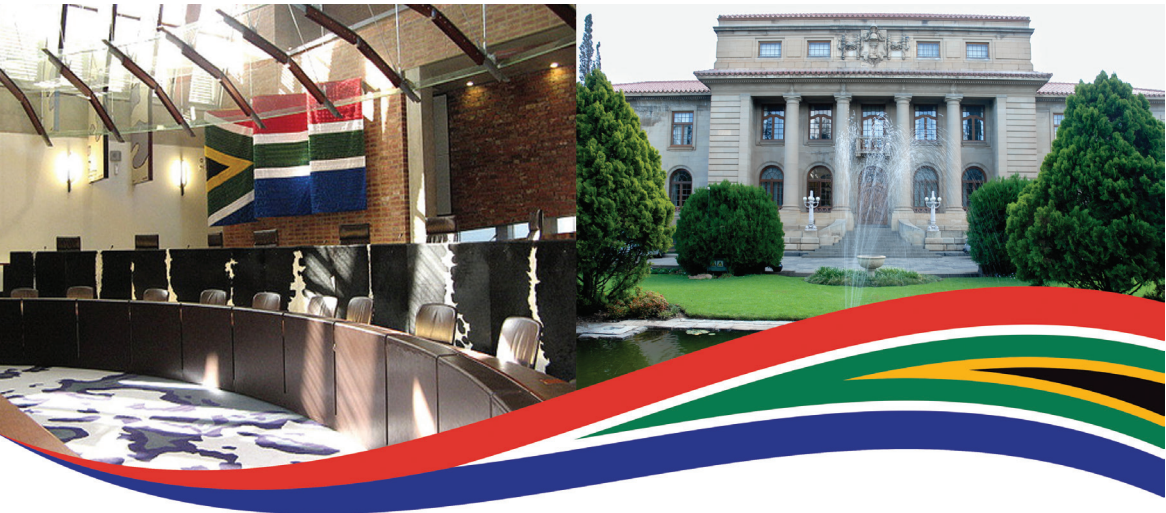


SOUTH AFRICAN JUDICIAL EDUCATION JOURNAL

VOLUME 2, ISSUE 1, 2019



Enhancing Judicial Excellence



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VOLUME 2, ISSUE 1, 2019



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

Published: December 2019

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.

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VOLUME 2
ISSUE 1
2019

THE SOUTH AFRICAN JUDICIAL EDUCATION JOURNAL

*THE TRANSITION TO DEMOCRACY:
CONSTITUTIONAL NORMS AND
CONSTITUTIONAL REASONING IN LEGAL
AND JUDICIAL PRACTICE¹*

EDWIN CAMERON

Retired Justice of the Constitutional Court of South Africa

I INTRODUCTION

South Africa's Constitution has been lauded as one of the world's most admirable,² but trying to make it work required very considerable adjustments of mindset, application and methodology on the part of lawyers and judges. These happened painfully, sometimes resistantly and often slowly. The primary revolution wrought by the Constitution was to replace a system of legislative supremacy, embedded in a received Roman-Dutch common law, with a constitutional apparatus of norms, values and democratic power structures. Those working within the law had to adjust the methods of applying their craft. In addition, they had to confront new

¹ I am grateful to my law clerks, Kate Paterson, Mfundo Salukazana and Martin Willner, for invaluable help in conceiving and completing this article.

² In 2012 during an interview on the best model for post-revolutionary Egypt, United States Supreme Court Justice Ruth Bader Ginsburg said: '[I]f I were drafting a Constitution in the year 2012, I might look at the Constitution of South Africa. That was a deliberate attempt to have a fundamental instrument of government that embraced basic human rights, had an independent judiciary. ... It really is, I think, a great piece of work that was done.'

defences by opponents invoking the Constitution. And they had to expand their armoury of legal weaponry to include constitutional remedies.

For judges, the revolution was gradual but no less encompassing.

This article examines the way in which the radical innovation the Constitution constituted confronted the thinking and practice of practitioners and judges to broaden and enrich both.

II 1994 AND THE TRANSITION TO DEMOCRACY

It is a quarter-century since 27 April 1994, when South Africa became a democracy. The changes have been big,³ even though, for those on the harsh end of discrimination, poverty and dispossession, they have not been big enough.

One of the biggest changes the transition demanded was in legal thinking and legal practice. Lawyers and judges schooled in the old style of precedent, statute and common law now had to factor in the radical shift in concept and methodology which the Constitution wrought. Although both the interim Constitution⁴ and the Constitution⁵ embraced and

³ Some of the practical changes in people's lives that constitutionalism and democracy have brought about are considered in Edwin Cameron 'What you can do with rights' (2012) 2 *European Human Rights Law Review* 147–159, http://www.lawcom.gov.uk/wp-content/uploads/2015/05/Scarman_2012_Justice_Cameron_What_you_can_do_with_rights.pdf (accessed 7 November 2019).

⁴ Act 200 of 1993. The limitation provision, s 33, provided that save as provided in subsec (1) or any other provision of the interim Constitution, 'no law, whether a rule of the common law, customary law or legislation, shall limit any right entrenched in this Chapter' (s 33(2)). Section 33(3) provided that the entrenchment of the rights in the Fundamental Rights Chapter 'shall not be construed as denying the existence of any other rights or freedoms recognised or conferred by common law, customary law or legislation to the extent that they are not inconsistent with this Chapter'. Section 35(3) provided that 'In the interpretation of any law and the application and development of the common law and customary law, a court shall have due regard to the spirit, purport and objects of this Chapter'.

⁵ In its final form, which came into effect on 4 February 1997. Section 8(2) provides that a provision of the Bill of Rights 'binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right', while s 8(3) provides that, when applying a provision of the Bill of Rights to a natural or juristic person in terms of subsec (2), a court (a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and (b) may develop rules of the common law to limit the

perpetuated the Roman-Dutch and English common law, the traditional sources of law were quite sharply and suddenly subordinated to a supreme Constitution and its values.⁶ A revolution had occurred.⁷

Lawyers had to adjust, and adjust fast. The revolution in normative structure both encapsulated and underscored the transition in political power from white minority rule to black majority government.⁸ So the transition necessitated a two-pronged transformation in the judiciary, the legal profession and law schools. First, institutional transformation was required to become inclusive and more representative. Second, methodologies and discourse had to change to encompass the new system and its novel hierarchy. These changes occurred, of course, within a pre-democracy legal tradition in which the notions of value, norm and justice were far from alien.⁹ indeed, the critique of apartheid judges, that they had

right, provided that the limitation is in accordance with the limitations provision, s 36 (1). Section 39(2) provides that a court, forum or tribunal, when interpreting any legislation, and when developing the common law or customary law, must promote the spirit, purport and objects of the Bill of Rights. Section 39(3) provides that the Bill of Rights 'does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill'. Section 173 stipulates that the Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each has the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.

⁶ Interim Constitution s 4(1) ('This Constitution shall be the supreme law of the Republic and any law or act inconsistent with its provisions shall, unless otherwise provided expressly or by necessary implication in this Constitution, be of no force and effect to the extent of the inconsistency'); Constitution s 2 ('This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled').

⁷ Similarly, four years later, the enactment of the Human Rights Act 1998 in the United Kingdom has been described as being 'revolutionary': D McGoldrick, 'The United Kingdom's Human Rights Act in theory and practice' (2001) 50(4) *International and Comparative Law Quarterly* 901–953, 901. Philip A Thomas 'The Human Rights Act 1998: Ready, steady, go?' (2001) 35(3) *The Law Teacher* 360–373, 373 alludes to the 'shock waves' the new enactment caused.

⁸ Similarly, Professor Conor Gearty prophesied that the United Kingdom Human Rights Act would 'profoundly affect' that country's 'political culture': quoted in Thomas (note 7 above) 373.

⁹ One should not overstate the novelty of constitutional thinking to a receptive common-law lawyer. In the United Kingdom, a senior judge, Lord Nicholls, said that guardianship of constitutional rights is part of the accepted function of judges – and that value judgments under the UK's Human Rights Act

been shamefully inert in the face of injustice,¹⁰ relied precisely on their capacity as proponents and exponents of deep common-law values to push for justice in the face of extremely unjust legislation.¹¹

Institutional transformation has been gradual but indisputable. In 1994, about 85 per cent of legal practitioners in South Africa were white.¹² The entire judiciary included only four black and two female judges, both of whom were white.¹³ Instead of uprooting and replacing that judiciary, the constitutional assembly elected to retain judges appointed under apartheid to ease the transition.¹⁴

of 1998 would not be different in kind or type from what judges had to make under the common law. Quoted in McGoldrick (note 7 above) 949. Of course not all common-law lawyers and judges were receptive.

¹⁰ John Dugard led the way: John Dugard *Human Rights and the Apartheid Legal Order* (1978).

¹¹ Those who were happy to consider themselves as Dugard's acolytes followed. See Edwin Cameron 'Legal chauvinism, executive-mindedness and justice: LC Steyn's impact on South African Law' (1982) 99 *South African Law Journal* 38, 52–62; Edwin Cameron 'Judicial endorsement of apartheid propaganda: An enquiry into an acute case' (1987) 3 *South African Journal on Human Rights* 223–229; Edwin Cameron 'Nude monarchy: The case of South African judges' (1987) 3 *South African Journal on Human Rights* 338–346; Edwin Cameron 'Inferential reasoning and extenuation in the case of the Sharpeville Six' (1988) 1 *South African Journal of Criminal Justice* 243–260. See too Gilbert Marcus, 'Judging the judges' (1984) 101 *South African Law Journal* 160 and Gilbert Marcus 'Respect for the courts: Myth and reality' (1985) 1 *South African Journal on Human Rights* 236.

¹² The figure comes from D McQuoid-Mason 'Access to justice in South Africa' (1999) 17 *Windsor Yearbook of Access to Justice* 230, note 6, citing a paper prepared in 1994 by Nic Swart for the Association of Law Societies of SA, reflecting 1993 estimates. McQuoid-Mason gives it thus:

'In 1993 it was estimated that there were 1,221 practising advocates of whom 133 (11%) were black and 8,368 practising attorneys of whom 1,178 (14%) were black, giving a total of 9,589 practising lawyers in South Africa, of whom 1,311 (14%) were black. n5 As a result of the legacy of apartheid, 85% of the legal profession is white and 15% black. Conversely 85% of the total population is black. Approximately 3,000 graduates are produced by the 21 law schools in the country each year.'

¹³ L Greenbaum 'Legal education in South Africa: Harmonizing the aspirations of transformative constitutionalism with our educational legacy' (2015) 60 *New York Law School Law Review* 463, 467 (internal citations omitted).

¹⁴ An informal count by the 'Judges Matter' website in March 2017, reflecting the previous year's figures, showed 145 male and 82 female superior court judges, of whom two-thirds were black and just over a third were white. In more detail,

This meant that the newly democratised South African people were enjoined to trust a judiciary that had, until then, largely enabled the apartheid system, and which remained preponderantly white. The judiciary, steeped as it was in a deleterious past, needed to establish itself as a legitimate arm of state and guardian of the new Constitution.¹⁵

Geopolitical factors – including the fall of the Berlin Wall in 1989 and the seeming collapse of the Soviet Union thereafter – enabled predominance of rights discourses and analyses. Hence rights, enforced by an independent judiciary, seemed feasible as a way of ensuring that the abuses of apartheid could no longer find legal sanction.¹⁶ The incoming governing party, the African National Congress (ANC), had a long-expressed commitment to rights discourse,¹⁷ most expressively articulated in the 1955 Freedom Charter.¹⁸

101 (44%) were black African, 78 (34%) were white, and 24 each were coloured and Indian respectively (11% each). See <http://www.judgesmatter.co.za/opinions/south-africa-judges> (accessed 2 October 2018).

¹⁵ Greenbaum (note 13 above).

¹⁶ During negotiations for the interim Constitution, the ANC pushed for a separate Constitutional Court to enforce the Constitution. The apartheid government, by contrast, had argued that a specialised constitutional chamber of the existing appellate court should be established, as the incumbent judges had ‘a proven record of excellence in adjudication of matters of law’. See R Spitz & M Chaskalson *The Politics of Transition – A Hidden History of South Africa’s Negotiated Settlement* (2000) at 192.

¹⁷ On 16 December 1943, the ANC adopted a document entitled ‘African claims in South Africa’, which included a Bill of Rights. It called for one person one vote, equal justice under law and freedom of land ownership, among other things. L du Plessis & H Corder *Understanding South Africa’s Transitional Bill of Rights* (1994) at 25 suggest that the ‘liberationist’ tradition is probably South Africa’s oldest post-World War II human rights tradition, and until the late 1980s certainly its most visible. They describe ‘liberationism’ as an egalitarian worldview premised on the struggle against oppression, prejudice and discrimination (at 23). Tembeka Ngcukaitobi *The Land is Ours* (2018) persuasively reinterprets the December 1943 document as the foundation for South Africa’s Bill of Rights, although Bongani Ngqulunga in *The Man Who Founded the ANC: A Biography of Pixley ka Isaka Seme* (2017) mentions it only in passing, even though Seme may be seen as the principal author of the document.

¹⁸ The Freedom Charter called for a range of civil, political and socio-economic rights and declared that they must be the same ‘regardless of race, colour or sex’.

There was widespread agreement that traditional liberal, civil and political rights ('first-generation' rights)¹⁹ were essential.²⁰ But in the negotiations, social democrats and democratic socialists pushed for more than purely 'liberal' rights.²¹ The ANC had long insisted on the constitutional embodiment of 'subsistence rights' (rights to social and economic goods).²²

The eventual inclusion of a wide-ranging set of fully justiciable socio-economic rights in South Africa's final Constitution was – in both practical and constitutional terms – a significant achievement. But the methodological and institutional implications of this triumph had yet to be absorbed and implemented practically. Two prominent objections remain some bite: judicial capacity and legitimacy. I consider each of these in turn.

The objection as to the capacity of judges stems from scepticism about their ability to carry out the task of ruling on socio-economic rights. This originates from three considerations: first, judges' professional training as lawyers, which is directed at the successful assertion of contested positions; second, the form in which disputes reach them, which springs from the adversarial, two-sided nature of most litigation; and lastly, the lack of resources within the adjudication process, including time, knowledge and experience, for properly considering policy-directed decisions.

The main concern was the especially high degree of polycentricity socio-economic rights claims entailed; courts would be required to make complex policy decisions. This would not be ideal because, contrasted

¹⁹ Examples are the right to a fair trial and due process of law, freedom of speech, movement and religion, the right to privacy and equal protection before the law. These 'freedom *from*' rights often reflect the classical liberal concern with 'negative' liberty, consisting in freedom from state interference. I Currie & J de Waal, *The Bill of Rights Handbook* 6 ed (2013) explain at 564 that 'second-generation' rights are often thought of as 'positive' rights that impose obligations on the government. Isaiah Berlin, in 'Two Concepts of Liberty' in *Four Essays on Liberty* (1969) 118–172, gives a classic account of two different concepts of political freedom.

²⁰ Du Plessis & Corder (note 17 above) 34. As black majority rule became imminent, the National Party, for long opposed to a justiciable bill of rights, committed itself to comprehensive human rights protections.

²¹ The Freedom Charter, for example, called for free, compulsory, universal and equal education for children, the right to decent housing and free medical care and hospitalisation. Du Plessis & Corder suggest (note 17 above at 25) that, at the time of the CODESA negotiations, social democrats predominated over democratic socialists within the liberationist tradition.

²² A Gutmann 'Introduction' in Michael Ignatieff (ed) *Human Rights as Politics and Idolatry* (2001) xxvi–xxvii at ix.

with the courts' traditional task of assessing competing arguments and determining a winner, socio-economic rights are said to be not two-sided, and hence not suitable to decision in adversarial contest, but multi-centred, or 'polycentric' – that is, they involve problems that have complex interacting centres of tension. They entail 'the coordination of mutually interacting variables: a change in one variable will produce changes in all the others'.²³ Choosing any solution will inevitably have consequences for other reasons and priorities. In the result, a broad focus is required, and not only the rights and wrongs as they appear to emerge from the positions of two contesting parties in opposed litigation.

When determining these issues, the executive and legislature, with their access to empirical evidence and sensitivity to many competing demands, are said to be better suited to polycentric decision-making, which entails the ability to make broad judgments about the best solutions to complex problems. In particular, it requires the careful allocation of scarce resources.

But these objections seem doubtful. The suggestion that judicial decisions in other areas are more predictable and that 'background norms' in other areas are less contested seem unsubstantiated. In this, the challenge to judges' capacity to make sound decisions in socio-economic rights litigation raises merely familiar questions arising from the larger debate whether judges should be able to make controversial decisions with major public impact.

Nevertheless, the complaint that institutional incapacity (by training, process and resource limitation) inhibits reliable judicial decision-making in this area has substance. Much depends on *how* the courts exercise their powers here.

On legitimacy, an objection stemming from separation of powers, objectors note that socio-economic rights require courts to direct the way the government allocates state resources. Granting remedies in socio-economic rights litigation will therefore have significant budgetary and policy implications. This gives courts the power to specify how other branches of government distribute their resources, thereby making

²³ I Currie & J de Waal *The Bill of Rights Handbook* (2005) 569. The Constitutional Court in *Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC) considered these and additional objections to the inclusion of socio-economic rights in the Constitution. The additional objections were that socio-economic rights are not universally accepted fundamental rights (para 76); and that they 'are not justiciable, in particular because of the budgetary issues their enforcement may raise' (para 78). Both these and the legitimacy concern were resoundingly rejected by the Constitutional Court.

budgetary allocations and comparable policy decisions susceptible to judicial intervention. Because the judiciary is unelected and unrepresentative, it is argued that judicial decision-making here is not democratically legitimate. This objection is also dubious. It appears to invoke the misleading distinction between ‘positive’ and ‘negative’ rights,²⁴ which the South African debate eventually escaped.

Human rights of all kinds give rise to both positive and negative duties.²⁵ The supposed distinction between positive and negative rights is too crude to do the work sceptics about socio-economic rights impose on it. Whether it is proper for judges to decide socio-economic rights cases is coordinate with the question whether it is proper for them to decide any politically contested cases at all.

Absorbing the practical implications of including justiciable social and economic rights in South Africa’s Constitution involved developing legal education curricula that reflected concerns broader than those previously embraced. This included access to the law, including customary law, and social justice.²⁶ But constitutional transformation also required a broader development of the very interpretative mechanisms on which South African law was based and within the confines of which South African practitioners and judges did their work.

The judiciary at that time had little conception of constitutional rights, but was obliged to become versed.²⁷ Before apartheid formally ended, the judicial branch was institutionally subordinate to the legislature. It acted with limited discretion and limited power. Parliamentary supremacy restricted the courts’ powers to review legislation. But of course institutional subordination caused and reflected ideological subordination, too. It is well documented that the South African legal system, and therefore

²⁴ See Henry Shue *Basic Rights: Subsistence, Affluence, and US Foreign Policy* (2 ed) (1996); Sandra Fredman *Human Rights Transformed: Positive Rights and Positive Duties* (2008).

²⁵ Taken on its own, the distinction between positive and negative duties is also inadequate to wholly represent the range of obligations arising from human rights. Section 7(2) of the South African Bill of Rights provides that ‘The state must respect, protect, promote and fulfil the rights in the Bill of Rights’.

²⁶ Greenbaum (note 13 above) 467 (quoting J Jeffrey ‘Remarks at the Prestige Lecture’ and citing CRM Dlamini ‘The law teacher, the law student and legal education in South Africa’ (1992) 109 *South African Law Journal* 595, 598).

²⁷ For the comparable position in the United Kingdom, see McGoldrick (note 7 above) and Thomas (note 7 above).

the culture of the judiciary, was dominated by legalism under apartheid.²⁸ Writing in 1989, Martin Chanock noted:

*Legalism has been prominent in the political culture of South Africa. The oppressions of apartheid have, until the beginnings of its disintegration, characteristically been imposed not by the random terror of the death squad, but by the routine and systematic processes of courts and bureaucrats.*²⁹

Many existing judicial powers were, as Chanock notes, ‘engulfed by an advancing tide of bureaucratic discretion’.³⁰ The enormous power in the hands of the executive led to an administrative law facilitating administrative power rather than keeping it in check.

III CONSTITUTIONAL PRIMACY AND CONSTITUTIONAL EDUCATION

The advent of the post-apartheid constitutional era decisively expanded the role of the judiciary.³¹ It has done so in a number of ways.

First, Parliamentary sovereignty was binned. The Constitution became expressly supreme.³² And it established an independent judiciary subject only to the Constitution and the law.³³ The courts were primarily responsible for navigating the new relationship between existing law and the Constitution. The common-law and legislative scheme had developed over the course of more than a century and looked, mostly with reverence,³⁴ to specific ancestors in Roman, Roman-Dutch and English law. It had manifested an established body of precedent, which facilitated a measure of legal certainty. Constitutional law is newer. The Bill of Rights in particular is in places skeletal. Yet it trumps the common law when they come into conflict.

