are subscribed to in the Constitution. The same applies to the other courts of the country. The decisions of the courts may of course from time to time undo some or other government prescription, whether executive, legislative or administrative, which has as its objective the implementation of a policy, decided upon by politicians. But where the decisions of the courts are informed by constitutional precepts, what the courts are doing is safeguarding our constitutional values against unconstitutional inroads on them by politicians. That is the constitutionally ordained role of the courts, and on that score there is simply no room for posing the question: *qui custodes custodet?*

The above comments are not to be taken as advocating that judges, or their judgments, should be immune from criticism. On the contrary, reasoned and balanced commentary, including criticism, is to be welcomed. But scurrilous and ill-considered attacks on the integrity and motives of the courts as a whole, or of individual judges, undermine respect for the judiciary and so undermine the rule of law. By way of example I refer to what must be stamped as the shocking, but wholly unsubstantiated and unelucidated, insinuation attributed in newspaper articles some years back to a government member of Parliament, that a number of judges (significantly, not identified) acquired assets with funds acquired improperly, for which they were unable to account, implying *inter alia* corruption on their part. The judiciary is traditionally extremely loath to respond to such attacks, and an individual judge does not respond to an attack on him or her. But the bar and the attorneys' profession are equipped to act on behalf of the judiciary and repudiate attacks of the nature referred to above where the circumstances are such as to dictate that course, and have done so in the past. They should be prepared to do so again; and thereby contribute to respect for the judiciary and consequently the rule of law. They can, and should, also join with the judiciary by making their voices known in opposition to any other envisaged steps that are calculated to threaten the independence of the judiciary.

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<sup>17</sup> A Chaskalson 'When law irks power' (Address to a law workshop at the University of Cape Town, January 2012) reported by *The Sunday Times* at: <https://www.timeslive.co.za/sunday-times/lifestyle/2012-01-29-when-law-irks-power/>.

<sup>18</sup> See s 167(5) of the Constitution.

An allied role lies in the manner in which relevant cases are presented in court by members of the legal profession. Much of the development of constitutional jurisprudence, specifically the application of the doctrine of the rule of law, reflected in the decisions of the courts, finds its origins in the excellence of the well-researched and well-presented arguments with which members of the bar, and now also the attorneys' profession, favour the courts, generally as a matter of course. The maintenance of that standard should be nurtured in newcomers to the legal fraternity. I do not have details of the curricula in respect of the principles of the rule of law offered by the universities to students or by the bar to pupils, but I would make the suggestion that specific attention be given to this branch of the law in the bar's advocacy training programme.

It is axiomatic, I would venture to say, that one of the essential foundations of an independent judiciary is a legal profession that is itself independent. It being properly steeped in the tradition of independence enhances the continuation of the independence of the judiciary, and practitioners with that tradition behind them are better able to assist the courts in which they appear to arrive at a conclusion in conformity with the rule of law. The two branches of the legal profession should accordingly be vigilant in their identification of, and resistance to, proposed steps that are calculated to make inroads upon the independence of the legal profession.

What is the independence of the legal profession? It is, in my view, the freedom, resolve and ability to act fearlessly in the interest of one's client, subject only to the practitioner's higher duty to him or herself, to the law and to the court, and to do so free of, and impervious to, any other influences, eg comments conveying or implying that the legal practitioner has identified him or herself with the client's cause or alleged cause, which might be an unpopular one or the subject of a criminal charge. I recall a conversation that I had during the 1960s with a member of the bar (who later went on to become a member of Parliament). He advised me that he was not prepared to represent persons who were charged with 'political offences', such as membership of a banned organisation. He explained that he personally did not agree with the cause allegedly ascribed to any such accused, nor did he want it to be thought that he associated himself therewith. His attitude offended against one of the finest traditions of the bar, and clearly he was without the fearlessness that would have been required of him as a legal practitioner.

In conclusion, I would urge legal practitioners jealously to guard against any encroachment upon the independence of the legal profession. The independence of the profession is key to the rule of law.

# *A DEAD HORSE NEED NOT BE FLOGGED: THE DUTY NOT TO PURSUE UNMERITORIOUS CAUSES*

SM MBENENGE

*Judge President of the Eastern Cape Division of the High Court*

Once upon a time as a prosecutor in the Regional Court, after I had led to a finish the evidence of witnesses who had been lined up to testify in support of a rape charge, I looked to the magistrate and said:

‘Your Worship, I am closing my case.’

In response, the magistrate, who was visibly flabbergasted, retorted:

‘What case, Mr Mbenenge?’

In turn I responded:

‘Your worship, I have no further witnesses to call for the State.’

In no time thereafter an application from the adversary’s camp for the discharge of the accused was granted. Given that I had, for my part, also not been satisfied that a *prima facie* case had been established against the accused, how should my address to the magistrate, whose view was that the State had not established a *prima facie* case, have been fashioned?

Related to the scenario narrated above is the oft-made submission: ‘I leave the matter in the capable hands of the court,’ which is becoming more familiar to the ear of a judge than ever before. Should such a submission ever be made? If so, why? If not, why not? I choose to answer the question in a round-about way.

There may be a variety of reasons for a legal practitioner<sup>1</sup> to resort to ‘leaving the matter in the capable hands of the court’. One that quickly springs to mind is the instance where the practitioner concerned, having advanced a proposition for the court to consider, reaches a point where there is nothing further to say in pursuit of the proposition beyond what has already been said. Saying ‘M’Lord, I can’t take the matter any further’ is, in my view, perfectly acceptable in this case. A submission that is a cause for concern, and which has prompted this discourse, is one resorted to because the practitioner shunned her or his duty towards the court and her or his client.

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<sup>1</sup> The appellation ‘legal practitioner’ is based on the Legal Practice Act 28 of 2014 and encompasses both advocates and attorneys.

I will start off by setting out the role and function of courts as a yardstick for what is expected of those who appear before them championing the causes of litigants. The role and function of courts in a constitutional dispensation will be highlighted (their traditional functions and their duties as set out in the Constitution). Thereafter, the duties of practitioners within the context of the role and function of courts will be dealt with before arriving at the conclusion that it is a flagrant failure on the part of practitioners 'to leave the matter in the capable hands of the court' in circumstances where they are clearly flogging a dead horse or pursuing unmeritorious or hopeless causes. Where the case is bad on the facts, the scenario is even worse. There is no intention on my part to dampen the enthusiasm and zeal on the part of those who, within acceptable proportion, are bent on traversing unentered areas in the legal realm. It is a known fact, for instance, that our jurisprudence has benefitted greatly from judicial activists and those who have embraced the challenge to develop the common law in accordance with constitutional norms.

The question at hand can best be answered by a consideration of the function and role of courts, and the correlative duties of practitioners towards the court and to their clients.

The function of courts is to resolve disputes brought before them by contesting parties. To this end, s 34 of the Constitution gives everyone 'the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court'. The change of wording from 'justiciable' disputes in s 22 of the interim Constitution to disputes resolvable 'by application of law' is insignificant and appears to have been resorted to because it is plain and simple language.

One might ask: 'Why champion a cause in an instance where the law on the subject has become settled even by the highest court of the land?' The doctrine of precedent provides legal certainty that seeks to ensure that citizens are able to arrange their affairs according to a predictable set of legal rules.<sup>2</sup> However, the courts have, in the context of the South African constitutional supremacy, assumed an active role in interpreting and developing the law in a way designed to ensure compliance with

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<sup>2</sup> K O'Regan 'Change v certainty: Precedent under the Constitution' (April 2017) *Advocate* 31.

the values, norms, and principles embodied in the Constitution.<sup>3</sup> This is judicial activism which, in the words of Lord Wilberforce in *Minister of Home Affairs (Bermuda) v Fisher*,<sup>4</sup> consists of interpreting constitutions in a way that avoids the ‘austerity of tabulated legalism’.

Courts have long recognised that the doctrine of precedent is not the only guiding principle in the adjudication of disputes between parties; by way of example, the Constitution has, in the context of s 39(2), developed the common law test that interim orders are not appealable. The test has now been denuded of its impeccable nature. In the case of appeals to the Constitutional Court appealability no longer depends largely on whether the interim order appealed against has final effect or is dispositive of a substantial portion of the relief claimed in the main application,<sup>5</sup> but on whether the interests of justice demand that the order be appealed against. Also, whilst the common law position is that a spoliator cannot be called upon to return a spoliated item that has been destroyed, judicial activism allowed Cameron JA in *Tswelopele Non-profit Organisation v City of Tshwane Metropolitan Municipality*<sup>6</sup> to source the restoration order directly from the Constitution.<sup>7</sup>

This demonstrates that what today may appear to be settled law may prove to be assailable. It is against this background that the duties owed by practitioners to the court should be dealt with.

Principally, practitioners are pivotal to the administration of justice. They are an extended arm of the judiciary in its quest to administer justice. They are, for all intents and purposes, officers of the court. Practitioners represent clients and must advance competing arguments to the court. Their duty towards the court has always been as expressed by Innes CJ in *Incorporated Law Society v Bevan*,<sup>8</sup> as:

*Now practitioners, in the conduct of court cases, play a very important part in the administration of justice. Without importing any knowledge or opinion of their own – which it is entirely wrong that they should ever do – they represent the case of their client by urging everything, both in fact and in law, which can*

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<sup>3</sup> *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors: In Re Hyundai Motor Distributors (Pty) Ltd v Smit* NO [2000] ZACC 12; 2001 (1) SA 545 (CC) para 21.

<sup>4</sup> 1980 AC 319 at 328H; referred to with approval by Mohamed J in *S v Mhlungu* 1995 (3) SA 867 (CC) para 8.

<sup>5</sup> *City of Tshwane Metropolitan Municipality v Afriforum* 2016 (6) SA 279 (CC) para 40.

<sup>6</sup> 2007 (6) SA 511 (SCA).

<sup>7</sup> At para 25.

<sup>8</sup> 1908 TS 724 at 731–2.