Judges, even in the Constitutional Court itself, were cautious of the new order. In *Mhlungu*,³⁵ Kentridge AJ, with whom Chaskalson P, Ackermann J

²⁸ See Dugard (note 10 above).

²⁹ M Chanock ‘Writing South African Legal History: A Prospectus’ (1989) 30 *Journal of African History* 265.

³⁰ Chanock (note 29 above).

³¹ This is what the United Kingdom Human Rights Act, 1998 has done, too: see Thomas (note 7 above) 372; McGoldrick (note 7 above) 920 and 949.

³² Sections 1(c) and 2 of the Constitution.

³³ Section 165.

³⁴ See, generally, Edwin Cameron ‘Legal chauvinism, executive-mindedness and justice: LC Steyn’s impact on South African Law’ (note 11 above).

³⁵ *S v Mhlungu* 1995 (3) SA 867 (CC).

and Didcott J agreed, laid it down ‘as a general principle’ that, where it is possible for a court to decide any case, civil or criminal, without reaching a constitutional issue, ‘that is the course which should be followed’.³⁶ This statement was prompted by institutional deference to the then-unclear status of the Appellate Division (later the Supreme Court of Appeal), but perhaps also by fear that unwarranted constitutional cases and claims could flood the new court.

Although in a minority judgment,³⁷ Kentridge AJ’s pronouncement was shortly after given unanimous ratification in *Zantsi*.³⁸ It proved influential and was repeatedly cited. It had to be given its quietus, eventually, more than 20 years later, in the court’s decision in *Jordaan*.³⁹ What the court there said is instructive about the historical progression of constitutional predominance:

Mhlungu should be set in its proper perspective. It was decided under the interim Constitution, where this Court had solely constitutional jurisdiction, and the Appellate Division of the Supreme Court, which became the Supreme Court of Appeal, had solely non-constitutional jurisdiction. That bifurcation of appellate power, and the cautions and courtesies it necessitated, has long been expunged from our constitutional landscape. From 4 February 1997, the Constitution conferred constitutional jurisdiction on the Supreme Court of Appeal, subject to appeal to this Court, and at the same time empowered this Court to develop the common law. The consequence of this was both logical and inevitable. This Court was in due time given jurisdiction to decide non-constitutional matters that raise arguable points of law of general public importance which it ought to consider. It thus became the apex Court on all matters. The result is that under the final Constitution the approach Mhlungu espoused has long since been abandoned in favour of its opposite, namely that constitutional approaches to rights determination must generally enjoy primacy. Far 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.⁴⁰

³⁶ *Mhlungu* (note 35 above) para 59.

³⁷ It seems, though, that Kriegler J concurred in this aspect of the judgment; see the judgment of Kriegler J para 100.

³⁸ *Zantsi v Council of State, Ciskei* 1995 (4) SA 615 (CC).

³⁹ *Jordaan v City of Tshwane* 2017 (6) SA 287 (CC), echoing on this point the minority judgment in *My Vote Counts NPC v Speaker of the National Assembly* 2016 (1) SA 132 (CC) para 51, from which the majority there did not differ.

⁴⁰ *Jordaan* (note 39 above) para 6. The Constitutional Court’s jurisdiction, which was solely constitutional, was provided for in s 98 of the interim Constitution. Section 101(5) of the interim Constitution made provision for the Supreme Court of Appeal’s jurisdiction and read: ‘The Appellate Division shall have no

Second, constitutional supremacy imported a greater role for judges. The unity of the post-constitutional legal system, and the primacy within it of the Constitution, was established only six years after the transition, in *Pharmaceutical Manufacturers*.⁴¹ There the court, chiding the Supreme Court of Appeal for suggesting that the common law continued to exist alongside and independently of the Constitution, asserted the crystalline position. In doing so, it radically asserted the power of the courts to control all exercise of public power under the Constitution:

There are not two systems of law, each dealing with the same subject matter, each having similar requirements, each operating in its own field with its own highest court. There is only one system of law. It is shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control.

Whilst there is no bright line between public and private law, administrative law, which forms the core of public law, occupies a special place in our jurisprudence. It is an incident of the separation of powers under which courts regulate and control the exercise of public power by the other branches of government. It is built on constitutional principles which define the authority of each branch of government, their inter-relationship and the boundaries between them. Prior to the coming into force of the interim Constitution, the common law was 'the main crucible' for the development of these principles of constitutional law. The interim Constitution which came into force in April 1994 was a legal watershed. It shifted constitutionalism, and with it all aspects of public law, from the realm of common law to the prescripts of a written constitution which is the supreme law. That is not to say that the principles of common law have ceased to be material to the development of public law. These well-established principles will continue to inform the content of administrative law and other aspects of public law, and will contribute to their future development. But there has been a fundamental change. Courts no longer have to claim space and push boundaries to find means of controlling public power. That control is vested in them under

jurisdiction to adjudicate any matter within the jurisdiction of the Constitutional Court.' The subsequent conferral of constitutional jurisdiction on the Supreme Court of Appeal is in s 168 of the Constitution. Section 173 of the Constitution confers on the Constitutional Court the power to develop the common law. The enactment of the Constitution Seventeenth Amendment Act 72 of 2012 gave this court final appellate jurisdiction in all cases; the power to determine appeals in non-constitutional matters is contained in s 167(3)(b)(ii) of the Constitution. Lastly, regarding the point that 'constitutional approaches to rights determination must generally enjoy primacy' see the minority judgment in *My Vote Counts* (note 39 above) para 51, with which the majority judgment expressed no disagreement.

⁴¹ *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic* 2000 (2) SA 674 (CC).

*the Constitution which defines the role of the courts, their powers in relation to other arms of government, and the constraints subject to which public power has to be exercised. Whereas previously constitutional law formed part of and was developed consistently with the common law, the roles have been reversed. The written Constitution articulates and gives effect to the governing principles of constitutional law.*⁴²

Consistently with this, *Jordaan*, in slaying the *Mhlungu* ghost, emphasised that the Constitution explicitly requires courts to develop the common law to give effect to rights in the Bill of Rights.⁴³ The Constitutional Court in *Carmichele* interpreted the Constitution to mandate the development of the common law ‘within the matrix of [the Constitution’s] objective normative value system’.⁴⁴ The Constitution similarly gives courts the power to interpret legislation in a way which best gives effect to the Bill of Rights or to strike it down as unconstitutional.⁴⁵

The sheer extent of courts’ new review powers coupled with the explicit transformative nature of the Constitution⁴⁶ necessarily shifts the way in which courts must interpret the law. Substantive arguments, rather than legalistic or authoritarian argument, should generally prevail. Deputy Chief Justice Moseneke, perhaps over-optimistically, articulated this as an ‘epoch making opportunity’ which ‘liberates the judicial function from the confines of the common law, customary law or statutory law or any other law to the extent of its inconsistency with the Constitution’.⁴⁷

So, dismantling apartheid legislation was more than a matter of excising overtly discriminatory provisions and bringing all within one legal system.⁴⁸ The Constitution warranted deliberate transformation of all law, though through systematic and systemic adjustment, rather than outright overhaul. Dennis Davis describes transformation as requiring ‘all law which was inherited from the apartheid state, including legislation

⁴² *Pharmaceutical Manufacturers* (note 41 above) paras 44–45.

⁴³ Sections 8(3)(a) and 173. Professor Anton Fagan has animatedly contested this. See A Fagan, *Undoing Delict: The South African Law of Delict under the Constitution* (2018) ch 4, 106–120.

⁴⁴ *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC) para 54.

⁴⁵ Sections 172(1)(a) and 39(2).

⁴⁶ See *Daniels v Scribante* 2017 (4) SA 341 (CC).

⁴⁷ Justice Dikgang Moseneke ‘The Fourth Bram Fischer Memorial Lecture: Transformative adjudication’ (2002) 17 *South African Journal on Human Rights* 309 at 318.

⁴⁸ See generally Edwin Cameron & Max Taylor ‘The untapped potential of the Mandela Constitution’ (2017) *Public Law* 382–407.

and the entire body of common law' to be constitutionally audited and, if necessary, repealed, changed or developed.⁴⁹

This necessarily affects private law. The Constitution has taken hold in contract,⁵⁰ delict⁵¹ and property⁵² law. But transformation takes place within each law's own 'developmental paradigm'.⁵³ Subject to the Constitutional Court's observations in *Jordaan*,⁵⁴ legislation must be examined as a first step before direct reliance on the Constitution.⁵⁵

For judges, this '[invitation] into a new plane of jurisprudential creativity and self-reflection about legal method, analysis and reasoning'⁵⁶ has made the adjudicative task significantly more challenging. Gone are the days where a judge could mechanically apply precedent to the case before them. All law is now viewed through a constitutional prism and the Constitution's rights and values give the law 'shape and colour'.⁵⁷

IV THOUGHT-SHIFT TO RIGHTS-BASED APPROACHES – A CHANGE IN DISCOURSE

Changes to methods of adjudication must obviously be accompanied by changes in legal education. Pre-democratic legal practice and scholarship were both 'steeped in the formal vision of law'⁵⁸ and did not sufficiently account for 'substantive reasoning'.⁵⁹

⁴⁹ Dennis Davis 'Legal transformation and legal education' in Michael Bishop & Alistair Price (eds) *A Transformative Justice: Essays in Honour of Pius Langa* (2015) 181.

⁵⁰ See *Barkhuizen v Napier* 2007 (5) SA 323 (CC).

⁵¹ See *Carmichele* (note 44 above).

⁵² See *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 (2) SA 104 (CC) para 34: 'The purpose of section 25 has to be seen both as protecting existing private property rights as well as serving the public interest, mainly in the sphere of land reform but not limited thereto, and also as striking a proportionate balance between these two functions.'

⁵³ Davis (note 49 above) 181.

⁵⁴ *Jordaan* (note 39 above).

⁵⁵ Davis (note 49 above) 177–179. See also *Walele v City of Cape Town* 2008 (6) SA 129 (CC) paras 29–30 and *Nokotyana v Ekurhuleni Metropolitan Municipality* 2010 (4) BCLR 312 (CC) paras 47–49.

⁵⁶ Moseneke (note 47 above).

⁵⁷ *My Vote Counts* (note 39 above) para 51.

⁵⁸ Alfred Cockrell 'Rainbow Jurisprudence' (1996) 12(1) *South African Journal on Human Rights* (cited in Johan Froneman 'Legal reasoning and legal culture: Our "vision" of law' (2005) 16 *Stellenbosch Law Review* 3, 4).

⁵⁹ See Johan Froneman (note 58 above).

Drawing on PS Atiyah and RS Summers, Justice Johan Froneman articulates the difference:

Formal reasons are different [from substantive reasons] in that they seldom invoke any considerations of rightness or goals: they are primarily concerned with the formal validity of any rule or decision. Once it is ascertained that the rule or decision emanates from a competent authority such as the legislature or a court whose judgments are binding in the hierarchy, it becomes mandatory to follow it and no further (substantive) reasoning is allowed.⁶⁰

Obviously, the substantive approach does not mean that courts should usurp legislative or executive functions. But it does mean, as ‘part of the package, [that] courts can no longer take shelter in the concept of “judicial restraint”, or the age-old idea that common-law judges do not make law’.⁶¹ Formal reasoning will not be evaded simply out of restraint. It is the courts’ duty to test state action or inaction against the Constitution.

And the obligation to engage in substantive reasoning has a knock-on effect. A judge has to be explicit about the reasons for the outcome of a case. This requires the judge to explain why a decision is ‘right’ or what ‘goal’ it aims to achieve.

But where and how are judges to be trained in the vague notions of rightness? As Justice Froneman points out, to invoke formalistic rationales does not solve the problem. Too often formal reasoning merely masks the substantive reasoning that underpins judgments.

Writing in 2015, almost two decades after the enactment of the Constitution, Judge Dennis Davis asks whether the teaching of private law has changed since the introduction of constitutional democracy, and whether law schools have substantially shifted from using ‘a culture of authority to existing precedent’ to one of justification under the Constitution. He answers these questions with a resounding ‘No’. He examines two leading law textbooks, on contract and delict, and finds that both fail to ‘construct a working methodology by which the subject-matter of the book [that is, contracts or delicts] can be interrogated to test for congruence with the Constitution’.⁶²

This he considers one of Chief Justice Langa’s five key principles of a transformative legal education: that ‘[t]here can no longer be an intellectual apartheid between constitutional and human rights law and traditional

⁶⁰ Johan Froneman (note 58 above) at 6.

⁶¹ Eric Kibet & Charles Fombad ‘Transformative Constitutionalism in Africa’ (2017) 17(2) *African Human Rights Law Journal* 340, 359–360.

⁶² Davis (note 49 above) 185.

private and commercial law'.⁶³ All law must be understood in and interpreted from the normative constitutional framework⁶⁴ though resting on a sound basis of skills in analytical argument and a comprehensive knowledge of legal principles.⁶⁵

This is closely linked with the notion that established legal principles are no longer sacrosanct: all depend on the source of their authority. And all law must be critically tested against the Constitution.⁶⁶

V HOW TO EDUCATE ON 'RIGHTS'?

Transformation of legal practice is inextricably linked to the transformation of institutions of legal learning. Yet, as Dennis Davis shows, little has changed in some of the primary texts used by university law students. The methodology of teaching law also warrants attention. As Quinot expounds in his 'new theoretical framework' for legal education, moving from an authoritarian system of governance to a constitutional democracy requires examination of teaching practices and their theoretical bases.⁶⁷

Quinot rightly notes that the South African legal culture remains 'highly conservative'. His concern is what the shift in the nature of post-democracy law means for the teaching of law.⁶⁸

If the Constitution enjoins practitioners and judges to seek substantive legal solutions, then, naturally, teaching too must encompass more than merely formal legal principles. Quinot's framework includes a less authoritarian and less hierarchical model of teaching which entails greater student involvement.⁶⁹ It approaches law as one integrated system flowing from the Constitution and not as consisting of distinct branches with isolated explanations of their constitutional development.⁷⁰ It also encompasses matters beyond law, including 'morality and policy, even politics'.⁷¹ And it compellingly captures the necessary shift in teaching legal analysis from

⁶³ Davis (note 49 above) 175.

⁶⁴ Davis (note 49 above) 179.

⁶⁵ Davis (note 49 above) 175.

⁶⁶ Davis (note 49 above) 175.

⁶⁷ Geo Quinot 'Transformative Legal Education' (2012) *South African Law Journal* 411, 412.

⁶⁸ Quinot (note 67 above) 414.

⁶⁹ Quinot (note 67 above) 416.

⁷⁰ Quinot (note 67 above) 415.

⁷¹ Quinot (note 67 above) 411.

viewing the strength of a legal position as based on the authority of its source to being based on ‘sound normative considerations’.⁷²

For those of us on the judiciary who had completed our legal training when democracy came, some education in rights was fundamental to trying to achieve competence.

The South African Judicial Education Institute Act 14 of 2008 was passed with the express purpose of providing judicial training ‘having due regard to both our inherited legacy and our new constitutional dispensation’.⁷³ But South Africa is still a young democracy, and the contours of rights in the Bill of Rights are still relatively undeveloped. And judges are required to determine the scope and limit of these rights. They cannot merely apply law and precedent.

Pre-democracy jurists may draw on their personal experiences of what it meant not to have rights (and, in many of our cases, to participate in the deprivation of others’ rights, or to benefit from it).

Klare’s concept of the ‘historical self-conscious doctrine’ is relevant here. He says a judge adjudicating in a transformative constitutional society must pay regard to the ‘legal history, traditions and usages of the country’. In South Africa, this means the legal history of apartheid and racism.

The influence on constitutional interpretation is described by O’Regan J in *Makwanyane* in relation to the interim Constitution. She points out that the language is broad. How is the court to determine its content?

This question is at least partially answered by section 35(1) of the Constitution which enjoins this court in interpreting the rights contained in the Constitution to ‘promote the values which underlie an open and democratic society based on freedom and equality’ ...

No-one could miss the significance of the hermeneutic standard set. The values urged upon the court are not those that have informed our past. Our history is one of repression not freedom, oligarchy not democracy, apartheid and prejudice not equality, clandestine not open government ...

[G]enerally section 35(1) instructs us, in interpreting the constitution, to look forward not backward, to recognise the evils and injustices of the past and to avoid their repetition.⁷⁴

The two powerhouse practical implements of forward-looking justice have been (i) extremely broad rules of legal standing⁷⁵ and (ii) shielding

⁷² Quinot (note 67 above) 417.

⁷³ Section 2(a).

⁷⁴ *S v Makwanyane* 1995 (3) SA 391 (CC) paras 321–323.

⁷⁵ Section 38 of the Constitution (s 7(4)). An early case applying a broad approach was *Beukes v Krugersdorp Transitional Local Council* 1996 (3) SA 467 (W).

public interest litigants, and litigants against the state, from adverse costs orders,⁷⁶ except where their litigation is wrong-headed.⁷⁷

Those coming into professional life without a meaningful first-hand memory of apartheid (or with an all-too-quickly fading memory of it) may understand. But perhaps not. This is compounded by the fact that it is inevitable that, over time, those who become judges will more rarely come from those who have been denied major rights. However, they will have been taught in a new era which, we must hope, embraces the substantive approach to constitutional learning, teaching and adjudication.

More important even are non-lawyers. The near quarter-century of democracy and constitutionalism has led – beyond the political class and its elite, and the lawyers who generally serve it – to widespread internalisation of notions of constitutionalism and of constitutional agency.⁷⁸ It is this that may secure our constitutional transition, more even than the efforts of judges and lawyers. When ‘ordinary people’⁷⁹ regularly and insistently claim their rights, activate assertively for them, demand accountability and come to law for vindication, then we may hope that our constitutional order may become secure.

VI CONCLUSION

Our Constitution is barely 25 years old. It has endured several strains but has emerged resilient. It has been shown capable of enabling invocation of its mechanisms and values by rural people, the urban homeless and activist groups as well as the business and political elites. The real test will be the extent to which the Constitution is able to afford redress to the disposed, protection from discrimination for those oppressed, a haven from abuse of power to those persecuted and greater equality and dignity

⁷⁶ *Biowatch Trust v Registrar Genetic Resources* 2009 (6) SA 232 (CC).

⁷⁷ A summation of all that has happened in public interest litigation, and how it was made possible, is found in Steven Budlender, Gilbert Marcus & Nick Ferreira *Public Interest Litigation and Social Change in South Africa: Strategies, Tactics and Lessons* (2014) <https://www.atlanticphilanthropies.org/wp-content/uploads/2015/12/Public-interest-litigation-and-social-change-in-South-Africa.pdf> (accessed 7 November 2019).

⁷⁸ This is explained and defended in Cameron (note 1 above – Scarman lecture) and in Edwin Cameron *Justice: A Personal Account* (2014).

⁷⁹ The quotation marks express the hope that it may just be silly to distinguish lawyers from other people, especially ordinary people.

for the still subordinated majority of South Africa's poor. These challenges have required significant adjustments of mind and method on the part of lawyers and judges, adjustments that have to a significant, though not complete, extent been successfully effected.

THE CASE FOR MORE ACCESSIBLE JUDGMENTS

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*Have something to say and say it as clearly as you can. That is the only
secret of style.* (Mathew Arnold)

I INTRODUCTION

Section 34 of the Constitution guarantees the right of everyone to have his or her legal dispute resolved in a fair and public hearing before a court of law or, where appropriate, by another independent and impartial tribunal or forum. In order to give proper content to this constitutionally enshrined right, one must accept that litigants are entitled not only to an expeditious and fair public hearing but also to reasonably swift pronouncements on those issues that fall for decision in their matters. Significant progress has been made to expedite the finalisation of both civil and criminal trials. To this end, the Norms and Standards promulgated by the Chief Justice prescribe strict guidelines and time limits for finalising trials and delivering judgments.¹

An important component of the constitutional right of access to courts is that judgments must be written in simple and clear language so as to make them easily understandable. Since the judiciary's primary function is to resolve disputes between litigants, judgments must explain the reasoning on which findings of fact and pronouncements on the law are based.

Regrettably, though, judgments are often still written in a convoluted and anachronistic manner which makes them difficult to understand, not only for laypeople but also for other lawyers. It is almost as if lawyers deliberately set out to obfuscate and confuse the reader. I know of legal practitioners who regard it as an insult if a layperson is able to understand and readily discern the meaning of their legal writing.

In order to illustrate the disastrous consequences that can flow from such imprecise and convoluted legal writing, I share the following anecdote with readers. Years ago, while I was still a practitioner, I represented a client in a defamation lawsuit. After a few days of intense legal battle, my opponent and I submitted written heads of argument and patiently awaited judgment. It took months of diplomatic cajoling and pleading for

¹ Government Notice 147 GG 37390 of 28 February 2014.

judgment to be delivered. Regrettably, when the terse, one-page judgment was eventually delivered, it was not clear, either from the reasoning or findings, which party had won. As a result, the matter was settled.