*honourably and properly be said on his behalf. And this method of examining and discussing disputed causes seems to me a very effective way of arriving at the truth – as effective a way, probably, as any fallible human tribunal is ever likely to devise. But it implies this, that the practitioner shall say or do nothing, shall conceal nothing or state nothing, with the object of deceiving the Court; shall quote no statute which he knows has been repealed, and shall put forward no fact which he knows to be untrue, shall refer to no case which he knows has been overruled. If he were allowed to do any of these things the whole system would be discredited. Therefore any practitioner who deliberately places before the Court; or relies upon, a contention or a statement which he knows to be false, is in my opinion not fit to remain a member of the profession.*

What is required of practitioners is aptly put by Marnewick, ie not to advise the client to pursue litigation unless there is a reasonable case to be made; not to deceive the court knowingly or recklessly on the facts or the law; not to tender evidence known by the practitioner to be false; not to present argument or points which are obviously specious or frivolous and not to withhold contrary authorities from the court.<sup>9</sup>

A further dimension to the legal practitioners' duties that has emerged with the advent of the Constitution is the 'rule of law imperative'. In a recent address<sup>10</sup> Justice Madlanga links to the rule of law the duty of legal practitioners to their clients and the courts. He seeks to demonstrate that the upholding of the rule of law is central to the mandate of legal practitioners and proceeds to say '[c]ourts being the traditional field of play of legal practitioners, it stands to reason that legal practitioners are an indispensable cog when the rule of law plays itself out before the courts'.

Let me interpose here to mention that in the event of the duty to the court coming into conflict with the duty to the client, the duty to the court takes precedence.<sup>11</sup>

Whilst the practitioner's duty is to present her or his client's case fully and properly so that it can be seen in the best possible light, at a basic level, the practitioner must be astute in her or his identification of the appropriate plaintiff or applicant who has the requisite *locus standi in iudicio*; identification of the appropriate respondent or defendant against whom the suit will be brought; deciding on the appropriate forum before which

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<sup>9</sup> CG Marnewick *Litigation Skills for South African Lawyers* 3 ed (2012) at 274.

<sup>10</sup> Madlanga J, unpublished address entitled 'The importance of the Constitution and the need to place it at the forefront of the legal profession's mandate' delivered at a Young Lawyers' Summit hosted by the National Association of Democratic Lawyers in Ekurhuleni (26 January 2018).

<sup>11</sup> Madlanga J (n 10 above).

the case should serve; formulation of a proper cause of action or defence, which invariably includes clinically considering what allegations should be made to sustain the cause of action or defence; or in some instances, the observation of time-frames within which certain steps should be taken in pursuit of litigation or championing a defence. These questions call for reflection right at the outset when, during consultations with the client, consideration is being given to whether litigation should be embarked upon or opposed. It does, however, often happen, especially in the case of trials, that the facts appear to support the contention to be advanced in court but the opposite comes to the fore as the trial unfolds. You might during consultation think you have a star witness on whom your client's success depends but who so exaggerates her or his narrative once she or he takes the witness stand that it becomes unlikely that she or he will be believed. Although the question 'must I continue' may come to the fore, that scenario is not what this discourse is about.

At this point, it should be highlighted that the duty of a practitioner is not limited to court appearance; the primary task goes much beyond that. It includes advising a client on any other remedy available to him or her except embarking on litigation. This task involves analysing whether the facts support the case the legal practitioner is seeking to advance; this should be ascertained upfront and thoroughly. If not, the legal practitioner is under a duty to inform his or her client of such. Whether you are for the plaintiff or applicant or the defendant or respondent, it is at the outset incumbent on you to decide what legally cognizable cause you wish to advance. That means the available facts and law must be capable of leading to the conclusion you seek to advance. In sum, as a legal practitioner, you should never simply set out a narrative by your client and only start looking up the relevant law you may possibly rely on when the time for argument comes.

The client expects (legitimately so) that the practitioner will perform his or her duties in a meticulous way. To this end, the client will be taken aback when his or her lawyer, after having been furnished with all the necessary information, returns from court with an order –

- non-suiting the client because he or she lacks *locus standi*;
- that the wrong party has been sued (mis-joinder) or interested party has not been joined as a respondent or defendant (non-joinder);
- that the application or action has been launched before the wrong forum (ie the court lacks the jurisdiction to entertain the matter);
- that the summons has been successfully excepted to on the ground that the necessary averments to sustain a cause of action were not made;



- that there is no credible evidence to support the pleaded case; or
- that a step in the litigation has been declared irregular and set aside because of non-observance of the applicable time frames through no fault on the part of the litigant.

I have always maintained that, all things being equal, in such instances the practitioner and not the client lost the case. More often than not, a lay client is at a complete loss in relation to what averments are necessary to sustain a cause of action or whether, for example, the Labour Court, and not the High Court, has the jurisdiction to entertain a particular dispute.

By way of example some practitioners are remiss in their choice of a forum to champion their clients' causes of action. The road to settling the dichotomy involving whether labour-related disputes are justiciable before a high court came to an end with the pronouncement by the Constitutional Court in *Chirwa*.<sup>12</sup> The Constitutional Court *per* Skweyiya J held that the High Court does not have concurrent jurisdiction with the Labour Court in labour-related matters and that litigants desirous of championing labour-related matters must approach the Labour Court. Yet legally represented litigants continue to knock on the doors of the High Court seeking recourse in labour-related disputes appropriately justiciable before the Labour Court.<sup>13</sup> Why then do some practitioners still bring labour-related matters before the High Court as they ought to know that the legal position is that such matters should serve before the Labour Court?