Unfortunately, it is often unavoidable to use complex legal concepts. But judicial officers must make an effort to explain these concepts so that the judgment is understandable. Where some of these concepts are conveniently expressed in Latin, a useful practice has developed to translate them in parentheses.²

To complicate matters further, we are still inclined to verbosity and imprecise language that obfuscates even the most commonplace legal principle. Fortunately, our law reports are replete with examples of judgments that are written in a clear, concise and logical style so as to make even the most difficult legal principles easily understandable to the reader. Some of us read these judgments with a sense of awe, but often struggle to discern what it is that makes them such a joy to read.

Bearing in mind that the quest for the simplification of legal writing is probably as old as the legal profession itself, I do not intend this article to be a comprehensive discourse on the rules of grammar, punctuation or legal style. It is rather an effort to inspire judicial officers to emulate those fortunate colleagues who have sipped from the holy grail of legal clarity. The discourse in this article will thus focus on a variety of grammatical rules of usage and ideas that will hopefully assist in simplifying our legal writing, infuse it with conciseness and clarity, and thereby render it easily understandable, not only to other lawyers who may demand erudition but also to those anxious litigants whose lives may well depend on its contents.

II THE IMPORTANCE OF THE OPENING PARAGRAPHS

The astute writer never loses sight of the fact that the reader will be either captivated or alienated by the first few paragraphs of a document. More often than not, judgments are sabotaged by ill-considered introductory remarks which set the tone for the confusion that will unavoidably follow. Bryan A Garner in his celebrated book, *The Elements of Legal Style*, has the following to say about the importance of opening paragraphs:

*Our rule of structure is ironclad: the capital importance of the openers. The opening paragraphs get the subject underway; it must engage readers, make them want to stay the course. A weak opener weakens all that follows.*³

² For example, the expression *ex abundante cautela* can be translated to mean 'for the sake of greater caution'.

³ Bryan A Garner *The Elements of Legal Style* (2002) 60 and 61.

The following is an example of an opening paragraph written in elegant and flowing prose that immediately captures and holds the reader's attention:

On the night of 8th May 2008 plaintiff discovered for himself the truth of the adage that brandy and depression make bad bedfellows. Late that night plaintiff was sitting disconsolately at the bar of the Bermuda Night Club in Jeffreys Bay nursing the latest in a long succession of alcoholic drinks, as well as nursing an ego badly battered in the aftermath of a bruising divorce, when a number of policemen entered the premises and ordered him to leave. In a less fraught situation plaintiff would no doubt have informed them that it was actually his brother they were looking for, it having been his unruly conduct at the other end of the bar which had caused the owner of the club to call the police.⁴

The ensuing paragraphs of the judgment, in the space of a few concise sentences, ensure that the reader is promptly informed of the factual and legal issues which fell for decision.

Thus, the first few paragraphs of a judgment must have the effect of immediately introducing the reader to the heart of the matter. This can be achieved only if the writer takes care to tell the reader up front, in succinct and clear terms, who the parties to the litigation are; what issues will be considered in the course of the judgment; the relevant facts and applicable legal principles that will be considered in the resolution of the issues; and the arguments presented for and against. This approach of stating the issues up front (also referred to as the 'deep question'), has the salutatory effect of putting everything that follows into perspective and providing structure and logic to one's writing.

Conversely, we have no doubt all come across judgments where the relief sought in the notice of motion is quoted almost verbatim in the first few paragraphs, whereas it would have been preferable instead to summarise and explain the essence of the relief sought in a few crisp sentences. The effect of this unfortunate tendency is the wholesale importation of passages drafted by lawyers who are known for their convoluted and repetitive style. The reader is then immediately antagonised by what will be perceived as a careless and lackadaisical writing style.

In addition, following this simple rule of stating the 'deep question' upfront in clear and concise terms, compels the writer to put in the hard work required to distil and assimilate the relevant facts, do the legal research, strive to understand the applicable legal principles, and contemplate the issues that fall for decision in a logical and structured manner. This not

⁴ Per Pickering J in *Smit v Minister of Safety and Security for South Africa* (51/2010) [2016] ZAECPEHC 73 (22 November).

only inspires confidence in the reader but also benefits the writer, whose discourse will then be infused with a measure of logic and certainty.

III TO QUOTE OR NOT TO QUOTE

The practice of unnecessarily quoting long passages from the papers, other judgments or academic writings often indicates that the writer has chosen the easy way out. The hard and responsible option is to read the passage on which a legal conclusion will be based to understand its relevance and import, and then explain it in the simplest and clearest terms possible. While there are certainly instances where quoting cannot be avoided, explaining the essence of a passage in a few concise and simple sentences makes for easier reading. This also applies to excerpts from the evidence, where there is still a tendency to quote long passages. While it may sound harsh, this practice can almost invariably be ascribed to lethargy on the part of the writer. To be able to explain the essence of the *ratio* (basis on which a case is decided) of a case or succinctly summarise the evidence adduced during a trial, requires hard work and diligence. It is only when an authority is read with a view to understanding and explaining it in unambiguous and concise terms, that the reader can be persuaded that sound conclusions have been reached.

In addition, the wholesale importation of quotations often puts the reader off. The reader may be driven to the conclusion that the writer was too lazy to read and understand the quoted passages and now requires him or her to do all the work. Where quotations cannot be avoided and may be necessary to illustrate some obscure legal principle or to establish the authoritative nature of the passage relied upon, one should try as far as possible to weave the quotations into one's prose.

Nevertheless, most legal principles that require explanation in judgments are well established (if not trite) and it thus makes for greater clarity if they are explained in one's own words.

IV FOLLOW THE ARROW OF TIME: THE IMPORTANCE OF CHRONOLOGY

In his best-selling book, *A Brief History of Time*, the renowned physicist, Stephen Hawking, explains the concept of time as an arrow that moves in one direction only. While I had difficulty in understanding most concepts explained in his book (even after the fourth reading), the one thing that I did understand is that the unrelenting forward motion of time is an immutable law of the universe.⁵

⁵ Stephen Hawking *A Brief History of Time* (2017) ch 9.

Moreover, our brains are also genetically designed more easily to understand and assimilate facts that have been presented in a logical and sequential order. Any writing that disturbs this law will fail to hold the attention of the reader. While it is acceptable for a novelist, whose objective is to create dramatic effect, to move back and forth in time, as lawyers we do not have this luxury. The nature of our trade demands logic and sequence.

It is for these reasons that Garner stresses the importance of following an issue-by-issue structure so as to order thoughts logically and reveal 'the sequence of thinking or the merit of the point under discussion'.⁶ If the issues that fall for decision in the case are not stated succinctly and precisely upfront, it will invariably upset the apple cart. It will affect the logical and chronological sequence of other issues such as the summary of relevant facts; the legal principles relevant to the resolution of the issues; the critical analysis of the arguments for and against; and the resolution of the disputes on a basis supported by the mentioned factors.

Consequently, we must accept that, without chronology, we cannot hope to achieve clarity and, for that matter, concision. A failure to present issues in a chronological and logical manner irritates readers. It also invariably requires the writer to provide unnecessary and tortuous explanations to put issues into perspective. It thus only serves to make our writing even more convoluted.

What is more, structuring one's thoughts in a chronological and logical arrangement compels one to review evidence with a critical eye in order to discern and summarise only the relevant facts. It is unfair to bury the reader under an avalanche of facts that have no relevance to the resolution of the disputes. The astute writer will ensure that only those facts that underpin the reasoning on the facts and law, and illustrate the soundness of factual or legal findings, are presented in a chronological and logical manner.

V WHERE HAVE ALL THE SIMPLE WORDS GONE?

The most frequent and justifiable criticism against legal writing is that it is verbose and makes for difficult and ponderous reading. As I have mentioned earlier, it is, for obvious reasons, not always possible to avoid using technical legal terminology to illustrate a point. However, while one can understand the difficulties involved in explaining complex legal principles in simple, precise language, there can be no excuse for a failure to summarise the relevant facts in a concise, clear and logical manner.

⁶ Garner *The Elements of Legal Style* (note 3 above) 58.

Moreover, with a bit of effort, most legal jargon can be translated into plain English. The writer who makes a genuine effort to simplify his or her legal writing by identifying and eliminating fancy words and avoiding pompous posturing, will be rewarded with brevity, concision and greater clarity.

In addition, unnecessary ‘throat clearing’ and circumlocution do nothing to enhance our writing. Instead, they make it more ponderous and difficult to understand. Garner mentions various examples of circumlocution that can easily be simplified, for example: ‘now’ instead of ‘at the present time’; ‘during’ instead of ‘for the duration of’; and ‘because’ instead of ‘reason being that’.⁷ These are merely examples of how one can remove unnecessary words, and it may be useful to compile and keep one’s own list.

We have all no doubt experienced, when reading the well-written prose of an accomplished author, that he or she did not let the words get in the way of the story. Garner quotes the following statement by Samuel Taylor Coleridge (*Specimens of the Table-Talk of Samuel Taylor Coleridge* (1835)) to illustrate the importance of this element of an effective writing style:

*The words in prose ought to express the intended meaning and no more; if they attract attention to themselves, it is, in general, a fault. In the very best of style, as Southey’s, you read page after page, understanding the author perfectly, without taking notice of the medium of communication; – it is as if he had been speaking to you the whole while.*⁸

Such concise and effortless communication of facts and legal reasoning should be the main objective of all legal writing. I know of some colleagues who have adopted the practice of reading their drafts out loud. This helps them to ensure fluidity and to discern whether the intended meaning is conveyed with sufficient clarity and conciseness. There would no doubt be as many diverse strategies to achieve these objectives as there are judges. The main imperative is, however, not to allow verbosity to prevent you from making your point.

VI YES, GRAMMAR AND PUNCTUATION STILL MATTER

We all know anecdotes about altercations generated by disputes regarding the correct placing of a comma. And we have all no doubt had occasion to debate, collegially I hope, the proper use of punctuation. Punctuation is indeed an important aspect of writing. Not only does it guide the reader

⁷ Garner *Elements of Legal Style* (note 3 above) 53.

⁸ Garner *The Elements of Legal Style* (note 3 above) 230.

when it is necessary to pause or introduce related phrases, but it can also change the meaning of sentences.

The proper use of punctuation can also help to clarify and simplify legal writing. It is important to understand how to use the serial comma to separate items and thus avoid ambiguity, when to use the comma to set off another introductory phrase, how to use the apostrophe in the singular or plural form of possessive nouns, and how to use the semicolon to signify a stronger break. While it may not be possible within the scope of this article to traverse all the rules on punctuation (this thorny issue alone has been the subject of numerous erudite tomes), it will help if we make an effort to understand the basic principles of punctuation.

Other rules of grammar, too numerous to mention here, are all intended to promote clarity and conciseness. Some useful suggestions are the following:

- Avoid abstraction by using the active voice (e.g. ‘she wrote the judgment’ instead of ‘the judgment was written by her’). Using the active voice usually requires fewer words, reflects chronological sequence and generally serves to make things easier for the reader.⁹
- Try to avoid splitting the infinitive unless you are able to discern the rare occasions when it is grammatically acceptable to do so. The infinitive is the form of a verb preceded by *to*. Splitting the infinitive is when you place a word between *to* and the verb, e.g. ‘to briefly summarise’ instead of ‘to summarise briefly’.
- Structure your paragraphs so that you deal with only one idea in a paragraph.¹⁰ The purpose of dividing a document into paragraphs is to present it in easily readable segments of text. Readers accordingly assume that they will be required to consider only one idea or proposition per paragraph. Stating a multiplicity of ideas, propositions or issues in one paragraph will only make your document more complex and daunting for the reader. It is also a good idea to vary the length of your paragraphs, not only for visual effect but also to retain the reader’s interest.
- Develop a strategy to provide transition between paragraphs by either using pointing words (e.g. *this*, *these*, *that*), words that reverberate ideas or expressions used in the preceding paragraph (e.g. *This*

⁹ Bryan A Garner *Legal Writing in Plain English: A Text with Exercises* (2013) 25: ‘It better reflects a chronologically ordered sequence (ACTIVE: actor → action → recipient of action) as opposed to the reverse.’

¹⁰ William Strunk *The Elements of Style* (2014) ch III para 9.

unexplained phenomenon or *This spirit of defiance*), explicit connectives (e.g. *furthermore, moreover, therefore, nevertheless*), or headings to ensure continuity. It will also help to know that it is indeed grammatically acceptable to start sentences with ‘*And*’ or ‘*But*’.¹¹

- Simplify your sentences further by keeping the subject, verb and object together. Following this rule will help make the sentence easier to understand.
- The length of your sentences, more than any other aspect of your writing, will determine how readable your document will be. According to Garner, the general rule is that sentences should on average not be longer than 20 words.¹² As with paragraphs, it is important to vary the length of sentences so as to avoid boring the reader. While it will not always be possible to achieve this goal and still explain your thoughts effectively, it is the striving for concision that will improve your writing.

VII START WRITING SOONER RATHER THAN LATER

Writing a judgment is an exacting and complicated process that requires hard work and singular focus. If approached correctly, however, it can also be a supremely satisfying experience. But you can only enjoy the process of writing a judgment if you start with a draft as soon as possible after hearing argument. Then the evidence and arguments are still fresh in your mind and you can compose your judgment with confidence. If you leave it for too long, it becomes progressively more difficult with the passage of time even to start producing a draft. Apart from unfairly prejudicing the litigants, an unduly long delay may result in a half-cooked document that will be difficult to understand.

VIII THE IMPORTANCE OF REPEATED REVISION

We have all experienced how difficult it is to eliminate spelling and grammatical errors completely. After the third or fourth reading of our

¹¹ See also Garner *Legal Writing in Plain English* (note 9 above) 50: ‘Another point is to begin sentences with *And*, *But*, and *So* – especially *But*. You do this in speech all the time. Good writers routinely do it in print – nearly 10% of the time. But legal writers often lapse into stiffer openers like *Similarly*, *Consequently*, and *Inasmuch as*. Try to replace these heavy connectors with faster, more conversational ones.’

¹² Garner *Legal Writing in Plain English* (note 9 above) 19 para 6.

own writing we become blind to obvious mistakes as the mind becomes progressively lazier and sees what ought to be there instead of the written word. It is not always possible to eliminate all mistakes even if we have the luxury of having our judgments proof-read by researchers. However, too many obvious grammatical and spelling errors conjure up negative images in the mind of the reader. How can the reader trust your analysis of complicated evidence and legal principles when you do not even make an effort to dot the i's and cross the t's? It is therefore good practice to read your judgment a few times over. Then leave it to 'stew' for a week or two (or at least overnight). When you read it again, with your mind refreshed, the errors will become easier to detect. This strategy, however, presupposes that we give ourselves the luxury of allowing our judgments to lie fallow for some time before delivery.

IX CONCLUSION

We often make the mistake of thinking that lay litigants are not interested in reading and understanding our judgments. In my experience, nothing can be further from the truth. The respected author of *The Principles of the Law of Contract*, Professor Alastair Kerr, related the following anecdote during one of his lectures on Indigenous Law. A postgraduate student had undertaken a field trip into the rural areas to research the oral tradition of customary law. He was particularly interested in the origins of a particular custom and the villagers referred him to one of the local chiefs. He put the issue to the chief and was pleasantly surprised when the latter launched into an erudite exposition of the applicable legal principles. The student was astounded by the accuracy of the chief's analysis and asked him whether the information had been passed on in his family from generation to generation. 'No,' said the chief, 'I read it in Chapter 10 of *Seymour's Customary Law in Southern Africa*.' Of course, the anecdote does not concern a judgment. But it does illustrate the point that non-lawyers do read legal documents.

Admittedly, some litigants may be only interested in the outcome of their cases. However, there are those who may also wish to understand the cogency of the factual findings and pronouncements on the law. By simplifying and making judgments more accessible to litigants, the judiciary will be making a valuable contribution towards realising the constitutional imperative of access to justice. I hope that this article will go some way in helping to achieve this noble objective.

TRANSFORMATION AND THE INTRINSIC VALUE OF A DIVERSIFIED BENCH

MBULELO S JOLWANA

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A lot has been said about the need to transform the South African judiciary so that it reflects the demographic composition of the country. A reading of subsections 174(1) and (2) of the Constitution¹ suggests that the writers of the Constitution had as the goal of this section a judiciary that reflects the gender and racial composition of the country while ensuring that those appointed are appropriately qualified. This unenviable task of transforming the judiciary and thus achieving diversity has been entrusted to the Judicial Service Commission (JSC). Professor Ntlama² has expressed herself on how she views this task. She says:

The JSC has sought to eliminate the general disadvantages of the past. It advances the representativeness of the judiciary in a more meaningful way, and also validates the significance of the JSC's mandate so that it becomes a reality and is not merely a principle on paper. In essence, the JSC – as a unique institution entrusted with the obligation of diversifying the judiciary – is giving effect to the constitutional and legal duty to advance the aspirations of the country.

Most people would appreciate the egalitarian ethos of the Constitution. That appreciation comes with acknowledging that the history of this country has resulted in a situation in which white legal practitioners were enabled to acquire skills that are far above those of their black counterparts. Regrettably, there are people who believe that white practitioners acquired their skills only through sheer hard work, natural flair and acumen. This suggests, indirectly at least, that the acquisition of those skills had nothing

¹ Section 174(1) and (2) of the Constitution provides:

‘(1) Any appropriately qualified woman or man who is a fit and proper person may be appointed as a judicial officer. Any person to be appointed to the Constitutional Court must also be a South African citizen.

(2) The need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed.’

² N Ntlama ‘The Transformation of the South African Judiciary: A Measure to Weaken its Capacity?’ <http://www.nylawreview.com/wp-content/uploads/sites/16/2014/10/Ntlama.pdf>.

to do with the socio-political history of this country. This is unfortunate, disingenuous denialism of how deeply the history of this country affected the advancement of black legal practitioners in their chosen career. The reality, though, is that 25 years since democracy, we are still saddled with the legacy of the past.

This article will focus on the intrinsic value of transforming and diversifying the judiciary as is required by section 174(2) of the Constitution. This section would either not have been necessary at all or would have been crafted differently had the history of our country not been what it is. The article will also highlight the importance of understanding the depth of true transformation – how it is more than just a constitutional imperative but is essential in the creation of unity in diversity within the judiciary. Finally, it will look at the intrinsic value of jurisprudential transformation, paying particular attention to customary law as an illustrative example; and questions will be posed in the hope of stimulating a discussion on some of the issues that should flow naturally from the whole transformation debate.

Section 174(2) dovetails with the equality clause in the Constitution. That clause is transformative in its nature. In this regard I refer, in particular, to section 9(2),³ which makes plain that transformation does not mean treating equally those who are not in like positions. It is for that reason that it can never be that, in a contest for a post in the judiciary, a candidate who is technically the most qualified must invariably be appointed. Of course, in an ideal world, no one would disagree that this candidate should ordinarily be appointed. However, our past does not typify an ideal world. It was so bad that it moved Mahomed J in *S v Makwanyane*⁴ to say:

All Constitutions seek to articulate, with differing degrees of intensity and detail, the shared aspirations of a nation, the values which bind its people, and which discipline its government and its national institutions, the basic premises upon which judicial, legislative and executive power is to be wielded; the constitutional limits and the conditions upon which that power is to be exercised, the national ethos which defines and regulate that exercises; and the moral and ethical direction which that nation has identified for its future. In some countries the Constitution only formalises, in a legal instrument, a historical consensus of values and aspirations evolved incrementally from a stable and unbroken past to accommodate the needs of the future. The South African

³ Section 9(2) provides:

‘Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to promote or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.’

⁴ *S v Makwanyane* 1995 (3) SA 391 (CC) para 261.

Constitution is different: it retains from the past only what is defensible and represents a decisive break from, and a ringing rejection of that part of the past which is disgracefully racist, authoritarian, insular and repressive and a vigorous identification of and commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos expressly articulated in the Constitution. The contrast between the past which it repudiates and the future to which it seeks to commit the nation is stark and dramatic.