Another example is that emerging because of the pronouncement in *Kubyana v Standard Bank of South Africa Ltd*.<sup>14</sup> In that case the Constitutional Court had to decide what constituted delivery of a notice in terms of s 129 of the National Credit Act 34 of 2005. It was held that where a credit provider can show that a track-and-trace report indicates that a s 129 notice was sent to the correct Post Office branch and that the Post Office sent a notification slip to the applicant's selected residential address, the credit provider would have discharged its duty under the National Credit Act for delivery. However, you still find practitioners approaching courts, on behalf of clients, to argue that they did not receive a s 129 notice although the facts of their cases are materially similar to that of *Kubyana*.

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<sup>12</sup> *Chirwa v Transnet Limited* 2008 (4) SA 367 (CC).

<sup>13</sup> *Chirwa* (n 12 above). See also *Gcaba v Minister for Safety and Security* 2010 (1) SA 238 (CC).

<sup>14</sup> 2014 (3) SA 56 (CC).

Such scenarios and many others not dealt with here are clear examples of flogging a dead horse or the championing of a hopeless cause.

What remedy is available to a court or litigant where a practitioner does not discharge his duty to the court? In *Ulde v Minister of Home Affairs*<sup>15</sup> the Supreme Court of Appeal was faced with a matter where a practitioner had failed to disclose adverse facts to the court and the court *a quo* had referred the practitioner to the Law Society of the Northern Provinces. The relevant part of the Supreme Court of Appeal judgment dealing with the referral reads:

*In its order dismissing the application for the appellant's release from detention, the learned judge in his order also referred to the Law Society of the Northern Provinces, Mr Omar's conduct in failing to inform the court of authority adverse to the appellant's case and directed the Society to report the outcome of the referral to the Deputy-Judge President of the Johannesburg High Court.*

This case illustrates the seriousness with which courts view the matter of practitioners who fail to discharge their functions towards the court in an appropriate way.

Before concluding, it is important to stress that I should not be understood as shunning the creativity of practitioners in aiding courts to discharge their duty but rather as highlighting the responsibilities, role and function of practitioners in the administration of justice. Unsurprisingly it does happen that settled, long-standing authority gets upset; and I am not in the least discouraging such well-founded attempts at pushing the boundaries. For instance in *Mokone v Tassos Properties CC*<sup>16</sup> settled law was upset on three fronts: an old English law principle that we had inherited ages ago was overruled; the *Moolman*<sup>17</sup> principle on compliance with formalities on alienation of land was also overruled; and the principle that proceedings could not be stayed based on the general notion of equity was also said no longer to have a place under our constitutional dispensation.

In conclusion, practitioners play a pivotal role in the administration of justice. As officers of the court they have a duty to not only ensure that their clients' interests are protected but also that the efficient, effective and fair administration of justice is achieved. In most instances they serve as a gateway between litigants and the judiciary. Practitioners should come into court riding on horses as knights in shining armour ready to protect or advance the interests of their clients. This is because 'access to

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<sup>15</sup> 2009 (4) SA 522 (SCA) para 13.

<sup>16</sup> 2017 (5) SA 456 (CC).

<sup>17</sup> *Hirschowitz v Moolman* 1985 (3) SA 739 (A).

courts is fundamentally important to our democratic order. It is not only a cornerstone of the democratic architecture but also a vehicle through which the protection of the Constitution may be achieved.’<sup>18</sup> Proper legal representation, being an incident of the rule of law, is key to this.

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<sup>18</sup> *Mukaddam v Pioneer Foods (Pty) Ltd* 2013 (5) SA 89 (CC) at [29].

## DO WE NEED DEFERENCE?

MALCOM WALLIS

*Judge of the Supreme Court of Appeal\**

‘Borrowing from another system is the most common source of legal change.’<sup>1</sup> True though that aphorism may be, such borrowing may create problems when a rule is torn from its domestic roots and transplanted to foreign soil. Dealing with the role that foreign law can play in our constitutional jurisprudence, Kriegler J sounded the following warning:<sup>2</sup>

*Nor does the advent of the Constitution, which codifies them, warrant the wholesale importation of foreign doctrines or precedents. To be true we are to promote values not yet rooted in our traditions and we must have regard to applicable public international law. We are also permitted to have regard to foreign case law. But that does not amount to a wholesale importation of doctrines from foreign jurisdictions.*

He returned to the theme in *Bernstein v Bester*:<sup>3</sup>

*[132] ... I agree with the identification and logical analysis of the principle involved ... but prefer to express no view on the possible lessons to be learnt from other jurisdictions. That I do, not because of a disregard for section 35(1) of the Constitution, nor in a spirit of parochialism. My reason is twofold. First, because the subtleties of foreign jurisdictions, their practices and terminology require more intensive study than I have been able to conduct. Even on a superficial view, there seem to me to be differences of such substance between the statutory, jurisprudential and societal contexts prevailing in those countries and in South Africa as to render ostensible analogies dangerous without a thorough understanding of the foreign systems. For the present I cannot claim that degree of proficiency. ...*

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<sup>1</sup> A Watson *Legal Origins and Legal Change* (1991) 73 quoted in B Markesinis and J Fedtke (eds) *Judicial Recourse to Foreign Law: A New Source of Inspiration* (2006) 99.

<sup>2</sup> *Du Plessis v De Klerk* 1996 (3) SA 850 (CC) para 144.

<sup>3</sup> *Bernstein v Bester* NO 1996 (2) SA 751 (CC) paras 132–3.

[133] *The second reason is that I wish to discourage the frequent – and, I suspect, often facile – resort to foreign authorities. Far too often one sees citation by counsel of, for instance, an American judgment in support of a proposition relating to our Constitution, without any attempt to explain why it is said to be in point. Comparative study is always useful, particularly where courts in exemplary jurisdictions have grappled with universal issues confronting us. Likewise, where a provision in our Constitution is manifestly modelled on a particular provision in another country’s constitution, it would be folly not to ascertain how the jurists of that country have interpreted their precedential provision. The prescripts of section 35(1) of the Constitution are also clear: where applicable, public international law in the field of human rights must be considered, and regard may be had to comparable foreign case law. But that is a far cry from blithe adoption of alien concepts or inapposite precedents ....*

The difficult task of delineating the boundaries between the judicial realm and other branches of government has seen the introduction from other jurisdictions of the concept of deference. It came into South African legal parlance as an immigrant from other jurisdictions. A passage from an academic article, in which Professor Hoexter called for the construction of an appropriate theory of deference,<sup>4</sup> was cited by Cameron JA in *Logbro*,<sup>5</sup> repeated by Schutz JA in *Phambili Fisheries*<sup>6</sup> and quoted with apparent approval in the latter case on further appeal to the Constitutional Court in *Bato Star*.<sup>7</sup> The relevant passage from Professor Hoexter’s article described deference as –

*a judicial willingness to appreciate the legitimate and constitutionally-ordained province of administrative agencies; to admit the expertise of those agencies in policy-laden or polycentric issues; to accord their interpretation of fact and law due respect; and to be sensitive in general to the interests legitimately pursued by administrative bodies and the practical and financial constraints under which they operate. This type of deference is perfectly consistent with a concern for individual rights and a refusal to tolerate corruption and maladministration. It ought to be shaped not by an unwillingness to scrutinize administrative action, but by a careful weighing up of the need for – and the consequences of – judicial intervention. Above all, it ought to be shaped by a conscious determination not to usurp the functions of administrative agencies; not to cross over from review to appeal.*

<sup>4</sup> C Hoexter ‘The future of judicial review in South African administrative law’ (2000) 117 *South African Law Journal* 484 at 501-2.

<sup>5</sup> *Logbro Properties CC v Bedderson NO* [2003] 1 All SA 424 (SCA) para 21.

<sup>6</sup> *Minister of Environmental Affairs and Tourism v Phambili Fisheries (Pty) Ltd* [2003] 2 All SA 616 (SCA).

<sup>7</sup> *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 (4) SA 490 (CC) para 46.

The use of the word deference prompted an immediate explanation from the court in these cases that it did not bear its ordinary meaning, with a suggestion in *Bato Star* that it could be better understood as respect.<sup>8</sup> Some such explanation was necessary because the ordinary meaning of the word ‘deference’ according to the *New Oxford Dictionary* is:

- 1 *Polite submission and respect*
- 2 *Compliance with the advice or wishes of another.*

The *Collins English Dictionary* gives two meanings:

- 1 *Submission to or compliance with the will, wishes etc of another;*
- 2 *Courteous regard, respect.*

The undercurrent of subordination and submission appears more forcefully in American dictionaries, such as *Merriam Webster*, which gives the following meaning:

*Respect and esteem due to a superior or elder.*

The *Webster’s New World College Dictionary* gives:

*A yielding in opinion, judgment, or wishes.*

Whichever of these definitions one chooses, it conveys an image of the court standing back in favour of the decision-maker or administrator that seems inconsistent with the role of the court in review proceedings, where it is determining the lawfulness of the conduct of decision-makers and administrators. It is legitimate therefore to ask how it came about that the relationship between courts on the one hand and administrative agencies and functionaries on the other has come to be described in terms that suggest a subordination of the courts to other decision-makers and administrators. The answer lies in exploring the origins of the concept of deference in its country of origin, the United States of America.

Use of the word ‘deference’ to describe the court’s response to agency decisions in the United States has a lengthy history, which the confines of this article do not permit me to trace.<sup>9</sup> Instead I take as my starting point for present purposes the leading case of *Chevron v NRDC*,<sup>10</sup> which can be taken to represent the US position well before deference made its

<sup>8</sup> At footnote 32 and para 47.

<sup>9</sup> Those interested can refer to A Bamzai ‘The origins of judicial deference to executive interpretation’ (2016/2017) 126 *Yale Law Journal* 908.

<sup>10</sup> *Chevron, USA, Inc. v National Resource Defense Council* 467 US 837 (1984).

journey to the southern tip of Africa. The US Supreme Court articulated a twofold rule governing the construction of legislation administered by an administrative agency. In the first part of the rule the court asked whether Congress had addressed the specific matter in issue and the statute was clear in its language. In that case the lawfulness of the agency's decision would depend upon whether it was in accordance with the unambiguous expression of the position by Congress. However – and this is where deference comes into the picture – in the second part of the rule, if Congress had not directly addressed the precise question in issue or left the position ambiguous, the court would not substitute its own view of the proper interpretation of the relevant legislation, but would determine whether the agency's interpretation was reasonable. In other words it would defer, in the true meaning of the word, to the agency. This was not an entirely novel approach, there having been prior cases that had indicated that, even on questions of legal interpretations of agency powers, courts should defer to the interpretation of the agency.<sup>11</sup>