The above words by the former Chief Justice should be a constant reminder of where we come from and a pointer to where we should be going. It goes without saying that our egregious past requires decisive action to create a bright and better future for everyone; decisive action including, but not limited to, a change in briefing patterns and work allocation. The natural consequence of the change in work allocation patterns has a direct impact on the transformation of the judiciary by skilling professionals in the legal fraternity in all spheres. That is why it is disgraceful that, with a past described in the manner above, those who appear in various courts, from the lower courts right up to the highest court, mainly representing the private sector, are still predominantly white and male. There is also a feeling that even the government can do a lot better than it is doing in allocating work to black and female practitioners. Without deliberate and decisive action being taken in this regard, it is almost unfathomable that we will be able to create – with the necessary urgency – a large pool of black and female practitioners from which judicial appointments may be made; a pool which will bring to an end the controversy around the contest for judicial appointment. This controversy sometimes manifests itself in the disparaging reference to some candidates as ‘*transformation appointees*’ that are seen as less suitable for judicial appointment than their white counterparts.⁵

This controversy can best be illustrated with reference to a speech of the former Deputy President of the Supreme Court Appeal, Justice Harms,⁶ when he said:

⁵ Of course, there is nothing negative in the concept of ‘transformation’, but those who are opposed to it make it sound like profanity.

⁶ LTC Harms ‘Transparency and Accountability in the Judicial Appointment Process’ (2010) 23(2) *Advocate* 36–38. Address delivered at the 12th Annual International Judicial Conference at Bucharest, Romania, 19–21 May 2004. <https://www.sabar.co.za/law-journals/2010/august/2010-august-vol023-no2-pp36-38.pdf> (accessed 30 October 2019).

The new regime attempts to make the decisions more democratic and more representative. It creates the impression that politicians do not have the final say and it wishes to promote judicial independence. It is more transparent than the old but politically less accountable. The downside is that it caters for judicial ambition. Appointment committees tend (according to Sir Michael Kirby) to opt for the safe or unknown candidate rather than the intellectually vibrant, energetic or bold ... On a practical level: there is no doubt that the JSC rejects suitable candidates only because they are white and male. As a result, the Bars are unwilling to nominate anyone because their candidates are so often rejected, and prominent members of the Bar are not prepared to accept a nomination for fear of an unreasoned rejection in favour of a poor candidate. This in my view is a serious abdication of duty. It means that invariably a 'transformation candidate' will be appointed, even where there is no merit at all, because the alternatives are so mediocre. For the same reason suitable judges are not prepared to be nominated for appointment to higher courts. There are those who believe that a crash course creates a judge and there are those who believe that this is a pious hope.

I disagree with this for two reasons. First, when Justice Harms says '[o]n a practical level: there is no doubt that the JSC rejects suitable candidates only because they are white and male', he creates the impression that this is the fate that befalls white male candidates. The truth is that competent and respected white male senior counsel do avail themselves for judicial appointment and many have been appointed, including in recent times. Second, Justice Harms suggests that the appointment of 'transformation candidates' equates to the appointment of candidates that are unsuitable for judicial office. However, there is no denying that, equally, there may be some white candidates who may have been overlooked only because their appointment would be contrary and counterproductive to the constitutional imperative of judicial transformation. Anecdotal evidence suggests that there are white legal practitioners who were rejected not because they were not qualified or were somehow blemished, but only because they are white. The inevitable consequence of this is the undeniable loss of their experience to the judiciary. This should happen as no surprise at all. This is the choice that the founders of our constitutional democracy made. I cannot see how else transformation, as required by the Constitution, can be achieved, without some 'collateral damage', for lack of a better expression. In some ways Justice Harms is correct to say that there are white practitioners who may be reluctant to avail themselves for nomination if, after having gone through the whole process, they are not recommended for appointment in favour of a less experienced black or female colleague.

Having said this, I refer to yet another constitutional imperative: the requirement in section 174(1) that only an 'appropriately qualified woman or man who is a fit and proper person' qualifies for judicial office.

Justice Yvonne Mokgoro⁷ had this to say about these two constitutional imperatives:

Assuming that the JSC has a broad strategic plan, as it should, in terms of which the transformation of the Bench is pursued, each judicial appointment session should aim to advance that strategic plan. The promotion of a diverse judiciary must be an important aspect of that strategy. Thus, each and every candidate who is up for consideration has to be appropriately qualified and be a fit and proper person for appointment. These considerations are all constitutional imperatives. Thus in the pursuit of the creation of a diverse Bench which reflects broadly the race and gender profile of South Africa, the JSC may not recommend for appointment a candidate who is not considered to be appropriately qualified and is not a fit and proper person. Doing so would frustrate the objectives of judicial transformation.

The JSC must do what the Constitution enjoins it to do. When South Africans adopted the Constitution, they expected no less. It is to be hoped that a time will come, and hopefully in the not-so-distant future, when section 174(2) of the Constitution will not evoke emotive debate – when diversity becomes a natural outcome of the appointment process.

For the country to reach that ultimate destination, both the public and private sectors must be deliberate in allocating work while paying regard to race and gender in a manner consistent with the values of the Constitution and democracy. The transformation of the judiciary is a mammoth task which the JSC must continue to pursue without being distracted by views that may be disparaging, because so far it has largely succeeded in doing so.

Ours is not the only society that grapples with the difficult issues of diversity. For instance, Sonia Lawrence, in an article titled ‘Reflections: On judicial diversity and judicial independence’⁸ on the Canadian situation, especially in the State of Ontario, said:

We also lack data on key questions in terms of public confidence in the judiciary on how public opinion does or does not differ between different population subsets. Comparative research on strategies used across the country in recruiting judges, and with respect to different under-represented groups would also be useful. Why have we been so successful, comparatively, in increasing the representation of women on the Bench, but less so with respect to visible minorities?

⁷ Yvonne Mokgoro ‘Judicial appointments’ (2010) 23(3) *Advocate (Middle Temple and SA Conference: Judicial Independence)* 43–48. <https://www.sabar.co.za/law-journals/2010/december/2010-december-vol023-no3-pp43-48.pdf> (accessed 30 October 2019).

⁸ Sonia Lawrence ‘Reflections: On Judicial Diversity and Judicial Independence’ (2010). *Articles & Book Chapters*. Paper 369. http://digitalcommons.osgoode.yorku.ca/scholarly_works/369 (accessed 30 October 2019).

At the heart of true transformation is the question of whether judicial diversity and constitutional transformation are an end in themselves. They are not. Justice Madlanga talks about functional value and legitimacy that are brought about by a diversified Bench.⁹ First, transformation should serve the purpose of making an ordinary South African have confidence in a judicial outcome regardless of the race of the litigant or the judge, even in racially charged matters; likewise in matters in which gender is at the centre of the contest.

Second, this brings me to the very important question whether the work of the JSC manifests itself in judicial output. Is it too much for South Africans to expect that judicial outcomes should reflect a transformed judiciary through the pronouncements that judges make? As part of the debate on the value that transformation and diversity should add, I am not certain that South Africa has focused beyond the race and gender composition of the judiciary. I do not know if the increasingly diversified Bench has had the effect of transforming the jurisprudence. For example, in respect of customary law, could it be that common-law principles continue to dominate judicial pronouncements even in cases that may be decided purely on customary law without offending any constitutional provisions? Our jurisprudence was negatively affected by our colonial and apartheid past and that ought to be addressed pointedly in the transformation agenda.¹⁰

The truth is that there is a substantial number of South Africans who believe in and live according to customary law belief systems. To what extent has the judiciary paid more than a fleeting glance to customary law? Unless courts become deliberate in this regard and take every opportunity

⁹ M Madlanga 'Judging According to Personal Attributes, Outlook on Life and Life Experience: Any Practical Values?' (2018) 1(1) *South African Judicial Education Journal* 48–60 at 58:

'Unsurprisingly, section 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.'

¹⁰ TW Bennett *Customary Law in South Africa* (2004) 34:

'Until the advent of a new constitution in 1993, customary law had never been fully recognised as a basic component of the South African legal system. Instead Roman-Dutch Law was treated as the common law of the land. The unequal relationship began with the foundation of a settlement by the Dutch East India Company in 1652.'

that presents itself to develop customary law jurisprudence, the diversity of the Bench will not be sufficiently substantive. Depending on the facts of a case, it may be necessary, and even desirable, that a matter that could easily be determined on common-law principles be decided on the applicable customary law if only to make an effort to affirm the litigants and at the same time develop customary law jurisprudence. Section 211(3) of the Constitution enjoins courts to apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.

I pay particular attention to customary law, but my point is broader: has the gradual transformation of the Bench manifested itself in judicial output? It is crucial that it must. If it does not, some sections of society will continue to see themselves as represented only in the appearance of the Bench but not in the pronouncements that judges make in judgments.

In conclusion, whatever one's views are about diversity, there is no denying its intrinsic value in the confidence of society in the judiciary as an institution. However, I do feel that the value of public trust would be enhanced if judicial pronouncements were not only legally sound but also socially relevant, knowledgeable and sensitive to the way South Africans actually live. A debate on diversity in the judiciary beyond merely looking at the race and gender composition has to take place and the other side of transformation has to be acknowledged. In the words of Edward Chen:¹¹

[D]iversity invigorates the judiciary. Chief Justice Roger Traynor of the California Supreme Court once described the courthouse as '[e]very man's castle. His fortress against tyrants of powerful government or of powerful private groups, and against mobs and brutes and scoundrels. ... [J]ustice you find and share with others in every man's castle, the courthouse'. Without diversity, Justice Traynor's vision of the courthouse's role in ... democracy becomes elusive. With diversity, the power of the judiciary to protect more fully and effectively all our constitutional rights becomes that much more complete.

It is difficult to contemplate any greater tragedy in the judiciary than when the work of the JSC is regarded not as the beginning of judicial transformation which, I suggest, it is, but as an end in itself which, in my view, it is not. I do not see how the rule of law, a fundamental value of our constitutional dispensation which the courts are enjoined to protect and advance, is served by the transformation of the Bench when only the colour and gender composition are, by and in themselves, the end.

¹¹ Edward M Chen 'The Judiciary, Diversity and Justice for All' (2003) 91(4) *California Law Review*.

Meaningful transformation in the judiciary will remain the proverbial pie in the sky unless all impediments to its realisation are deliberately and purposefully addressed.

In the final analysis, judicial pronouncements must mirror the value systems of society as they develop organically, being neither far ahead nor lagging far behind. Only in this way will the 'courthouse' indeed become 'every person's castle'. There has to be convergence between judicial pronouncements and the ethos of society, which can only be possible if judicial officers are alive to where society is at any given point. This, in my view, is what could lead to the germination of a truly organic jurisprudential development of the law with the citizenry being able to see themselves in judicial pronouncements. To achieve this requires the judiciary to be deliberate in its approach and purposeful in its execution of the constitutional mandate entrusted upon it.

LANGUAGE AND LABELS IN LAW AND LIFE

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I. INTRODUCTION

'In the beginning was the Word.'

It is not the first time I begin a piece of writing, quoting John 1. It makes paramount sense that creation should start with the unveiling of language, which is 'human speech ... and the essence of (man's) culture'.

Failing language, our world would have been one of silence. George Steiner has written about silence and language – about 'the complex energies of the word' (in his collection of essays, 'Language and Silence'), holding up to us, on the one hand, the idea that silence itself can be superlatively expressive of our humanness ('a fantastically complex and vulnerable structure which probably defines man's humanity'), yet also finds itself under pressure of the kind of vulgarities that led to the atrocities of Nazism (and other demagoguery).

Calling the Biblical Word to mind, is not of narrow religious moment. It is of philosophical consequence, and refers to a task such as we have been set We may speak of the work we ... accepted to do.

EF Schumacher, in his thoughtful text 'Good Work', raises the question: How does work relate to the end and purpose of man's being?

In other words, what we have on our hands, is not just another 'project', to be completed prescriptively. To the extent that we intend the execution of (our) task to be 'good work', the question ... 'of what the work does to the workers' ... is really the cardinal one.'

The above was written by the famous South African poet Adam Small, introducing the work and report of a panel advising the University of Pretoria on its language policy.¹ It is probably the last piece he wrote. He died in hospital about two days after the report was presented. The thoughts on language and the work at hand may well be appreciable to judges and other lawyers.

The law deals with people. On an untamed, empty island in the middle of the ocean, not belonging to any state, juristic or natural person, without human interaction, there is no law.

¹ Independent Transformation Panel of the University of Pretoria Council (17 June 2016) para 1.

People need to communicate. It is part of our being. Without the freedom to express oneself and to receive information, the right to human dignity is violated. The destructive consequences of solitary confinement are well known. Language is essential in life. So it is in law.

Is there a difference between legal language and the language of the people, though? What do we expect from legal language? Why do lawyers speak and write in such a complicated way? How should courts interpret ordinary words? And why do labels matter so much to us? Does language give people access to the law, or reserve the benefits of law for the educated, wealthy and powerful?

II. THE RULE OF LAW AND THE NEED FOR CLARITY

South Africa is a democratic state, founded on the supremacy of the Constitution.² The doctrine of the separation of powers requires the legislature to make law and the courts to interpret and apply it to the best of their ability.

The legislature has to give effect to the government's policy objectives. It bears an obligation to maintain the rule of law, though. It must make sure that the law is clear, precise and consistent so that the people who are expected to act lawfully know what the law demands from and grants to them. Law that is meaningless or too vague to be understood cannot 'rule'. In fact, it should not be law.

Courts attribute meaning to statutory provisions by interpreting them. If more than one meaning is reasonably plausible, the one resulting in constitutional compliance must be chosen. But if the interpretation emerging from the wording and context results in constitutional invalidity, a court has to make a finding to that effect.³

When courts are unable to interpret a provision which is meaningless and unworkable, even in light of the rest of the particular statute, a provision can be found constitutionally invalid on the basis of vagueness. In *Affordable Medicines Trust*, Ngcobo J reasoned on behalf of a unanimous court:

The doctrine of vagueness is founded on the rule of law, which ... is a foundational value of our constitutional democracy. It requires that laws must be written in a clear and accessible manner. What is required is reasonable certainty and not perfect lucidity. The doctrine of vagueness does not require absolute

² Section 1(c) of the Constitution.

³ *National Credit Regulator v Opperman* 2013 (2) SA 1 (CC) (*Opperman*) at para 42.

*certainty of laws. The law must indicate with reasonable certainty to those who are bound by it what is required of them so that they may regulate their conduct accordingly.*⁴ (Citations omitted.)

In the *South African Liquor Traders* case, the court found the definition of the word *shebeen* impermissibly vague and thus inconsistent with the Constitution.⁵ Section 1 of the Gauteng Liquor Act 2 of 2003 defined a *shebeen* as ‘any unlicensed operation whose main business is liquor and is selling less than ten (10) cases consisting of 12 x 750 ml of beer bottles’. It did not stipulate the period within which these had to be sold. Nothing in the rest of the Act assisted. Thus the definition was vague, hence the declaration of invalidity.

By contrast, in *Opperman*,⁶ the Constitutional Court found that section 89(5)(c) of the National Credit Act 34 of 2005 (NCA) did not rise to a constitutionally fatal level of vagueness.⁷ Before it was amended, the section read:

If a credit agreement is unlawful ... despite any provision of common law ... a court must order that—

(c) all the purported rights of the credit provider under that credit agreement to recover any money paid or goods delivered to, or on behalf of, the consumer in terms of that agreement are either—

(i) cancelled, unless the court concludes that doing so in the circumstances would unjustly enrich the consumer; or

(ii) forfeit to the State, if the court concludes that cancelling those rights in the circumstances would unjustly enrich the consumer.

In terms of section 40 of the NCA, certain credit providers are required to register with the National Credit Regulator (NCR). Mr Opperman lent money to Mr Boonzaaier. The total principal debt exceeded the R500 000 threshold in terms of section 42(1) of the NCA.⁸ Mr Opperman was required to register as a credit provider, but failed to do so. The credit

⁴ *Affordable Medicines Trust v Minister of Health of the Republic of South Africa* 2006 (3) SA 247 (CC) at para 108.

⁵ *South African Liquor Traders' Association v Chairperson, Gauteng Liquor Board*, 2009 (1) SA 565 (CC) (*South African Liquor Traders*).

⁶ *Opperman* (note 3 above).

⁷ *Opperman* (n 3 above) at para 88.

⁸ The amount was set at R500 000 by the Minister in *Government Gazette* No 28893 1 June 2006 (see item 5 of the schedule to Government Notice 713).

agreement was thus unlawful and void and Mr Opperman lost his right to reclaim the money he had lent.

The Constitutional Court ruled that, although section 89(5)(c) of the NCA was not well-drafted, the inaccuracy frustrating the situation was different from that in *South African Liquor Traders*.⁹ There the provision was utterly meaningless and unworkable and nothing in the rest of that Act assisted in giving meaning to the definition.¹⁰

In *Opperman* the provision was capable of interpretation. In spite of words and phrases that might show incoherence and a lack of understanding of common law and specifically of unjustified enrichment, the stated objectives of the NCA and the context within which section 89(5)(c) appears assisted in interpreting the provision.¹¹ Consumers have to be protected against uncontrolled credit providers and therefore credit providers are required to register. If credit providers do not register, courts must declare the agreement void and order that all rights perceived to follow from the agreement (including the right to restitution) are either cancelled or forfeited to the state.¹²

The court did not find the provision unconstitutionally vague. It thus adopted the interpretation summarised above. So interpreted, the provision resulted in an arbitrary deprivation of property of the lender contrary to section 25(1) of the Constitution,¹³ 'because it extinguishes his right to claim restitution based on unjustified enrichment, without leaving any discretion to a court to consider a just and equitable order under the circumstances'.¹⁴

Hence, where a legislative provision is reasonably capable of a meaning that keeps it within constitutional bounds, a court must, through the use of legitimate interpretive aids, seek to preserve that provision's constitutional validity.¹⁵ Courts should give priority to a reasonable construction which may be given to a provision and avoid an interpretation of a statutory

⁹ *South African Liquor Traders* (note 5 above).

¹⁰ *Opperman* (note 3 above) para 51.

¹¹ *Opperman* (note 3 above) para 52.

¹² *Opperman* (note 3 above) para 55.

¹³ Section 25(1) of the Constitution states:

'No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.'

¹⁴ *Opperman* (note 3 above) para 88.

¹⁵ *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd In re: Hyundai Motor Distributors (Pty) Ltd v Smit NO 2001 (1) SA 545 (CC)* at para 26.

provision that gives rise to an absurdity or irrationality.¹⁶ This is not always an easy exercise, as *Opperman* shows.

In *SATAWU v Garvas*, the Constitutional Court had to clarify the meaning of section 11(2) of the Regulation of Gatherings Act 205 of 1993. The constitutional validity of this provision was questioned by SATAWU, which faced damages claims following a gathering of thousands of people to register employment-related concerns within the security industry.¹⁷ Section 11(2) sets three conditions which a person or organisation must satisfy in order not to be held liable for the damage resulting from their gatherings, namely:

- (a) *that he or it did not permit or connive at the act or omission which caused the damage in question; and*
- (b) *that the act or omission in question did not fall within the scope of the objectives of the gathering or demonstration in question and was not reasonably foreseeable; and*
- (c) *that he or it took all reasonable steps within his or its power to prevent the act or omission in question: Provided that proof that he or it forbade an act of the kind in question shall not by itself be regarded as sufficient proof that he or it took all reasonable steps to prevent the act in question.*

SATAWU argued that the provision was irrational and inadequate and that, by protecting the right to assembly, section 17 of the Constitution¹⁸ entitled them to a wider defence. The argument was that section 11(2)(c) could never find application. If the act or omission is reasonably foreseeable, then liability arises regardless of the steps taken. If the harm is not reasonably foreseeable, then there are no reasonable steps that can be taken to avoid it. In either case, section 11(2)(c) plays no role.¹⁹

The court held that section 11(2) was capable of proper interpretation.²⁰ First, the purpose of the provision sought by Parliament is to create deliberately a tight defence for an organisation facing a claim for statutory liability. Indeed:

¹⁶ See *South African Transport and Allied Workers Union v Garvas* 2013 (1) SA 83 (CC) (*SATAWU v Garvas*) at para 37.

¹⁷ *SATAWU v Garvas* (note 16 above) at para 10.

¹⁸ Section 17 of the Constitution provides:

‘Everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions.’

¹⁹ *SATAWU v Garvas* (note 16 above) paras 34 and 35.

²⁰ *SATAWU v Garvas* (note 16 above) para 50.

*except in the limited circumstances defined, organisations must live with the consequences of their actions, with the result that harm triggered by their decision to organise a gathering would be placed at their doorsteps.*²¹

Further, the defence is viable as there are examples of circumstances in which organisers would not be liable where all reasonable steps had been taken to prevent the foreseeable harm.²²

Therefore, section 11(2) was not irrational and did not negate the right to freedom of assembly. It merely subjected the exercise of that right to strict conditions, in a way designed to moderate or prevent damage to property or injury to people.²³

III. WHY DO LAWYERS WRITE SO COMPLICATEDLY?

So, if clarity is required in the use of language in law, why do lawyers write in such a complicated, often confusing and intimidating way?

The ‘Nuts Order’ has been used as a popular example:²⁴

In the Nuts (unground), (other than ground nuts) Order, the expression nuts shall have reference to such nuts, other than ground nuts, as would but for this amending Order not qualify as nuts (unground) (other than ground nuts) by reason of their being nuts (unground).