From the United States deference migrated north to Canada. Here two cases must be considered. The first, *CUPE v New Brunswick Liquor Corporation*,<sup>12</sup> involved the construction of a provision governing picketing and the employer's entitlement to use replacement labour in the course of a strike. The statute contained a privative clause, that is, a clause that said that the decisions of the Public Service Labour Relations Board on matters within its jurisdiction were final and binding and not subject to appeal. The Board held that the Corporation was not entitled to use managerial employees to perform the work of striking workers. This decision was set aside on review, on the basis that the Board had incorrectly construed the relevant provision governing picketing and replacement labour. On appeal the Supreme Court of Canada restored the Board's decision. It held that the privative clause, and the general purpose of speedy resolution of disputes in labour matters, meant that the legislature had left to the Board the question of the proper construction of the statutory provision. Unless the decision could be set aside on review grounds, such as bad faith, failure to take account of relevant factors or misinterpreting the section so as to

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<sup>11</sup> Justice Antonin Scalia 'Judicial deference to administrative interpretations of law' 1989 *Duke Law Journal* 511 at 513. Scalia explained the theoretical underpinnings of this approach as being derived from the intention of Congress that the question of interpretation should be left to the agency for decision.

<sup>12</sup> *Canadian Union for Public Employees Local 963 v New Brunswick Liquor Corporation* (1979) 2 SCR 227.

embark on an enquiry not within its jurisdiction, its interpretation should stand even if the court thought it incorrect.<sup>13</sup>

Seen from a South African perspective this decision, which did not use the word 'deference', would have fitted comfortably into the line of cases where South African courts held that, if on a proper interpretation of the statute a legal issue was left to the determination of the administrative decision-maker or agency, it was in the absence of other review grounds unassailable, even if as a matter of law the court thought the decision wrong.<sup>14</sup> While the principle was unaffected by its decision, the scope within which a court would hold that a matter of law was wholly within the jurisdiction of an administrative decision-maker or agency was considerably confined by the judgment in *Hira v Booysen*.<sup>15</sup>

But deference was brought to the fore in Canada by the decision in *Dunsmuir*.<sup>16</sup> Also an employment case, it arose from the decision by the province to terminate Mr Dunsmuir's employment on reasonable notice with the payment of salary in lieu of notice. On a reference under the relevant labour legislation an adjudicator granted reinstatement, even though the contract of employment and the law were clear in permitting such a termination without the need to give reasons. The Supreme Court of Canada held that the adjudicator's decision had to be set aside because it disregarded basic legal principles governing contracts of employment. But it took the opportunity to restate the basis of judicial review in Canada and held that there are only two standards of review in relation to decisions on legal issues, namely, correctness and reasonableness. In cases attracting the standard of correctness the court's determination of the legal issue is decisive. Where it is reasonableness, the court will show deference to the decision of the administrator. The selection of the standard of review depends upon the construction of the legislation empowering the decision-maker to make the decision in question.

McLachlin CJ giving the majority judgment used deference to explain why the reduction to two standards of review did not represent a return to formalism or a more intrusive standard of review in which the court engaged with the merits of the decision. She said:<sup>17</sup>

<sup>13</sup> At 237.

<sup>14</sup> *Doyle v Shenker & Co Ltd* 1915 AD 233; *Union Government (Minister of Mines and Industries) v Union Steel Corporation (South Africa) Ltd* 1928 AD 220; *Goldfields Investment Ltd v City Council of Johannesburg* 1938 TPD 551; *Johannesburg City Council v Chesterfield House (Pty) Ltd* 1952 (3) SA 809 (A) and *South African Railways v Swanepoel* 1933 AD 370.

<sup>15</sup> *Hira v Booysen* 1992 (4) SA 69 (A) at 90.

<sup>16</sup> *Dunsmuir v New Brunswick* [2008] 1 SCR 190.

<sup>17</sup> At paras 48 and 49.



*What does deference mean in this context? Deference is both an attitude of the court and a requirement of the law of judicial review. It does not mean that courts are subservient to the determinations of decision-makers, or that courts must show blind reverence to their interpretations, or that they may be content to pay lip service to the concept of reasonableness review while in fact imposing their own view. Rather, deference imports respect for the decision-making process of adjudicative bodies with regard to both the facts and the law. The notion of deference 'is rooted in part in a respect for governmental decisions to create administrative bodies with delegated powers' ... . We agree with David Dyzenhaus where he states that the concept of 'deference as respect' requires of the courts 'not submission but a respectful attention to the reasons offered or which could be offered in support of a decision.*

*Deference in the context of the reasonableness standard implies that courts will give due consideration to the determinations of decision makers.' ...*

It is difficult to understand at this distance why it was thought necessary to say that courts must give due consideration to the knowledge, experience and determinations of decision-makers and to explain the application of deference in those terms. Substituting respect for deference and saying that courts must pay respectful attention to the reasons proffered by administrators is extraordinarily patronising to judges. What did the author who suggested it think that judges do? Courts faced with an application for judicial review do not usually disregard the decisions made by administrators or the reasons they give for those decisions. Nor, one would think, do they need to be counselled that the administrative decision-maker may have greater knowledge and experience than they of the background against which the decision-making power is conferred and falls to be exercised. All of this seems obvious and if it is not judges who become unusually ambitious and confident of their own omniscience soon find that appellate courts are swift to correct them.