The above is not meant to be taken seriously.

Different reasons have been given why lawyers use complicated language. First, *stare decisis* (the doctrine of deciding cases in accordance with precedent) requires – for consistency purposes – that today’s law must be interpreted in light of past cases. Outdated words and phrases from centuries ago thus survive in a new linguistic environment.²⁵

²¹ *SATAWU v Garvas* (note 16 above) para 38.

²² *SATAWU v Garvas* (note 16 above) paras 46 and 47.

²³ *SATAWU v Garvas* (note 16 above) para 69.

²⁴ The ‘Nuts Order’ was once listed in the *Guinness Book of Records* as the world’s most incomprehensible legal provision. See J van der Westhuizen ‘Legal language: Instrument of deception or empowerment? (Notes on plain language and the Constitution)’ (12 September 2013) Talk to law clerks of the Constitutional Court.

²⁵ B Leszkay ‘Why do lawyers use such complicated language (legalese)?’ (2014) Blog: Criminal Law Writers & Filmmakers <http://www.criminallawconsulting.com/blog/why-do-lawyers-use-such-complicated-language-legalese> (accessed 5 November 2019).

Second, lawyers write long, complicated sentences in an attempt to avoid misinterpretation. The law strives to be detailed, in order to be precise.

But Stark wrote:

[L]egal writing' has become synonymous with poor writing; specifically, verbose and inflated prose that reads like – well, like it was written by a lawyer Every time lawyers confound their clients with a case situation, a 'Heretofore', or an 'in the instant case', they are letting everyone know that they possess something the non-legal world does not.²⁶

Thus, lawyers use language as an instrument to protect the need for and status of their profession. He calls it 'linguistic self-preservation' and concludes:

Perhaps most damaging, however, is lawyers' frequent use of language as an instrument of deception. Face it: if lawyers know they have a losing case – and half the time they should – confusing the court may be the best they can do for their clients. Indeed, attorneys may be our most respected con artists; after all, their job in many cases is to try to make something out of nothing. Again, there is nothing necessarily wrong with that: lawyers may simply be victims of the role society has created for them. But lawyers recognize their role as deceivers and understand that language is the means by which they work their magic. And after a while, they begin to lose faith in the honesty of words. Language is a human invention, one designed to bring people closer together. But after a lifetime of using words to strangle communication, lawyers begin to view speech as a barrier that separates them from others and others from the truth.

The opposite ideal was verbalised by Judge Billings Learned Hand, who said that the 'language of the law must not be foreign to the ears of those who are to obey it'.

The plain language movement has been attempting to make law more accessible to ordinary people:

The goal of plain language is to express precisely a communication with clarity and conciseness so that it is easily read and understood by its intended audience. Therefore, plain language drafters avoid verbosity, pretentious language, and tortuous sentence structures.²⁷

An attempt was made to draft the Constitution in plain language. The contents were structured in a way to avoid cross-referencing; *shall* and

²⁶ S Stark 'Why lawyers can't write' (1984) *Harvard Law Review* 1389–1392.

²⁷ C Adams 'The move toward using plain legal language' (2017) https://www.americanbar.org/groups/young_lawyers/publications/tyl/topics/writing/the_move_toward_using_plain_legal_language/ (accessed 5 November 2019).

shall not were replaced with *must*, *may* and *may not*; the active voice was preferred to the passive; and in Chapter 2 it is stated that *everyone* has fundamental rights, not *every person*, because we are *people*, not *persons*.

Archaic terminology is often retained, even over centuries, because we seem to think that confusion will follow and legal certainty be sacrificed if different words are used. But sometimes we keep old words and phrases for so long that we forget what they meant in the first place and thus lose the very certainty for which we strive.

In order to avoid the ongoing repetition of *he or she*, *she or he*, *him or her* and *her or his*, the Bill of Rights states that, for example, everyone has the right to privacy, which includes the right not to have ‘*their person or home and property searched*’ (emphasis added).²⁸ Unlike virtually all legislation preceding it, the Constitution defines very few terms or concepts.²⁹

Since the adoption of the Constitution, various attempts have been made to draft legislation in plain language. The degree of success has varied.

IV. LABELS IN LIFE AND LEGAL LANGUAGE

Labels are important in our lives. We categorise phenomena and, based on the category, often regard something as *good*, *bad*, *acceptable*, *inappropriate*, or whatever else. In order to avoid ongoing repetitive exhausting moral and intellectual decision-making, we label things for future use. But the labels do not always fit.

Do lawyers use labels according to legal definitions, or as they exist in the minds and fall out of the mouths of ordinary people? Courts have had to reconcile the technical legal meaning of labels – such as *murderer*,³⁰ *stealing*,³¹ *rape*³² and *marriage*³³ – with their ordinary meaning.

²⁸ Section 14 of the Constitution.

²⁹ An example is s 239 of the Constitution. It defines ‘national legislation’, ‘organ of state’ and ‘provincial legislation’. Another example is item 1 of Schedule 6 to the Constitution. It defines ‘homeland’, ‘new Constitution’, ‘old order legislation’ and ‘previous Constitution’. The scantiness of definitions in the Constitution underscores the fact that the use of plain language in the Constitution has largely rendered definitions unnecessary.

³⁰ *The Citizen 1978 (Pty) Ltd v McBride* 2011 (4) SA 191 (CC) (*‘The Citizen v McBride’*).

³¹ *Democratic Alliance v African National Congress* 2015 (2) SA 232 (CC) (*‘DA v ANC’*).

³² *Masiya v Director of Public Prosecutions Pretoria (The State)* 2007 (5) SA 30 (CC) (*‘Masiya’*).

³³ *Minister of Home Affairs v Fourie; Lesbian and Gay Equality Project v Minister of Home Affairs* 2006 (1) SA 524 (CC) (*Fourie*).

Who is a murderer?

*The Citizen v McBride*³⁴ is an example of a judgment where the Constitutional Court relied on ordinary language to clarify the interpretation of *murderer*. Mr McBride was granted amnesty, under the Promotion of National Unity and Reconciliation Act 34 of 1995 (the Reconciliation Act), after having been convicted of the murder of three women killed in bomb attacks in 1986, which injured 69 people.³⁵ *The Citizen* newspaper opposed Mr McBride's subsequent application for a senior police post, contending that he was unsuitable for appointment because he was a murderer.³⁶ He sued for defamation.

One of Mr McBride's primary assertions was that *murderer* has a technical legal meaning – that is, a person convicted in a court of law of the unlawful intentional killing of a human being. Moreover, he argued for a literal interpretation of section 20(10) of the Reconciliation Act and the term *amnesty*. He claimed that he could no longer be referred to as a *murderer* because he had been granted amnesty,³⁷ which meant that any reference to his conviction 'shall be deemed to be expunged from all official documents or record' and the conviction 'shall for all purposes ... be deemed not to have taken place'.³⁸

In a majority judgment, Cameron J did not agree with the literal meaning of *amnesty* proposed by Mr McBride. First, it was inconsistent with the *Du Toit* judgment, which noted that, while the Reconciliation Act sought to advance reconciliation and national unity, it could not undo what had happened in the past. Just as the statute cannot restore to the victims what they had lost, it does not restore the perpetrator in every respect to his or her position before the commission of the offence.³⁹ Moreover,

³⁴ *The Citizen v Mc Bride* (note 30 above).

³⁵ *The Citizen v Mc Bride* (note 30 above) para 3.

³⁶ *The Citizen v Mc Bride* (note 30 above) para 4.

³⁷ *The Citizen v Mc Bride* (note 30 above) para 40

³⁸ Section 20(10) of the Reconciliation Act provides:

'Where any person has been convicted of any offence constituted by an act or omission associated with a political objective in respect of which amnesty has been granted in terms of this Act, any entry or record of the conviction shall be deemed to be expunged from all official documents or records and the conviction shall for all purposes, including the application of any Act of Parliament or any other law, be deemed not to have taken place: Provided that the Committee may recommend to the authority concerned the taking of such measures as it may deem necessary for the protection of the safety of the public.'

³⁹ *The Citizen v Mc Bride* (note 30 above) para 53; *Du Toit v Minister for Safety and Security* 2009 (6) SA 128 (CC) at para 51.

Mr McBride's interpretation would be in conflict with the statute's aim, which is national reconciliation, premised on full disclosure of the truth.⁴⁰ It is hardly conceivable that its provisions could muzzle truth and render accurate statements about our history false.⁴¹ A literal reading also does not give sufficient weight to the right to freedom of expression⁴² of those who wish to speak about the perpetrators who killed their relatives.⁴³ Lastly, the 'ordinary use of language accords with reading section 20(10) as merely expunging official records, thereby restoring the convict to unblemished legal and civil status',⁴⁴ nothing more.

Amnesty could thus not, for example, limit the right to freedom of expression of the mother of one of the deceased to tell a group of old friends at a school reunion that her child was 'murdered' by Mr McBride. The conviction could be 'deemed not to have taken place', but not the death of a daughter in an incident the mother regards as murder.

The defamation claim by Mr McBride – that he was untruthfully accused of being a criminal and murderer – was dismissed.⁴⁵ However, the court awarded R50 000 for the seemingly false accusation made by the newspaper that he lacked contrition.⁴⁶

Did the President steal?

In *DA v ANC*, the central issue was the interpretation of a cellular phone message (SMS) sent by the Democratic Alliance (DA) to 1.5 million voters before the 2014 national and provincial elections. It stated:

⁴⁰ Section 20(1) of the Reconciliation Act provides:
 'If the Committee, after considering an application for amnesty, is satisfied that—
 (a) the application complies with the requirements of this Act;
 (b) the act, omission or offence to which the application relates is an act associated with a political objective committed in the course of the conflicts of the past in accordance with the provisions of subsections (2) and (3); and
 (c) the applicant has made a full disclosure of all relevant facts,
 it shall grant amnesty in respect of that act, omission or offence.'

⁴¹ *The Citizen v Mc Bride* (note 30 above) para 60.

⁴² See s 16 of the Constitution.

⁴³ *The Citizen v Mc Bride* (note 30 above) para 62.

⁴⁴ *The Citizen v Mc Bride* (note 30 above) para 71.

⁴⁵ *The Citizen v Mc Bride* (note 30 above) para 96.

⁴⁶ *The Citizen v Mc Bride* (note 30 above) para 129.

*The Nkandla report shows how Zuma stole your money to build his R246m home. Vote DA on 7 May to beat corruption. Together for change.*⁴⁷

Section 89(2) of the Electoral Act 73 of 1998 and item 9(1)(b) of the Electoral Code of Conduct⁴⁸ prohibit the publication of *false information* with the intention of influencing the outcome of the election. The Electoral Act is based on section 19(2) of the Constitution, recognising the right of every citizen to free and fair elections. Without freedom of expression, an election cannot be free; but the publication of false information might render it unfair.

Was the statement *information*? If so, was the information *false*?

The Public Protector's report on Nkandla did not contain the terms *steal*, *theft* or *thief*. It described the President's involvement in the building project and recommended that some of the money be paid back. The DA argued that the words 'shows how Zuma stole' made the message an opinion and not a factual statement. The exact wording of the report was not crucial, because all the DA said was that, in its opinion, the reader of the report will see the method by which money was stolen. The allegation that theft had taken place was the opinion of the author.

Three judgments were handed down. In the main but minority judgment (concurrent in by two judges), Zondo J dealt with the case according to the law of defamation, finding that the SMS would have been understood by 'an ordinary reasonable reader'⁴⁹ as a statement of fact and not a comment.⁵⁰ He further found that the elements of a violation of the legislation were met, since the statement of fact was false information; and it was sent out with the intent of influencing the conduct or outcome of the election. The ANC should thus succeed.

But President Zuma did not sue the DA. He was not a party to the litigation. It was not a defamation case.

In a joint judgment by Cameron J, Froneman J and Khampepe J (supported by two other judges), the primary question was said to be whether the message contained factual statements or the expression of an opinion. If it were an opinion, it would not fall within the ambit of the legislation⁵¹ which prohibits a false statement of fact and not the expression of comments or ideas. The SMS was not a statement of fact,

⁴⁷ *DA v ANC* (note 31 above) para 13.

⁴⁸ Section 99(2) of the Electoral Act empowers the Electoral Commission to issue an Electoral Code of Conduct.

⁴⁹ *DA v ANC* (note 31 above) para 55.

⁵⁰ *DA v ANC* (note 31 above) para 110.

⁵¹ *DA v ANC* (note 31 above) para 120.

but ‘an interpretation of the content of the Report’ and thus not hit by the prohibitions.⁵² The judgment emphasised the importance of freedom of expression. Although freedom of expression is limited by section 89(2) and item 9(1)(b),⁵³ prohibiting expression altogether would have negative consequences. Freedom of expression during elections enhances and does not diminish the right to free and fair elections.⁵⁴

Effectively this meant that the SMS did not fall within the ambit of the Electoral Act 73 of 1998 and the Code of Conduct issued under it. Yet, the judgment went on to show that the word *stole* would not be unjustified, based on the Report. It stopped short of finding that it was not *false*.

A separate judgment by Van der Westhuizen J, with which one other judge agreed, also concluded that the appeal should fail, but reasoned differently. According to this judgment, the central question was whether the SMS published by the DA was *false information*.⁵⁵ It did not matter whether the message was considered to be a factual statement or an opinion. In defamation cases, courts expressed difficulties with this distinction in any event. Even an opinion, purporting to be *information*, could unfairly influence an election, for example ‘in the opinion of our medical expert the President is terminally ill and has one month to live’. It is not a blatantly false statement of fact, such as ‘the President has fled the country’, or that ballot boxes in a certain area would be closed on election day. It falls somewhere on a continuum. What matters is whether the statement is purporting to describe a readily falsifiable state of affairs which poses a real danger of misleading voters and undermining their right to a free and fair election.⁵⁶ Following a narrow interpretation of the term *false*⁵⁷ and a generous understanding of the word *stole*,⁵⁸ the SMS did not contain *false information* or *false allegations* within the meaning of the legislation, having regard to the context of the constitutional protection of the rights to *free* and *fair* elections, which require free campaigning and free expression, also fairness.⁵⁹

Words like *stealing* and *theft* have several meanings, not merely based on a criminal conviction or textbook definition of a crime. Complainants at a

⁵² *DA v ANC* (note 31 above) paras 146 and 147.

⁵³ *DA v ANC* (note 31 above) para 127.

⁵⁴ *DA v ANC* (note 31 above) para 135.

⁵⁵ *DA v ANC* (note 31 above) para 172.

⁵⁶ *DA v ANC* (note 31 above) para 192.

⁵⁷ *DA v ANC* (note 31 above) para 193.

⁵⁸ *DA v ANC* (note 31 above) para 198.

⁵⁹ *DA v ANC* (note 31 above) para 205.

police station allege that their property was *stolen*, or that they were *robbed*, based on their experience, even though no one has been convicted yet and the textbook definitions of *theft* and *robbery* are not necessarily met. On a more symbolic level, it is often said that one's heart, or thunder, was stolen.

A majority of seven out of ten judges thus decided in favour of the DA. Because of the five-three-two split, there is no binding majority reasoning.

What is rape?

One dictionary meaning of rape is:

*The crime, typically committed by a man, of forcing another person to have sexual intercourse with another against their will.*⁶⁰

This definition does not limit the commission of the crime to men, but mentions men as typical perpetrators. Neither does it limit the victims to women. The emphasis is on forced sexual intercourse, thus intercourse without consent.

The word *rape* comes from the Latin *rapere*, meaning to snatch, grab, or carry off, referring to ancient battles when conquering men took the women – as well as other items regarded as property – from the conquered. Some Christians believe in a future *rapture*, when believers will be grabbed from the earth – with or without their consent – and transferred straight to Heaven. And some birds of prey are called *raptors*.

Relying on Roman and Roman-Dutch sources, as well as case law, criminal law textbooks defined the common-law crime of rape as 'a male having unlawful and intentional sexual intercourse with a female without her consent'.⁶¹ The definition was then broken up into 'elements' of the crime; and the element of 'sexual intercourse' separately described as 'the penetration of the female's sexual organ by that of the male'.⁶² Relying on case law, the Roman-Dutch writer Van Leeuwen and academic authors, Snyman pointed out that '[t]he slightest penetration is sufficient' and 'it is immaterial whether semen is emitted or whether the female becomes pregnant'.⁶³

In *Masiya*, the definition of rape was adapted 'so as to promote the spirit, purport and objects of the Bill of Rights' as demanded by the

⁶⁰ Online Oxford Dictionaries (accessed 20 September 2018).

⁶¹ See e.g. CR Snyman *Criminal Law* 4 ed (2002) at 445.

⁶² Snyman (note 61 above) at 446.

⁶³ Snyman (note 61 above).

Constitution.⁶⁴ Rape, which was understood as the penetration of a vagina by a penis, now included anal penetration by a penis.⁶⁵ Nkabinde J stated:

Non-consensual anal penetration of women and young girls such as the complainant in this case constitutes a form of violence against them equal in intensity and impact to that of non-consensual vaginal penetration. The object of the criminalisation of this act is to protect the dignity, sexual autonomy and privacy of women and young girls as being generally the most vulnerable group in line with the values enshrined in the Bill of Rights.⁶⁶

The inclusion of anal penetration of a female by a penis in the definition of rape is understandable. The facts of the case – anal sexual intercourse with a nine-year old girl – required the development. Obviously *male rape* also came into the picture. It is prevalent in prisons. The court, however, considered that the issue was a matter that should be dealt with by the legislature, or the courts when the circumstances make it appropriate and necessary to do so.⁶⁷

Based on the principle of legality and the aversion to retrospectivity, the court found that the extended definition of rape could not apply to Mr Masiya.⁶⁸ At the time he committed the crime, it was not rape. His rape conviction should thus be replaced with a conviction of indecent assault. The court noted, however, that in sentencing Mr Masiya, the trial court should not merely look at the legal definition of the offence. Indecent assault is an egregious crime which should not necessarily be punished less severely than rape.⁶⁹

Therefore, when determining the sentence, a court should not merely focus on the legal definition. The same sentence could be imposed for rape and indecent assault.

Why, one may then wonder, should the definition of rape be changed if it makes no difference to the sentence? Why would we want to change the label of utterly reprehensible conduct from *indecent assault* to *rape*? Does it make the offence sound more serious to the public ear? Is it to capture the revulsion in the harshest and most condemning label, as opposed to any term which may sound ‘softer’, even when it has the same consequences?

⁶⁴ *Masiya* (note 32 above) paras 27 and 32; s 39(2) of the Constitution.

⁶⁵ *Masiya* (note 32 above) para 29.

⁶⁶ *Masiya* (note 32 above) para 37.

⁶⁷ *Masiya* (note 32 above) para 30.

⁶⁸ *Masiya* (note 32 above) para 51.

⁶⁹ *Masiya* (note 32 above) para 72.

After *Masiya*, the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (the Sexual Offences Act) consolidated crimes relating to sexual matters. It repealed the common-law crime of rape, replacing it with an expanded statutory crime of rape, applicable to all forms of sexual penetration without consent, irrespective of whether the perpetrator or the victim is a man or a woman.⁷⁰ Any person who unlawfully and intentionally commits an act of sexual penetration with another person without the latter's consent, is guilty of the offence of rape.⁷¹ The expression *sexual penetration* is elaborately defined so as to include in some instances penetration of genital organs, the anus or the mouth and in other instances only the genital organs or the anus.

Even the words *genital organs* are further defined in section 1(1) as including:

the whole or part of the male and female genital organs, and further includes surgically constructed or reconstructed genital organs.

This expansion of the scope of the crime of rape is not uncontroversial. Despite the abundance of intimate detail in the definition, clarity has not necessarily been achieved. The word *causes* seems to introduce a new element of causation, which could – among other things – result in a woman being convicted of raping another woman, or, for that matter raping a man.⁷² One could indeed *rape* someone by *causing* another to penetrate with an object. Is this the intention?

Snyman spends almost five pages examining a wide range of (some fairly gruesome) possibilities of acts committed by a man in respect of a woman; a woman on a man; a man in respect of a man; and a woman on another woman, involving not only the insertion of the perpetrator's own body parts, but of pencils, sex toys and animal parts into sexual organs, anuses and mouths.⁷³ For example, the insertion of a pencil into a vagina is *rape*; so is the insertion of the penis of an animal into a mouth (which is simultaneously the crime of *bestiality*); but the insertion of a pencil or an animal paw into a mouth is not *rape*, but *sexual assault*.

The earlier reservation of *rape* for the act of brutalising women as a historically very vulnerable group has been abandoned. In striving to capture a wide range of abhorrent activities under the dramatic label, the legislature might have sacrificed not only the clarity much needed in

⁷⁰ Snyman (note 61 above) at 311.

⁷¹ Section 3 of the Sexual Offences Act.

⁷² Snyman (note 61 above) 347.

⁷³ Snyman (note 61 above) 347–351.

criminal law, but also a centuries-old project to protect women – if not indeed the very seriousness of *rape* as a gruesome intimate brutalisation of human dignity.

These doubts are not a conclusion. They enquire how and why the legislature uses labels in criminal law.

Who is married?

The label *marriage* has triggered much debate. One dictionary meaning is:

*[t]he legally or formally recognized union of two people as partners in a personal relationship (historically and in some jurisdictions specifically a union between a man and a woman).*⁷⁴

South African common law viewed *marriage* as a union between a *man* and a *woman*. The Marriage Act 25 of 1961 [footnote deleted] seemed to confirm that view.

In *Fourie*,⁷⁵ the Constitutional Court ruled that the common-law definition of marriage was constitutionally invalid ‘to the extent that it does not permit same-sex couples to enjoy the status and the benefits coupled with responsibilities it accords to heterosexual couples’; and that the Marriage Act was invalid in so far as it referred only to marriage between *husband* and *wife* and not between *spouses*. The rights to equal protection of the law, not to be unfairly discriminated against, and to dignity, were violated.

The outcome of *Fourie* was perhaps inevitable given the Constitutional Court’s precedents regarding discrimination based on sexual orientation.⁷⁶ In the 1998 *National Coalition for Gay and Lesbian Equality* case,⁷⁷ the court declared invalid the common-law crime of sodomy as well as several legislative provisions dealing with male same-sex sexual activity. One year later, the court stated that the conclusions in that case were also applicable to lesbians. It did this in the 1999 *National Coalition for Gay and Lesbian Equality* case.⁷⁸ In 2002 the non-inclusion of same-sex partners in a statute providing pension rights to surviving spouses was

⁷⁴ Online Oxford Dictionaries (accessed 20 September 2018).

⁷⁵ *Fourie* (note 33 above).

⁷⁶ *Fourie* (note 33 above) paras 46–58.

⁷⁷ *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC).

⁷⁸ *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) at para 42.

declared discriminatory.⁷⁹ The same year, the court found in *Du Toit*⁸⁰ that a provision in child care legislation, which confined the right to adopt children jointly to married couples, discriminated unfairly against same-sex life partners. Lastly, in 2003, *J v Director-General, Home Affairs*⁸¹ dealt with parental rights of permanent same-sex life partners in cases where one of the partners was artificially inseminated.

By the time the Constitutional Court had to decide on the same-sex marriage question, it had therefore already given growing recognition to the rights of same-sex partners. The *Fourie* case was not about the contents of *marriage*, but the label. It was essentially a brand name case. The question was no longer about the pension benefits of same-sex partners, but: Who has the right to say 'I am married' or 'Please come to our wedding'?

The court situated its analysis within the historical context of South Africa's discriminatory past where marriages between white and black people were prohibited⁸² and gay and lesbian people were considered abnormal and unnatural.

The court considered the implications of the term *marriage*, which is 'much more than a mere piece of paper'.⁸³ Not only is it a source of socio-economic benefits but it also entitles a couple to celebrate their commitment to each other in a public event. Sachs J declared that 'given the centrality attributed to marriage and its consequences in our culture, to deny same-sex couples a choice in this regard is to negate their right to self-definition in a most profound way'.⁸⁴

For the court, the exclusion of same-sex couples from marriage had both a practical and a symbolic impact. In responding to the unconstitutionality of the existing marriage regime, both aspects should be dealt with:

*Thus it would not be sufficient merely to deal with all the practical consequences of exclusion from marriage. It would also have to accord to same-sex couples a public and private status equal to that which heterosexual couples achieve from being married.*⁸⁵

⁷⁹ *Satchwell v President of the Republic of South Africa* 2002 (6) SA 1 (CC).

⁸⁰ *Du Toit v Minister of Welfare and Population Development (Lesbian and Gay Equality Project as amicus curiae)* 2003 (2) SA 198 (CC).

⁸¹ *J v Director General, Department of Home Affairs* 2003 (5) SA 621 (CC).

⁸² Prohibition of Mixed Marriages Act 55 of 1949.

⁸³ *Fourie* (note 33 above) para 70.

⁸⁴ *Fourie* (note 33 above) para 72.

⁸⁵ *Fourie* (note 33 above) para 81.

The court rejected the familiar argument that marriage is by its very nature a religious institution. In the open and democratic society contemplated by the Constitution, there must be mutually respectful coexistence between the secular and the sacred.⁸⁶ The constitutional claims of same-sex couples can accordingly not be negated by invoking the rights of believers to have their religious freedom respected. The two sets of interests involved do not collide, they coexist in a constitutional realm based on the accommodation of diversity.⁸⁷

The judgment required Parliament to remedy the constitutional invalidity within one year. Parliament had to enable same-sex couples to enjoy the status, entitlements and responsibilities that heterosexual couples achieve through marriage.⁸⁸ The court made it clear that:

whatever legislative remedy is chosen must be as generous and accepting towards same-sex couples as it is to heterosexual couples, both in terms of the intangibles as well as the tangibles involved.

If Parliament failed to cure the defect, the Marriage Act would automatically be amended to enable same-sex couples to achieve the status and benefits coupled with responsibilities available to heterosexual couples.⁸⁹

De Vos identified a contradiction in the judgment between, on the one hand, the recognition of the fundamental importance of the institution of marriage for our society in order to show that the exclusion of same-sex couples from marriage fundamentally affects their human dignity; and, on the other, the affirmation of the right of gay men and lesbians to 'be different'. If the test for full recognition of equality is about the recognition of and respect for difference, then why 'is it appropriate for the law to bestow special rights and a special status on those hetero- or homosexual couples who choose to enter into traditional marriage?'⁹⁰

This criticism applies to the Civil Union Act 17 of 2006, passed by the legislature to comply with the judgment. It provides that a civil union is a 'voluntary union of two persons who are both 18 years of age or older, which is solemnised and registered by way of either a *marriage* or a *partnership*'. Thus the Act allows homosexual as well as heterosexual couples to enter into a *marriage* or a civil *partnership*. It is up to the individuals

⁸⁶ *Fourie* (note 33 above) para 89.

⁸⁷ *Fourie* (note 33 above) para 98.

⁸⁸ *Fourie* (note 33 above) para 122.

⁸⁹ *Fourie* (note 33 above) para 161.

⁹⁰ P de Vos 'The "inevitability" of same-sex marriage in South Africa's post-apartheid state' (2007) *South African Journal on Human Rights* 457.

to choose which form their civil union takes.⁹¹ Whether one chooses to register a marriage or a civil partnership, the legal consequences are exactly the same. The Act amends all existing laws and customary law in which references are made to *marriage, husband, wife* or *spouse*, so that it will apply equally to homosexual and heterosexual couples who register their union under the Act.⁹²

The non-discriminatory nature of the Civil Union Act is to be applauded. It is available to all to utilise and to choose whether they want to be *married* or *partners* – whatever the significance of this choice might be.

However, the Marriage Act remains in force, with its commitment to *husband* and *wife* and thus to a heterosexual institution. Those who feel strongly that their marriage should not be confused with any kind of same-sex relationship, can still choose to marry under the Marriage Act and proudly state that in public. The Marriage Act remains unavailable to same-sex couples.

Whether the present situation complies with the demand for full equality in *Fourie* is debatable. In equality jurisprudence it has been well established that *separate but equal* is seldom, if ever, *equal*.

However, gay married men seem to quite openly and proudly refer to one another as *husband*. This is equally true of lesbian married women who call each other *wife*. What is the big deal then, one might ask? Could they not have used the Marriage Act in the first place by both declaring that they take the other as *husband* or *wife*? The Marriage Act provides for *husband* or *wife*, but does not state that both terms have to be used in a wedding ceremony. Apart from the stress this might cause for marriage officers, would the common law prevent this interpretation of the Marriage Act?

⁹¹ Section 11(1) of the Civil Union Act.

⁹² Section 13 of the Civil Union Act states:

- ‘(1) The legal consequences of a marriage contemplated in the Marriage Act apply, with such changes as may be required by the context, to a civil union.
- (2) With the exception of the Marriage Act and the Customary Marriages Act any reference to—
- (a) marriage in any other law, including the common law, includes, with such changes as may be required by the context, a civil union; and
- (b) husband, wife or spouse in any other law, including the common law, includes a civil union partner.’

The legal significance of marriage has largely been reduced to patrimonial consequences. But the battle about the *marriage* 'label' is a largely public one. And meanings and attitudes seem to keep changing.

Do sheep have rights?

Animal lovers and activists use the terms *animal rights* to denounce the cruel treatment of animals. In a strict legal sense, animals do not have rights. They are property. They can be bred, sold, killed and eaten. Furthermore, cruelty by humans to animals is a criminal offence, or in any event unnecessary.

But the term is not used in the strict legal sense. It aims to protect human feelings around decency and morality. Animals are part of the world of humans. They provide us with the opportunity to love and care. Those who are cruel to animals often have the same tendency towards fellow human beings. Animal *rights* talk is thus not to be discarded as legally wrong. It helps us to realise our need for empathy and to be able to identify with the pain and suffering of another being. The reference to a supposedly legal concept with connotations to the Constitution and to human rights discourse strengthens a public debate about morality.

V. CHANGING TIMES

Because of the passing of time, the meaning of words may change, or words themselves may become inappropriate in a constitutional democracy based on human rights. A few examples should suffice.

The term *illegitimate child* (for years central in the law of persons and of inheritance), should never be used for a child born out of wedlock. It is deeply insulting and means that someone's very existence is illegal. Words like *civilised* and *barbaric* call for caution, as they may well represent eurocentric or colonialist attitudes, not useful in an African democracy.

In *Shilubana v Nwamitwa*,⁹³ the Constitutional Court did use the terms *tribe* and *chief*, even though they might not sound all that respectful. This was because the litigants themselves chose to use the terms, and proudly so. Thus the preference of those to whom the Constitution and the law apply cannot necessarily be ignored in the interests of political correctness.

Until a few decades ago, the use of derogatory racial language (like the *k*-word) was acceptable in South African law, practised by white lawyers and applied in courts staffed by white judges and magistrates. A *crimen injuria* (an offence that constitutes a serious impairment of a person's

⁹³ *Shilubana v Nwamitwa* 2009 (2) SA 66 (CC) (4 June 2008) (*Shilubana v Nwamitwa*).

dignity) charge or delictual injury claim based on such language would have been dismissed, because it was ‘just how we (white South Africa) talk’. In view of the constitutional demand to develop the common law according to the values of the Constitution, this can no longer be the case.

An equality court recently ordered someone who had referred to black people as ‘monkeys’ in a Facebook post to pay R150 000 to a charity organisation.⁹⁴ And a magistrate’s court convicted a person of *crimen injuria* after the use of racially insulting language towards police officers on a public street.⁹⁵

VI. SPACE FOR POETRY?

It has been said that, whereas the natural sciences and technology help us to live better, poetry and the other arts are the reason why we live.⁹⁶ Do we want to reduce poetry and purple prose to the bare minimum of what is necessary for legal certainty, clarity and accuracy?

In *Hamlet*, Shakespeare puts the following words into the mouth of his eponymous tragic hero upon seeing his father’s ghost:⁹⁷

*I’ll call thee Hamlet.
King, father, royal Dane: Oh answer me,
Let me not burst in ignorance; but tell
Why thy canoniz’d bones hearsed in death,
Have burst their cerements, why the sepulchre
Wherein we saw thee quietly inurn’d
Hath op’d his ponderous and marble jaws,
To cast thee up again?*

In plain language it may look like this:

*What are you doing out of your coffin, Dad?
We buried you the other day and you’re
supposed to be dead.
Don’t keep me waiting!
I’m bursting to know!*⁹⁸

⁹⁴ *ANC v Sparrow* (01/16) [2016] ZAEQC 1 (10 June 2016).

⁹⁵ *S v Momberg* 2019 (2) SACR 505 (GJ) at paras 1–2.

⁹⁶ O Eliasson ‘Why art has the power to change the world’ (2016) <https://www.weforum.org/agenda/2016/01/why-art-has-the-power-to-change-the-world>.

⁹⁷ *Hamlet: Prince of Denmark* Act 1, Scene IV.

⁹⁸ I borrowed this example, with appreciation, from a presentation on ‘Plain language and the law’ by Professor Annelize Nienaber of the University of Pretoria at a PEG Conference on 14 November 2009.

Is there space for poetry in legal language?

The language of Holmes JA is well known, for example:

*what manner of man is this, whose grave and ugly crime against society now requires the law's visitation?*⁹⁹

and

*This is a grim and sombre drama of despair and mercenary death, uniquely macabre because the deceased arranged his own murder.*¹⁰⁰

Some of his words became famous precedents. On sentencing he said:

The element of mercy, hallmark of a civilised and enlightened administration, should not be overlooked, lest the court be in danger of reducing itself to the plane of the criminal.

and

*Justice must be done; but mercy, not a sledge-hammer, is its concomitant.*¹⁰¹

In the first paragraph of the unanimous *Nkandla* Constitutional Court judgment¹⁰² Mogoeng CJ penned:

[P]ublic office-bearers ignore their constitutional obligations at their peril. This is so because constitutionalism, accountability and the rule of law constitute the sharp and mighty sword that stands ready to chop the ugly head of impunity off its stiffened neck. (Citations omitted.)

Poetic language must be balanced, though, against the need for clarity and the necessity to make our Constitution and judgments accessible to our people. How we balance linguistic, poetic or prosaic elegance with clarity and practicality also depends on the target audience of a particular text, be it a statute, judgment, legal argument or correspondence. A judgment may arguably have more room for a poetic touch than a statute. But a strong preamble may do much to set the tone for a statute. Section 7 of the Constitution, which was intended to be an inspirational opening statement for the Bill of Rights as a 'cornerstone of democracy' in our country, has acquired considerable legal significance.¹⁰³

⁹⁹ *S v Bradbury* 1967 (1) SA 387 (A).

¹⁰⁰ *S v Robinson* 1968 (1) SA 666 (A).

¹⁰¹ *S v V* 1972 (3) SA 611 (A); *S v Harrison* 1970 (3) SA 684 (A).

¹⁰² *Economic Freedom Fighters v Speaker of the National Assembly; Democratic Alliance v Speaker of the National Assembly* 2016 (3) SA 580 (CC) (*Nkandla*).

¹⁰³ Section 7(1) states:

Some caution is called for. Lawyers look for every opportunity to advance their case. A loose explanation of the law can be quoted to bring about an unintended binding change. Innocent poetry could be the foundation for building future cases, perhaps cynically to escape the very purpose for which it was included in the judgment.

In *Christian Education*¹⁰⁴ Sachs J compared corporal punishment ‘in the intimate and spontaneous atmosphere of the home’ with the ‘detached and institutional environment of the school’. From the perspective of respect for home life, it sounds charming. However, Skelton¹⁰⁵ points out that the Constitutional Court seems to suggest a difference between violence from public and private sources, at least as far as child victims are concerned. Fortunately, Sachs J did not refer to the ‘intimate and spontaneous atmosphere of the home’ in *Baloyi*,¹⁰⁶ dealing with family violence against a woman. Very little can indeed be as *spontaneous* as violent outbursts and vicious assaults by a brutal parent or husband in what he regards as the *intimate* atmosphere of his own *home*.

In *R v Theron*¹⁰⁷ Krause J, who was ahead of his time on matters such as capital and corporal punishment, said the following in dismissing an appeal against a conviction for assault against a teacher:

The bullying teacher who struts about with his cane or has it ever ready to inflict corporal punishment, and who is obsessed with the importance and greatness of his position, should not, in my opinion, be entrusted with the education of our youth. The science of education is a progressive one and the task of the teacher is not only to impart learning and knowledge to his pupils, but is largely concerned with the formation of their characters. Methods of violence and force may create fear and hatred, but hardly ever respect or affection. The old saying ‘Spare the rod and spoil the child’ has long ago been abandoned by educationalists. Our increased knowledge of the operations of the mind has revealed the incontestable fact that in the building of character the rod should be sparingly, if ever, used.

-
- ‘(1) This Bill of Rights is a 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.
 - (2) The state must respect, protect, promote and fulfil the rights in the Bill of Rights.
 - (3) The rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill.’

¹⁰⁴ *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 para 49.

¹⁰⁵ A Skelton ‘*S v Williams: A springboard for further debate about corporal punishment*’ *Acta Juridica* 15 240.

¹⁰⁶ *S v Baloyi (Minister of Justice Intervening)* 2000 (2) SA 425 (CC).

¹⁰⁷ *R v Theron* 1936 OPD 166.

VII. CONCLUSION

In legal language, the requirements of accuracy, certainty, accessibility to more readers than lawyers and sensitivity must be balanced. Lawyers must realise that the law and courts applying it are crucial to the lives of ordinary people. The law is indeed a powerful instrument in the hands of a very small group, privileged to have been educated and trained in it. It could either be used to intimidate, oppress and further marginalise those who are not as privileged as lawyers are; or to inform, educate and empower; and indeed to protect the people.

In 1970 the late legendary country singer Kris Kristofferson sarcastically sang that ‘the law is for protection of the people’.¹⁰⁸ The song became iconic.¹⁰⁹ It describes how a harmless drunk stumbled on the side-walk until ‘six squad cars came screaming to the rescue’, and how a hippy ‘walking thru this world without a care’ was manhandled by ‘six strapping brave policemen’ who cut his hair. All of this is because ‘rules are rules and any fool can see’ that ‘we don’t need no drunks’ and ‘no hairy headed hippies ... scaring decent folks like you and me’. Because we also needed protection against ‘riddle speaking prophets’, ‘they nailed the saviour to the cross’, sings Kristofferson.

As quoted in the first paragraph of this article, Adam Small said – poetically and ‘not of narrow religious moment’ – that it ‘makes paramount sense that creation should start with the unveiling of language’. In law, as in life, language should be a form of communication with other human beings. It should open up the law to people, for their protection.

Stark¹¹⁰ pointed out that lawyers ‘recognise their role as deceiver’ and use language as the tool to work their magic. So, they lose faith in the honesty of words. Whereas language is designed to bring people closer together, it could be used to strangle communication and set up a ‘barrier that separates lawyers from others and others from the truth’.

Judges may also have to keep this in mind.

¹⁰⁸ J van der Westhuizen ‘Madiba would have agreed: ‘The law is for protection of the people’ (2013) 46 *De Jure* 878.

¹⁰⁹ The song is titled ‘The law is for protection of the people’.

¹¹⁰ Stark (note 26 above).

ETHICS AS A DRIVER OF TRANSFORMATION OF THE LEGAL PROFESSION¹

G GOOSEN

Judge of the Eastern Cape Division of the High Court

The Legal Practice Act 28 of 2014 has ushered in important changes in the governance of the legal profession. The Legal Practice Council, established in terms of the Act, has been constituted and it has assumed governance responsibility of the profession for both attorneys and advocates. These long-awaited changes have been the subject of considerable debate and, at times, hard-fought negotiation between the branches of the profession. With the commencement of operation of the Legal Practice Council, the profession enters a new era, the contours of which are not altogether certain. Some of the changes are quite possibly not much appreciated by all practitioners but they present new challenges that need to be embraced.

The preamble to the Act sets out its purpose in the following terms:

WHEREAS section 22 of the Bill of Rights of the Constitution establishes the right to freedom of trade, occupation and profession, and provides that the practice of a trade, occupation or profession may be regulated by law;

AND BEARING IN MIND THAT—

- *the legal profession is regulated by different laws which apply in different parts of the Republic and, as a result thereof, is fragmented and divided;*
- *access to legal services is not a reality for most South Africans;*
- *the legal profession is not broadly representative of the demographics of South Africa;*
- *opportunities for entry into the legal profession are restricted in terms of the current legislative framework;*

AND IN ORDER TO—

- *provide a legislative framework for the transformation and restructuring of the legal profession into a profession which is broadly representative of the Republic's demographics under a single regulatory body;*

¹ This article is based on a speech delivered at the annual general meeting of the South Eastern Cape Attorneys' Association held in Port Elizabeth on 28 November 2018 and an earlier version of a similar talk delivered at the Young Leaders Symposium of the General Council of the Bar hosted by the Eastern Cape Society of Advocates in Port Elizabeth on 30 June 2018.

- *ensure that the values underpinning the Constitution are embraced and that the rule of law is upheld;*
- *ensure that legal services are accessible;*
- *regulate the legal profession, in the public interest, by means of a single statute;*
- *remove any unnecessary or artificial barriers for entry into the legal profession;*
- *strengthen the independence of the legal profession; and*
- *ensure the accountability of the legal profession to the public.*

The Act seeks to address the legacy of racial and gender exclusion born out of the historical development of the professions. It does so by introducing significant changes in the structures of governance. The most significant of these changes establish statutory governance and disciplinary organs to regulate both branches of the practising profession, attorneys and advocates, as well as non-practising legal professionals. A key element of the regulation of legal professionals is enhanced public accountability. It is in this broader domain of accountability that I wish to place professional ethics as a driver of the transformation process.