If all that deference means is that courts must pay due regard to the case before them and exercise a little judicial humility, it seems to be unnecessary and nothing more than an 'admonitory circumlocution', to borrow the words of Lord Cooke of Thorndon.<sup>18</sup> Viewed in relation to such matters it has been referred to as evidential deference, but even that more modest description hardly warrants the apparent doctrinal significance that appears to have been attached to it.

There are further difficulties with the Canadian invocation of deference. It appears from the various judgments in *Dunsmuir* that it is used to

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<sup>18</sup> *R v Chief Constable of Sussex, ex parte International Trader's Ferry Ltd* 1998 UKHL 40; [1999] 1 All ER 129 (HL) at 157c.

determine the standard of review, whether correctness or reasonableness; as a determinant of what is reasonable in any given situation; and, as an approach to both factual and legal decision-making. Its most important role appears to lie in determining whether on a question of law determined by an administrative decision-maker the standard of review is correctness or reasonableness. If it is the latter and the decision is one that a decision-maker in that position could reasonably reach, in other words, it is a possible meaning of the legislation under consideration, or a permissible construction of the parties' contractual position, then the court will defer to the decision-maker's conclusion. To that extent it appears to parallel the position in the United States under *Chevron*.

Attention has already been drawn, in the context of the United States' approach to deference, to the similarities between this approach and that which formerly prevailed in South Africa where on a proper interpretation of the legislation the decision-maker had been vested with the responsibility to decide the legal issue. However, it is no longer an approach that can prevail in the face of the express provisions of PAJA,<sup>19</sup> s 6(2)(d) of which provides that a decision is reviewable if it is materially influenced by an error of law. That demands of a reviewing court that it decide what the true legal position is, not whether the legal conclusion of the decision-maker was one that could reasonably be held and defended. Accepting that in many instances the arguments on either side of a legal issue may be relatively evenly balanced, it is the function of courts when required to determine the law to choose between the competing arguments, making use of the tools that commonly inform judicial decision-making.

Deference has of course crossed the Atlantic, although it has not always been welcomed on arrival in the courts of the United Kingdom. Lord Hoffmann, for example, in a passage cited in *Bato Star*, said:<sup>20</sup>

*[75] My Lords, although the word 'deference' is now very popular in describing the relationship between the judicial and the other branches of government, I do not think that its overtones of servility, or perhaps gracious concession, are appropriate to describe what is happening. In a society based upon the rule of law and the separation of powers, it is necessary to decide which branch of government has in any particular instance the decision-making power and what the limits of that power are. That is a question of law and must therefore be decided by the courts.*

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<sup>19</sup> The Promotion of Administrative Justice Act 3 of 2000.

<sup>20</sup> *R (on the application of ProLife Alliance) v British Broadcasting Corporation* [2003] 2 All ER 977 (HL) paras 75-76.

[76] This means that the courts themselves often have to decide the limits of their own decision-making power. That is inevitable. But it does not mean that their allocation of decision-making power to the other branches of government is a matter of courtesy or deference. The principles upon which decision-making powers are allocated are principles of law. The courts are the independent branch of government and the legislature and executive are, directly and indirectly respectively, the elected branches of government. Independence makes the courts more suited to deciding some kinds of questions and being elected makes the legislature or executive more suited to deciding others. The allocation of these decision-making responsibilities is based upon recognised principles. ... [W]hen a court decides that a decision is within the proper competence of the legislature or executive, it is not showing deference. It is deciding the law.

A reading of the leading judgments and textbooks does not suggest that deference has assumed the doctrinal importance in the United Kingdom that it has in its transpentine homes. Instead it is used as a convenient shorthand for the discretionary area that courts give to the executive and administrators in the performance of their functions and the decisions that they make in that regard.<sup>21</sup> There have been judicial endeavours to expound on the nature of deference,<sup>22</sup> but also judicial statements of the inappropriateness of describing the approach of the courts to discretionary decisions by administrators as ‘deferential’. Thus in *Huang*<sup>23</sup> the following was said:

*The giving of weight to factors such as these is not, in our opinion, aptly described as deference: it is performance of the ordinary judicial task of weighing up the competing considerations on each side and according appropriate weight to the judgment of a person with responsibility for a given subject matter and access to special sources of knowledge and advice. That is how any rational judicial decision-maker is likely to proceed.*

Notwithstanding these weighty judicial statements there continue to be judicial references to deference and a certain amount of academic debate concerning its usefulness. For some it is an ‘over-used word ... with

<sup>21</sup> HWR Wade & CF Forsyth *Administrative Law* 11 ed (2014) 308-310. The topic is mentioned but only briefly in leading student textbooks. See M Elliott & R Thomas *Public Law* 2 ed (2014) 502-505; T Endicott *Administrative Law* 3 ed (2015) 248-270. The latter asks whether it is deference at all.

<sup>22</sup> By Laws LJ in *International Transport Roth GmbH v Secretary of State for the Home Department* [2002] EWCA Civ 158 paras 80-87.