By way of background, which will become relevant as the discussion progresses, it is instructive to take a step back in history, to 1884. It was in this year that the *Cape Law Journal*² was first published under the auspices of the Eastern Districts Law Society. In that year the Eastern Districts Law Society, an association of attorneys practising in what was then the eastern districts of the Cape Colony, held its inaugural annual general meeting. The Law Society of the Cape was incorporated and given statutory recognition in 1883. Ultimately, the two societies amalgamated into a single Law Society for the Cape Colony.

The first pages of the *Cape Law Journal* record the proceedings of the first annual general meeting of the Eastern Districts Law Society, held in the Town Hall at Port Elizabeth on 17 January 1884. The president of the Society, Jonathan Ayliff, who practised in Grahamstown (now Makanda) is reported as having said the following in his address:

Let me then say, as far as affects, what I may call our domestic concerns, we have been chiefly occupied with the business of consolidating and establishing the system and economy which we formulated when we organised our Society, and which have found expression in the articles of association now forming

² The *Cape Law Journal* was the precursor to the *South African Law Journal*, which today is one of the most prestigious and certainly the oldest law journal on the African continent.

the basis of our constitution; we have been putting the machine in working order, meantime doing such work as has been incidentally thrown in our way; but there has hardly been any occasion for putting into operation the forces and influence which our association coupled with our wide-spread ramifications towards the community at large, may, in some degree, be considered to be at our disposal. The fact is we are not aggressive, we do not feel ourselves called upon to systematically attack any subsisting condition, nor have we been called upon to stand on the defensive against any serious inroad upon our status; judging from the individual experience of practitioners, we believe we enjoy the confidence of the public, and we feel assured that if we realise the objects that we now aim at, our members generally will be improved in learning, fixed in integrity, and well established usefulness and influence.³

The last portion highlights what were considered then to be three important objects of the Society: First, improvement in learning and the education of articled clerks⁴ or new entrants to the profession. In this respect, the president of the Society expressed some views on what might constitute a useful curriculum of study for law students. Second, the Society's role in ensuring that its members were 'fixed in integrity' was stressed, conveying a concern with the development and enforcement of standards of conduct in the profession. Third, the address identified a need for the Society to facilitate the development and improvement of the law through public engagement and debate.

The political and social context of the year 1884 is relevant. It was just five years after the last of the wars of resistance to European invasion and settler colonial occupation in the Eastern Cape. These wars had extended over a period of 100 years. By 1884, military resistance on the eastern frontier had all but been overcome. The territory in which these successive wars of resistance to colonial expansion had been fought was effectively under the control of the colonial administration.⁵ The whole of the territories that now make up South Africa was under European occupation in one form or another. The Kimberley diamond fields had been discovered and South Africa was about to enter a period of intense and protracted conflict within the settler polity that would define the settlement at Union in 1910 and shape the apartheid social order by the mid-century.

³ President's Address 'Proceedings at the Annual General Meeting of the Eastern Districts' Law Society' (1884) 1 *Cape Law Journal* 5.

⁴ Now known as candidate attorneys.

⁵ For detail on this historical account, see the magisterial work of Noel Mostert *Frontiers* (1993).

The consolidation of settler colonial rule was, of course, a defining period in our history, one that has left a legacy with which we continue to struggle today. Social institutions, both public and private, were constituted and developed to give effect to racial exclusion of the majority indigenous population. An extractive economy, founded on racial exclusion and exploitation, took root. Every facet of social and economic life came to be premised upon profoundly racist policies. Law was deployed to give effect to these policies. The legal profession was moulded in accordance with these policies and the judiciary reflected the prevailing social and political hegemony.

But even as the organised legal profession charted a path of development which reflected the social, political and economic realities of a colonial and then an apartheid legal order, some crucial building blocks of a critically important profession were laid down.

Illustrated in the first volume of the *Cape Law Journal* there is a report of the case of *Incorporated Law Society v Morkel*.⁶ The facts briefly are the following: Morkel was a practising attorney who was in a partnership with an administrator of estates. He submitted a bill for fees charged in respect of the administration of a deceased estate. The bill came before the Taxing Master who called for certain letters for which Morkel had raised a fee. Upon production of the letters, it was established that the letters had been written by Morkel's associate. Dissatisfied with Morkel's explanation, the Taxing Master referred the matter to the Law Society. The Society in turn brought an application to have Morkel struck off the roll. The court accepted Morkel's explanation and declined to make any order in respect of the matter. The report on the case, however, indicates that the court expressed deep appreciation for the fact that the Society had brought the matter to the attention of the court, commended it for doing so, and expressed the wish that the Society would continue to act in that manner in instances where the conduct of practitioners might warrant sanction.

Referring to the earliest activities of the organised legal profession in South Africa serves several purposes. First, it serves to highlight an important feature of law and the practice of law, namely that it does not exist in isolation from the power relations that fashion social, political and economic realities. It also demonstrates that the provenance of the values that regulate professional practice may be traced to practices and procedures developed long ago. A further reason is to call attention to the fact that today is the history of tomorrow. How we act today, what

⁶ *Cape Law Journal* (1884) 1 at 39. I have been unable to trace the reported judgment.

course we choose, what steps we take in the profession, shape the days to come and will, inevitably, be viewed and appraised from the perspective of tomorrow.

Some observations on the present context may serve to illustrate this. Over the course of the past few years, there has been considerable public discourse about abject failures of professional ethics. These have affected other professions, most notably the accounting and auditing professions. Some global auditing and accounting firms have been eviscerated in the public domain for instances of professional failings. There have been similar instances of corporate governance failure, sometimes on a grand scale, resulting in the loss of millions of rand in investment value. These failings are often accompanied by significant debate about the need to impose higher professional standards or to ensure a greater degree of accountability. In some respects, there is a crisis of confidence in the standards of professional ethics as they apply to certain professions. These failings and the public discourse accompanying them are not unique to South Africa.

The legal profession is, understandably, not immune to this concern about the standards of conduct at play in corporate bodies and institutions, both public and private. The question might well be asked, in relation to corporate governance failings or the failings of consultancy firms, or even the failings in public enterprises, government departments and the like: where are the lawyers in this? Legally trained people populate the boards of many corporate institutions and are often central to auditing and forensic investigations. In-house legal counsel play a significant role in the activities of these corporate entities. Yet, when governance failures emerge or when the failures in professional ethical conduct arise at these entities, questions that need to be asked are seldom asked. Who drafted the contracts? Who provided the legal advice on the structuring of certain investment deals or banking transactions? Who advised the department to take certain decisions? What was the role of the legal practitioner briefed to advise and guide certain processes?

These questions are raised not to stimulate a misguided challenge to the integrity of legal professionals by adding grist to the popular mill nor even to focus attention on the particular codes of conduct of in-house counsel, corporate lawyers or advocates. Rather, they aim to highlight the fact that we are in an era where professional conduct and professional ethics are central concerns in the public domain. Times have shifted significantly. There is today far greater transparency in the conduct of everyday life. Social media platforms, in which ordinary members of the public engage, place questions of accountability and impropriety in the conduct of professionals in the public domain. All this takes place in the

context of ongoing debates about the transformation, reorganisation and reorientation of those professions as they adapt and contribute to changing social, economic and political circumstances.

What this points to is that questions regarding professional ethics are fundamentally connected to the discourse of change. Often the failings in professional ethics stimulate the impetus for change. In this context, important issues arise about ethics and transformation⁷ and how the two are inextricably linked. Understanding these linkages will enable the profession to grapple with important practical questions, for example how we deal with training in ethics and how we promote transformation in our ethical practice in order to foster the transformation of the legal profession.

The Legal Practice Act 28 of 2014 addresses this linkage. The Code of Conduct published in terms of section 97 of the Act sets out standards and regulations that apply to attorneys, advocates and corporate counsel, and those admitted practitioners not in private practice. In this, it marks a very significant advance in extending professional accountability beyond the confines of practitioners in practice, as was the case previously. The Code reflects the importance of adhering to the values that define the qualifying criteria for entry into the profession. It does so within a framework that fosters accountability and the protection of the public interest.

The link between ethical practice and the process of transformation is best illustrated in the functioning of an independent profession within the courts. Our legal system is adversarial. This adversarial system, as a procedural mechanism, is deployed to give expression to and vindicate our supreme law, the Constitution, which is the foundation upon which all law and legal process is based. The Constitution vests judicial authority in the courts and guarantees their independence by means of various mechanisms. These include imposing certain obligations on the other arms of the state and by means of the judicial appointments process. The courts are accorded wide-ranging powers to uphold and enforce a set of fundamental rights enshrined in the Constitution; to hold public and private bodies to account; to review and strike down as unconstitutional, executive and legislative conduct; and to provide appropriate relief that gives expression to the values of the Constitution. Their principal function is to uphold the rule of law in a constitutional democracy that guarantees fundamental rights and imposes critical obligations on public and private bodies and individuals to transform the society in accordance with its foundational

⁷ The term is used to refer to organisational or structural change, the promotion of diversity in the composition of the profession and its alignment with the core foundational values that underpin our Constitution.

values. Independent courts that function effectively and efficiently in the discharge of their obligations are critical to maintaining the rule of law.

The adversarial system is key to the manner in which courts fulfil their constitutional role and function. The key players in this system are, understandably, legal practitioners.

Ponnan JA introduced his judgment in *General Council of the Bar of South Africa v Geach*⁸ with this observation:

‘The first thing we do, let’s kill all the lawyers’ is Dick the Butcher’s exhortation in Henry VI to Jack Cade – ‘the head of an army of rabble and a demagogue pandering to the ignorant’. That oft misunderstood phrase was William Shakespeare’s homage to lawyers as the primary defenders of democracy. Through it, the Bard recognised that for tyranny and anarchy to flourish, the law and all those who were sworn to uphold it had to be first eliminated. Lawyers, because of the adversarial nature of litigation in this country, will never be universally loved by the public. That is not to suggest that as members of a distinguished and venerable profession they do not occupy a very important position in our society. After all they are the beneficiaries of a rich heritage and the mantle of responsibility that they bear as the protectors of our hard won freedom is without parallel.

More than a century ago, Innes CJ described the position occupied by practitioners in an adversarial system in the following terms:⁹

Now practitioners, in the conduct of court cases, play a very important part in the administration of justice. Without importing any knowledge of opinion of their own – which is entirely wrong that they should ever do – they represent the case of their client by urging everything, both in fact and law, which can honourably and properly be said on his behalf. And of this method of examining and discussing disputed causes it 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.

⁸ *General Council of the Bar of South Africa v Geach* 2013 (2) SA 52 (SCA) para 87.

⁹ *Incorporated Law Society v Bevan* 1908 TS 724 at 731–732.

This passage captures the primacy of the legal practitioner to the discharge of a court's adjudicative function. It also highlights what is generally referred to as the dual, interlocked and balanced duties that apply to the practice of law before the courts, namely the legal practitioner's duty to the client and the duty to the court. The Code of Conduct requires the practitioner to treat the interests of the client as paramount, subject only to the legal practitioner's duty to the court, the interests of justice, observation of the law and the duty to maintain ethical standards.¹⁰

A practitioner's duty to the client is broad: it encompasses the requirement of fidelity, honesty and integrity in dealing with the client's affairs; it requires that practitioners should apply themselves with dedication and commitment to the resolution of the legal dispute or claim in the interests of the client; it demands that they should ensure that they are versed in the relevant legal principles and that those principles guide the advice given and the conduct of the matter; it requires industry and the maintenance of the highest professional standards; and, it requires fearless independence.

The duty to the client imposes high standards of professional conduct. There is no room for not knowing the legal principles; for not mastering the relevant facts upon which the case is based; for not giving careful consideration to a solution to the dispute that serves the interest of the client; for not applying oneself meticulously to the task of preparing the case. Nor is there room for shirking the obligation to advance the case of the client. The duty applies at every stage of the process: from the initial advice that is to be given, the management of the matter and decisions about how to prosecute the case to the framing of the issues that must be decided, the preparatory drafting, the research, the examination and cross-examination of witnesses and the formulation of argument presented to the court. The duty to the client envisages the application of a legal practitioner's best endeavours to resolve the claim or dispute in accordance with law. That is how the administration of justice is promoted and, ultimately, the rule of law advanced.

The corresponding duty to the court has the same effect. In this regard, the practitioner's duty is one of fidelity to the adjudication process: one that seeks to ensure that the court can determine the matter in accordance with the law and upon the facts which are properly before it. The legal practitioner's duty is to facilitate the court's adjudication in accordance

¹⁰ Part II, 3.3 of the Code of Conduct for Legal Practitioners, published under s 97(1)(b) of Act 28 of 2014, *Government Gazette* No 40610 (10 February 2017).

with law. He or she does so by ensuring that the case is meticulously prosecuted before the court.

The duty has both positive and negative elements. The constraint upon the duty to the client, to which Innes CJ refers, can be thought of as the negative elements. They circumscribe those things which the legal practitioner should not do, lest the very system be undermined. The positive elements are those that flow from the duty to the client. These include the duty to assist the court in its adjudicative function: to place the court in a position to decide upon those aspects of the case that may require, for instance, a development of the applicable legal principles.

The development of the law is, in the context of judicial adjudication, an incremental process. Relevant constitutional and legislative provisions, principles of the common law and prior judicial decisions are all brought into the reckoning when a court decides a matter. The process of decision-making involves a reasoning exercise, which serves to inform and guide the parties, the profession and the public.

This discussion of the duties of a legal practitioner serves to underline the crucial role that professional ethics plays in the effective functioning of the courts. Indeed, ethics in practice is a precondition not just for the maintenance of the integrity of the adjudicative function of the courts, it is also a precondition for the fulfilment by the courts of their role under our Constitution. It is this understanding of ethics in practice that leads to the premise that ethical practice is a *sine qua non* (an essential condition) for the process of transformation that the Constitution requires.

The Constitution calls for transformative adjudication by the courts so that the promise of a society based upon the values of human dignity, equality and freedom can be achieved. Courts, of course, do not choose which cases should come before them. That is the prerogative of litigants who are guaranteed, by section 34 of the Constitution, a right of access to courts so as to resolve disputed issues. If the courts are to meet their obligations, then it is incumbent on the legal profession to ensure that those cases that are prosecuted before them are prosecuted in accordance with the highest standards of professional ethics.

At the outset it was suggested that legal professional ethics are at the heart of legal transformation. They are not merely an adjunct to be considered in the context of those stipulated rules which may form part of a Code of Conduct. What this discussion has sought to illustrate is that locating ethics in practice as a driver of transformation both in society and in our profession, offers a way of conceptualising the transformation process that lies ahead. It requires us to examine not only our own practice but also how we train and guide others.

A cornerstone of the transformation agenda set by the Legal Practice Act is accountability. A reading of the Act indicates that the legal profession should be accountable via its structures of governance. Those structures of governance, more particularly the Legal Practice Council, are charged with ensuring that practitioners comply with the standards of professional conduct demanded of them and which are enshrined in the enacted codes of conduct.

It is therefore to be expected that, in the first instance, the Legal Practice Council and any disciplinary bodies established under its ambit, will act with due and proper expedition when faced with breaches of the set standards of conduct. The Legal Practice Council is called upon to fulfil a critical role in laying down the foundations of a transformed profession under its remit. The wish expressed way back in *Morkel* that the organised profession would, wherever necessary, bring to the fore ethical breaches to enable the courts to address them, is one which now bears repeating. The law reports are replete with examples where, over the past 135 years, the authority of the courts has been invoked to lay down and enforce principles of professional conduct by members of the legal profession.¹¹

¹¹ The procedure by which ethical standards are enforced by the courts is *sui generis* (unique). The professional body enjoys standing and acts as *custos morum* (literally, 'keeper of morals', but in this context 'custodian of ethical norms'), bringing to the attention of the court such facts relating to alleged misconduct as it possesses and requesting the court to exercise its inherent authority to sanction the misconduct of the practitioner as an officer of the court. In *Solomon v Law Society of the Cape of Good Hope* 1934 AD 401 at 409 Wessels CJ noted:

'Before the Cape Law Society received statutory recognition, the Court *mero motu* [of its own accord] dealt with the unprofessional conduct of attorneys. In practice the *Attorney General* was asked to lay facts before the Court (*In re Cairncross*, 1877, Buch. 122). In 1883 the Cape Law Society was established by statute, and it became the body which laid before the Court the facts concerning the unprofessional conduct of an attorney. The Law Society protects the interests of the public in its dealings with attorneys. It does not institute any action or civil suit against the attorney. It merely submits to the Court facts which it contends constitute unprofessional conduct and then leaves the Court to determine how it will deal with this officer.'

This has remained the role of professional bodies, which have controlled and regulated the conduct of legal professionals in South Africa for well over a century. That role is set to continue under the newly established Legal Practice Council (cf. *Society of Advocates of South Africa (Witwatersrand Division) v Rottanburg* 1984 (4) SA 35 (T) 39I-40B; *General Council of the Bar of South Africa v Matthys* 2002 (5) SA 1 (E) para 4).

There is no reason to doubt that this will continue. Nevertheless, it bears emphasising that the task of transforming the legal profession into one that measures up to the values enshrined in our Constitution will require far more than reorganisation at the level of governance. It also requires more than the periodic enforcement of regulated standards of conduct where breaches occur. It requires that we embed in the very fabric of the profession, a deep and abiding commitment by legal practitioners to standards of conduct that give expression to the values of the Constitution.

Achieving this is, of course, not merely a function of the enforcement of codes of conduct by an active regulatory authority such as the Legal Practice Council. Compliance with ethical standards and the requirements for professional conduct is born out of an individually rooted commitment to those values. To achieve this level of compliance, we will need to place these values at the core of the education of law students and the vocational training of practitioners. The Constitution requires it and the public deserves it. Notwithstanding the dramatic shift in the social context, the three core concerns expressed at the inauguration of the Eastern Districts Law Society so many years ago remain relevant challenges for the new Legal Practice Council today.

ARBITRARINESS, RATIONALITY AND REASON: THE CASE OF MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT V SOUTH AFRICAN RESTRUCTURING AND INSOLVENCY PRACTITIONERS ASSOCIATION

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I INTRODUCTION

In the recent decision of *Minister of Justice and Constitutional Development v South African Restructuring and Insolvency Practitioners Association*,¹ a majority of the Constitutional Court appeared to distinguish between ‘arbitrariness’ and ‘rationality’ as standards of review in relation to public power. Without purporting to develop the law, the majority held that, whereas arbitrariness is concerned with reasons and justification, rationality is not. It also held that arbitrariness is a higher standard of review than rationality.

This would have come as a surprise to most constitutional lawyers, for the majority’s approach appears to be at odds with two decades of constitutional jurisprudence. In our view, it risks adding considerable uncertainty to the established standards of review.

For practitioners and lower court judges, it is important that our highest court identifies, in clear and unambiguous terms, the grounds of review applicable to different exercises of public power. The regular recognition of new review grounds under the principle of legality can perhaps be justified as necessary, given the pressing need to hold executive action to account. But, as a consequence, it imposes an especial burden on the court to strive to provide absolute clarity on the content of those review grounds. Unfortunately, *Insolvency Practitioners* seems to do the opposite.

This article is structured as follows. In Part II, we explain the Constitutional Court’s well-established approach to challenges to public power and the various standards of review. In Part III, we analyse the relevant paragraph in *Insolvency Practitioners*, and illustrate that at least two

¹ *Minister of Justice and Constitutional Development v South African Restructuring and Insolvency Practitioners Association* 2018 (5) SA 349 (CC) (*Insolvency Practitioners*).

of the statements it contains are inconsistent with precedent and mistaken as a matter of principle and logic.

We conclude in Part IV by proposing that, given the absence of any express intention to develop the law in relation to standards of review, wherever possible, the decision should be interpreted in line with established constitutional principle, rather than constituting an extraordinary rupture.

II ESTABLISHED STANDARDS OF REVIEW

Until *Insolvency Practitioners*, the tests for constitutional challenges have been widely accepted. The first and lowest threshold is the rationality standard. This is the standard that emanates from the rule of law entrenched in section 1(c) of the Constitution and applies to all exercises of public power. It is also the standard that applies where a government measure is alleged to result in an unconstitutional differentiation under section 9(1) of the Constitution.

Rationality requires a rational connection between means and ends. There must be a rational connection between the measure the government adopts, be it policy or legislation, and the end.