<sup>23</sup> *Huang v Home Secretary* [2007] UKHL 11; [2007] 4 All ER 15 (HL) para 16.

its overtones of cringing abstinence in the face of superior status',<sup>24</sup> while for others it is a useful concept in dealing with the difficult area of the relationship between courts and the executive.<sup>25</sup> The difference between them lies, not so much in the approach each espouses to the judicial task when a challenge is made to administrative decisions, but in the use of deference to describe that task. This is very much the argument advanced by Alan Freckelton<sup>26</sup> for saying that while the Australian courts have rejected the approach adopted by the United States Supreme Court in *Chevron* their approach to the review of administrative decision-making<sup>27</sup> displays a similarly deferential approach.

Where then does this leave us in South Africa? Should we board the deference train or eschew its charms? Is it a convenient shorthand for a variety of other matters, that there is no harm in our using, provided we maintain our mental reservations as to its appropriateness, or is it one of those 'catch phrases devoid of legal meaning [devised] in order to describe concepts which [judges] are unable or unwilling to define'?<sup>28</sup> I suggest that the answer for South African judges lies in the general principle of accountability, responsibility and openness that is a fundamental value enshrined in the Constitution<sup>29</sup> and the obligation it imposes upon judges to give reasons for their decisions.<sup>30</sup>

Deference as it is understood in the United States and Canada is primarily an approach that the courts of those countries take to the legal decisions of administrative agencies and decision-makers. These may arise in a variety of circumstances. They may require an interpretation of a statute or regulations under which the administrator operates. They may involve the validity of regulations made by the agency or policies it adopts

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<sup>24</sup> Lord Sumption delivering the Administrative Law Bar Association Annual Lecture 'Anxious Scrutiny' on 4 November 2014, available at <https://www.supremecourt.uk/docs/speech-141104.pdf> (accessed on 24 October 2017).

<sup>25</sup> A Kavanagh 'Defending deference in public law and constitutional theory' (2010) 126 *Law Quarterly Review* 222.

<sup>26</sup> A Freckelton 'The concept of "deference" in judicial review of administrative decisions in Australian law. Part I' (2013) 73 *AIAL Forum* 52, available at <http://www5.austlii.edu.au/au/journals/AIAdminLawF/2013/13.html> (accessed on 24 October 2017).

<sup>27</sup> *Corporation of the City of Enfield v Development Assessment Commission* [2000] HCA 5; 199 CLR 135.

<sup>28</sup> Lord Sumption (note 24 above).

<sup>29</sup> Constitution s 1.

<sup>30</sup> *Mphahlele v First National Bank of South Africa Ltd* 1999 (2) SA 667 (CC) para 12; *Strategic Liquor Services v Mvumbi* NO 2010 (2) SA 92 (CC) paras 15 and 17.

in the exercise of its powers. Provided they are within the jurisdiction of the administrator – and the courts construe the notion of jurisdiction, and what we call jurisdictional facts, narrowly – the courts will only interfere with them if they fall outside the scope of decisions that could reasonably be made under the empowering legislation. The court does not approach the review from the perspective of a determination of the ‘correct’ legal position and assess the legality of the administrator’s actions against that yardstick. As explained earlier, that is not an approach that a South African court can take, given the express provisions of PAJA. So one sees immediately that the imported plant cannot grow in the same way in South African soil. It is perhaps for that reason that our scholars have tended to look more to the articulation of deference in the United Kingdom for comparison.

While it may seem to be a mere semantic quibble, there is nonetheless in my view substance in the criticism that the use of the word ‘deference’ in a sense other than any ordinary meaning it holds, particularly as it is one that requires immediate explanation and qualification if it is not to be misunderstood, is undesirable. It will inevitably be a source of misunderstanding, both for lawyers and, more importantly, for the ordinary citizen and the government agencies most affected by decisions given on judicial review. Whether they will share Justice Scalia’s cynical approach that there is not much harm in using ‘the mealy-mouthed word “deference”’ because it conveys nothing more to administrators than that their views have been considered with attentiveness and respect before being rejected,<sup>31</sup> is perhaps debatable, but if that is what is happening they are unlikely to find it satisfying.

The more fundamental problem is that ‘deference’ lacks any descriptive or analytical power to explain why a judge reached a decision one way or another. It is surely not sufficient for the judge to say that ‘in this case no judicial deference to the decision of the administrator is called for’ without explanation and, if explanation is called for, the explanation can stand on its own without the need to attach the ‘no deference’ label to it. Equally it is hardly acceptable for a judge to reject a claim for judicial review on the grounds that ‘deference is owed to the administrator’. The response would inevitably be ‘Why?’ In neither case does the reference to deference add anything to the judicial reasoning process. A reasoned decision requires the court to spell out why it accepts the factual finding by the administrator, or a construction of a statute or the explanation of a policy and its purpose, based on its expertise, background knowledge

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<sup>31</sup> Scalia (note 11 above).

and familiarity with the subject under consideration. In other words, as with any other decision, the court explains its decision on the basis of the evidential material and arguments presented to it. A judge who is convinced that a decision is unreasonable is not going to be deterred from saying so because of a need for deference. They may of course be wrong but that is a different matter altogether.

The primary responsibility of judges is reasoned decision-making.<sup>32</sup> The invocation of deference adds nothing to judicial reasons in the absence of expansion and explanation. Its omission would not detract from them. Like many invasive alien plants its extirpation from our society would not seem to be a loss.

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<sup>32</sup> BV Harris 'The continuing struggle with the nuanced obligation on judges to provide reasons for their decisions' (2016) 132 *Law Quarterly Review* 216.