This standard applies whether a challenge is brought under the rule of law or under section 9(1). It is not a high threshold. The courts will not, for example, inquire into whether the purpose could have been achieved by less restrictive or more effective means.² The question is simply whether there is a rational connection between the measure or the differentiation and the legitimate purpose.³

Rationality is widely understood to be the direct antonym of arbitrariness. As the Supreme Court of Appeal (SCA) has put it, ‘rationality entails that the decision is founded upon reason – in contrast to one that is arbitrary.’⁴ And as Yacoob J held in *New National Party v Government of the Republic of South Africa*,⁵ in the absence of an alleged rights-violation, courts will only review legislation—

² *East Zulu Motors (Pty) Ltd v Empangeni/Ngwelezane Transitional Local Council* 1998 (2) SA 61 (CC) para 24.

³ See, for example, *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC).

⁴ *Minister of Home Affairs v Scalabrini Centre, Cape Town* 2013 (6) SA 421 (SCA) para 65 (per Nugent JA) (*Scalabrini*).

⁵ *New National Party v Government of the Republic of South Africa* 1999 (3) SA 191 (CC) para 24.

if they are satisfied that the legislation is not rationally connected to a legitimate government purpose. In such circumstances, review is competent because the legislation is arbitrary. Arbitrariness is inconsistent with the rule of law which is a core value of the Constitution.

The same applies to executive conduct:

[T]he decision must be rationally related to the purpose for which the power was conferred. Otherwise the exercise of the power would be arbitrary and at odds with the Constitution.

Indeed, because rationality applies to both section 9(1) challenges and rule of law challenges, '[b]oth strike at arbitrariness' and 'conduct that is arbitrary may violate both the rule of law and the equality clause.'⁶

An analysis of relevant Constitutional Court decisions reveals that the court has always either regarded arbitrariness and irrationality as synonyms, or regarded arbitrariness as a species of irrationality. As the court held in *AB v Minister of Social Development*⁷ in the context of a challenge to legislation:

The correct approach to be adopted when legislative measures are challenged is to determine whether there is a rational connection between the means chosen and the objective sought to be achieved. A mere differentiation does not render a legislative measure irrational. The differentiation must be arbitrary or must manifest 'naked preferences' that serve no legitimate governmental purpose for it to render the measure irrational.

The same approach applies in the context of judicial review. As Hoexter explains, 'at common law action is said to be arbitrary or capricious when it is irrational or senseless, without foundation or apparent purpose'.⁸

The second, and more exacting, standard is that of reasonableness or proportionality. This applies when a law of general application limits a fundamental right in the Bill of Rights. Section 36(1) of the Constitution provides that such a limitation is valid only if it is 'reasonable and justifiable in an open and democratic society', and sets out a set of factors that must be applied to determine whether the limitation is proportionate. It also applies to reviews under the Promotion of Administrative Justice Act 3 of 2000 (PAJA), and requires courts to consider—

⁶ *Van der Walt v Metcash Trading Limited* 2002 (4) SA 317 para 36.

⁷ *AB v Minister of Social Development* 2017 (3) SA 570 (CC).

⁸ C Hoexter *Administrative Law in South Africa* 291–292.

*the nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing interests involved and the impact of the decision on the lives and well-being of those affected.*⁹

The Constitutional Court has emphasised the distinction between these two standards of review – that is, rationality review and reasonableness review.¹⁰

The only time it has developed an intermediate standard is in the context of section 25(1) of the Constitution – for purposes of assessing whether a law violates the prohibition against arbitrary deprivation of property. In *First National Bank*¹¹ the court explained that, in the special context of section 25, arbitrariness ‘is not limited to non-rational deprivations, in the sense of there being no rational connection between means and ends’. Rather, in this context, by requiring that a deprivation is not made ‘without sufficient reason’, section 25 imports ‘a stricter evaluative norm than mere rationality, although less strict than the proportionality evaluation under section 36’.

Whether one calls the section 25 approach the ‘extended rationality test’ or the ‘restricted proportionality test’, the applicable standard is circumstance-specific: in some cases, it may entail no more than a mere rational relationship between means and ends; in others it might require a proportionality evaluation approximating that under section 36.¹²

The approach to arbitrariness under section 25 thus constitutes an express exception to its ordinary meaning. But it is an exception that proves the rule. That is, by explaining that, for the special purposes of section 25, arbitrariness does not mean mere irrationality, the court made clear that in the ordinary context in which arbitrariness is used – such as challenges to exercises of public power based on the rule of law or section 9(1) of the Constitution – it means nothing more than the absence of a rational connection between means and ends.

⁹ *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 (4) SA 490 (CC), para 45).

¹⁰ See, for example, *Ronald Bobroff & Partners v De La Guerre* 2014 (3) SA 134 (CC) paras 6–8.

¹¹ *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services; First National Bank of SA Limited t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) paras 65–67 (*First National Bank*).

¹² *First National Bank* (note 11 above) paras 98–100.

III A NEW STANDARD?

The review standards described above are widely understood. But in the wake of *Insolvency Practitioners*, their status suddenly seems uncertain.

Insolvency Practitioners concerned a challenge to the government's policy on the appointment of insolvency practitioners, on two bases: (i) that the policy failed to meet the requirements of a restitutionary measure under section 9(2) of the Constitution, and (ii) that it was irrational. We do not consider the section 9(2) challenge in this note; our sole focus is the rationality challenge.

In the discussion of the merits of the rationality challenge, the majority (per Jafta J) said the following:

While there may be an overlap between arbitrariness and rationality these are separate concepts against which the exercise of public power is tested. Arbitrariness is established by the absence of reasons or reasons which do not justify the action taken. Rationality does not speak to justification of the action but to a different issue. Rationality seeks to determine the link between the purpose and the means chosen to achieve such purpose. It is a standard lower than arbitrariness. All that is required for rationality to be satisfied is the connection between the means and the purpose. Put differently, the means chosen to achieve a particular purpose must reasonably be capable of accomplishing that purpose. They need not be the best means or the only means through which the purpose may be attained.¹³

There are four discrete statements in this paragraph that require interrogation: first, that arbitrariness is established by the absence of reasons, or reasons which do not justify the action taken; second, that rationality is not concerned with the justification of an action; third, that rationality seeks to determine the link between the purpose and the means chosen to achieve such purpose; and fourth, that rationality is a standard 'separate' to and 'lower' than arbitrariness.

The first and third statements are uncontroversial. They cohere with what has long been the court's approach. But the second and fourth statements are, in our view, at odds with principle, inconsistent with the first and third statements, and directly in conflict with two decades of constitutional authority.

Let us begin with the second statement. The majority suggests that, whereas arbitrariness is concerned with absence of reasons, or reasons that do not justify action, rationality is not concerned with reasons or with justification at all. But, as we explained above, and as the majority

¹³ *Insolvency Practitioners* (note 1 above) para 55.

acknowledges in its third statement, rationality is concerned with there being an adequate relationship between means and ends.

What is an end, if it is not a reason that seeks to justify the means adopted? Consider an example. The government implements a policy regarding the provision of social grants. In its policy, it differentiates between rich and poor. It justifies the differentiation on the basis that the policy was made to pursue the legitimate goal of redistributing wealth from rich to poor. The key question in determining the rationality of the provision is whether there is a rational connection between such a differentiation and a social grants policy. That, of course, is just another way of asking whether the differentiation is justified by the reasons for it.

To be sure, rationality is the lowest threshold of inquiry. It does not interrogate the reasons any more than to determine the rationality of the connection between them and the means adopted. But it is mistaken to suggest that it is unconcerned with reasons and justification. As Kate O'Regan has dubbed it extra-curially, it is the 'some rhyme or reason rule'.¹⁴

The majority's entire mode of analysis is thus misplaced. What distinguishes rationality from any other ground of review is not that it is unconcerned with the reasons justifying an action. Instead, what distinguishes it from, say, reasonableness, is the *threshold* or *intensity* of scrutiny to which those reasons are subjected. Reasonableness requires a court to consider a range of factors, including the availability of less restrictive means. In the social grants example, if reasonableness were the standard, a court would ask whether policies that were less restrictive of the rights of those excluded were available. If rationality were the standard, a court would not ask that question.

Indeed, to suggest that rationality is not concerned with justification does a profound disservice to our constitutional democracy for, at the heart of our constitutional order is what Etienne Mureinik famously referred to as a 'culture of justification', in which every decision obtains its legitimacy not from the fact that it comes from a place of authority, but that it is *justified*.¹⁵ It is anathema to that order, in which rationality is the minimum

¹⁴ Kate O'Regan 'A Forum for Reason: Reflections on the Role and Work of the Constitutional Court (2012) 28 *South African Journal on Human Rights* 116 at 127.

¹⁵ E Mureinik 'A Bridge to Where? Introducing the Interim Bill of Rights' (1994) 10 *South African Journal on Human Rights* 31.

threshold to which *every* exercise of public power is subject, to suggest that a rational decision has no concern for justification.

The problem is compounded by the majority's fourth statement, which arguably gives rise to an even more profound departure from precedent: it says that arbitrariness is both separate to and a *higher* standard than rationality.

Recall that the majority's first claim is that arbitrariness can be established by the absence of any reasons at all. That is indeed consistent with the common understanding of arbitrariness. But a decision taken for no reason at all – that is, which has no end, no government purpose in respect of which its means can be assessed – is necessarily irrational without more. It is, in Hoexter's words, 'irrational or senseless, without foundation or apparent purpose'.¹⁶

So, principle and precedent tell us that an arbitrary decision is by definition one taken without reason, or without sufficient reason. It includes a decision taken where there is no legitimate government purpose whatsoever. That constitutes the end of the rationality inquiry – such a decision is necessarily irrational. Thus, to speak of an arbitrary but rational decision is, simply put, a contradiction in terms. And it is precisely the contradiction implied by the majority's approach.

We are not aware of any authority for the second and fourth statement. And, surprisingly, paragraph 55 cites no authority. What is more, every constitutional-era decision cited by the majority on these questions in other paragraphs – including *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa*¹⁷ – appears to contradict the second and fourth statements.

Indeed, just two paragraphs earlier, the majority quotes the following passage from *Prinsloo*, which clearly regards rationality and arbitrariness as two sides of the same coin:

*In regard to mere differentiation the constitutional state is expected to act in a rational manner. It should not regulate in an arbitrary manner or manifest 'naked preferences' that serve no legitimate governmental purpose, for that would be inconsistent with the rule of law and the fundamental premises of the constitutional state.*¹⁸

¹⁶ Hoexter (note 8 above) 325.

¹⁷ *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa* 2000 (2) SA 674; see also: *Prinsloo* (note 3 above); *Albutt v Centre for the Study of Violence and Reconciliation* 2010 (3) SA 293 (CC) and *S v Makwanyane* 1995 (3) SA 391.

¹⁸ *Insolvency Practitioners* (note 1 above) para 25.

And the passage quoted from *Makwanyane* (affirmed in *Pharmaceutical Manufacturers* at para 84) does the same, explaining that—

*[w]e have moved from a past characterised by much which was arbitrary and unequal in the operation of the law to a present and a future in a constitutional state where state action must be such that it is capable of being analysed and justified rationally.*¹⁹

Indeed, even the common-law authority cited in support of the claim that ‘[i]f action is taken for no reason or no justifiable reason it is arbitrary’ makes clear that an arbitrary decision is ‘capricious or proceeding merely from will and not based on reason or principle’.²⁰

Nothing in these authorities suggests a standard higher than rationality.²¹

All this threatens to add considerable uncertainty to an already indeterminate and ever-morphing area of our law. Practitioners and lower court judges have a hard enough time determining whether PAJA or the principle of legality applies to a given decision, which review grounds are recognised under each, and the precise contours of the ‘slippery path’ that is the rationality enquiry.²²

But before *Insolvency Practitioners*, one thing of which courts and practitioners could be certain was that irrationality and arbitrariness were equivalent, and that both were concerned with the lowest threshold

¹⁹ *Insolvency Practitioners* (note 1 above) para 156.

²⁰ *Kadiaka v Amalgamated Beverage Industries* (1999) 20 ILJ 373 (LC) citing *Beckingham v Boksburg Licensing Court* 1931 TPD 280.

²¹ Notably, each of the common-law authorities cited by the majority: *Kadiaka* (note 20 above), *Beckingham* (note 20 above) and *Bernberg v De Aar Licensing Board* 1947 (2) SA 80 (C), concerned the definition of ‘arbitrary’ under a specific statute. Each was also concerned with arbitrariness as a species of unreasonableness at common law, at a time when reasonableness was not a free-standing ground of review, but applicable only when a decision was ‘so unreasonable as to lead to a conclusion that the official failed to apply his or her mind to the decision’. (See *Bato Star* (note 9 above) para 43 citing *Johannesburg Stock Exchange v Witwatersrand Nigel Ltd* 1988 (3) SA 132 (A) 152A–D. For these reasons, the common-law authorities are of limited precedential value in determining the meaning of arbitrariness under the Constitution.

²² *Scalabrini* (note 4 above) para 65. On the uncertainty and indeterminacy of the rationality standard, see M Bishop ‘Rationality is Dead! Long Live Rationality! Saving Rational Basis Review’ (2010) 25 *South African Public Law* 312, and a compelling response in A Price ‘The Content and Justification of Rationality Review’ (2010) 25 *South African Public Law* 346. See also the more recent A Price ‘The Evolution of the Rule of Law’ (2013) 130 (4) *South African Law Journal* 649.

of justification for the exercise of public power. There are now serious questions about whether this is still the case.

IV CONCLUSION: THE WAY FORWARD

The majority's approach to rationality and arbitrariness in *Insolvency Practitioners* thus constitutes a concerning departure from established precedent. It threatens to introduce considerable and unnecessary uncertainty. And it appears to do so unwittingly.

This is regrettable, especially as it was not even necessary for the majority to reach the rationality challenge. It had already upheld the challenge based on section 9(2) of the Constitution, concluding that the policy failed to meet the constitutional requirements of a restitutionary measure. On that basis alone, the appeal had to fail.

At first glance, that might provide a fruitful path to practitioners and lower court judges to treat the majority's reasoning as *obiter* (by the way), and to prefer the pre-existing understanding of rationality and arbitrariness. But that path appears to have been closed off by the Constitutional Court's decision in *Turnbull-Jackson v Hibiscus Coast Municipality*,²³ which held that, where a court decides an issue on multiple bases, each of which is dispositive of the dispute, the additional bases are 'as much part of the *ratio decidendi* [basis for the decision] as the first basis', provided they are 'central to the reasoning'. It would be difficult to argue that the rationality reasoning was not central to the court's decision.

Does that mean that *Insolvency Practitioners* must be understood to create a new general standard of review in constitutional challenges called 'arbitrariness', which exists somewhere between rationality and reasonableness?

We would hope not. The Constitutional Court has held that precedents must be respected to ensure legal certainty and the rule of law and that, as the highest court of appeal, the court 'has to be especially cautious as far as adherence to or deviation from its own previous decisions is concerned'.²⁴

Therefore, in our view, such a drastic departure from established precedent should not be inferred easily. In the absence of a clear and unequivocal intention to develop the law and overrule precedent, courts should seek wherever possible to interpret the majority decision in

²³ *Turnbull-Jackson v Hibiscus Coast Municipality* 2014 (6) SA 592 (CC) para 62.

²⁴ *Gcaba v Minister for Safety and Security* 2010 (1) SA 238 (CC) para 62.

Insolvency Practitioners to fit with two decades of established constitutional principle rather than constituting an extraordinary rupture (see, in this regard, the approach of the Full Court in *Bosch v Commissioner, SARS*²⁵ at paras 84 (majority) and 103 (minority)).

²⁵ *Bosch v Commissioner, SARS* 2013 (5) SA 130 (WCC).

BOOK REVIEWS

Precedents for Applications in Civil Proceedings
by Peter van Blerk. Juta. 2018

776 pages. Price: R940 (soft cover)

Precedents for Applications in Civil Proceedings (Precedents) has been written by legal practitioners for legal practitioners. A book of precedents is by definition aimed at providing practical examples. The drafting of documents for court is one of the most important skills that a legal practitioner has to acquire, but also one of the most daunting, especially for junior and inexperienced practitioners. In practice, much reliance is placed on precedents in order to save time, to ensure accuracy and to fill in gaps due to a lack of knowledge. As any practitioner knows, a good example is worth its weight in gold.

The author and contributors are seasoned litigators with specialist knowledge in their respective fields and are eminently qualified to write a book of this nature. Peter van Blerk is a senior advocate of the High Court of South Africa, and a barrister and solicitor of the High Court of New Zealand. He acted as a judge of the High Court, sat as an arbitrator and played a substantial role in practical legal training, having set up the Johannesburg Bar Advocacy Training Programme. Gavin Marriot and Kevin Iles, both advocates of the High Court of South African and members of the Johannesburg Bar, made specialist contributions to the book in the fields of intellectual property law, constitutional litigation, administrative law and class actions.

It is worth recalling that Adv Van Blerk previously wrote a book on drafting for civil proceedings entitled *Legal Drafting: Civil Proceedings (Legal Drafting)*, which was first published in 1998 and which is presently in its second edition. In the preface to that book, the author noted that he had often received requests to include more precedents in *Legal Drafting* but had refrained from doing so as he wished to retain the integrity of *Legal Drafting* as an instructional manual. The author expressed confidence in *Legal Drafting* as an instructional manual by referring to the fact that the book was not allowed to be taken into the bar examinations, the implication being that this would amount to an unfair advantage. It is to be hoped that *Precedents* will offer the same advantage to practitioners. In this book, where precedents are the main focus, the author has clearly responded to the requests he had previously received to provide precedents for drafting in civil proceedings. The author has narrowed the focus further by including only drafting relating to application proceedings in this book.

In terms of South African civil law, proceedings may be brought to court by means of two vehicles, namely action and application proceedings.

As indicated in the title, *Precedents* focuses on application procedure. Application proceedings are brought by means of notice of motion, supported by affidavits (rule 55 in the Magistrate's Court and rule 6 in the High Court). The parties have to take particular care in drafting their affidavits, as they have to include both the *facta probanda* (facts that must be proved) and the *facta probantia* (facts adduced to prove the *facta probanda*) of their respective claims and defences. The evidentiary material must be included in affidavits because generally in application proceedings oral evidence is not led. The preface to *Precedents* alludes to this when it states that '[t]he preparation of most applications requires greater skill and presents more challenges than drafting pleadings in an action'.

Precedents is an ambitious project because it is the first work of its nature in civil procedure. The author alludes to this in the preface when he states that '[t]here is no textbook that provides a comprehensive guide as to how to undertake the task of preparing application papers'. He is commended on filling that gap.

As stated above, an identifying feature of application papers is that they need to incorporate both material facts and evidentiary facts, as there is no opportunity of presenting oral evidence to the court on the day that the matter is heard, although the court retains the discretion to call for evidence. In motion court, counsel has to 'argue on the papers', and it is imperative that those papers are drafted with care. The South African court rules stipulate that every application must be brought on notice of motion supported by an affidavit as to the facts upon which an applicant relies for relief. The notice of motion is the initiating document in an application, but contains only the relief sought in the application. It is the founding affidavit that accompanies the notice of motion that sets out the full details of the claim. *Precedents* contains mainly examples of founding affidavits, of which there are approximately 100.

An affidavit is a written statement of evidence under oath. As such, the contents of every affidavit must be uniquely tailored to reflect the evidence of the deponent. As it is a 'bespoke' instrument, it is tricky to reduce an affidavit to a concrete example, and authors of textbooks on procedural law generally avoid doing so. How fortunate it is then that the author has taken the bull by the horns and presented a textbook with the specific aim of doing just that: to provide, in one source, a collection of founding affidavits relating to different types of applications. The examples are accompanied by instructive commentary, covering practical suggestions (for instance to attach a separate order rather than incorporating an order of court into a notice of motion), potential defences that may be raised, relevant aspects of the substantive law and how delays may be circumvented.

The book aims to provide both a 'how to' for students or junior practitioners who are starting out in practice and who are new to drafting, and a 'one stop' repository of a wide-ranging list of applications for seasoned practitioners. The contents of *Precedents* have been divided into 61 short chapters dealing with an eclectic mix of applications. The author has admirably aimed to be as inclusive as possible with a wide variety of applications but, due to the disparate nature of the content, one can appreciate the difficulty of organising the examples in a structured way. Fortunately for the reader, an endeavour has been made to do that and a guideline is provided in the introductory chapter (entitled 'Introduction – Guide to the use of the book'), which outlines the division of the chapters into four different parts. The table of contents does not reflect the division of the chapters into different parts and the reason for this oversight is not clear.

Part 1 (comprising Chapters 2 and 3) relates to general principles of preparing application papers. Part 2 (comprising Chapters 4 to 11) addresses generic types of applications. Part 3 (Chapters 12 to 25) deals with interlocutory, incidental and procedural applications. The final part, Part 4 (Chapters 26 to 61) is a 'hold all' chapter which covers a wide range of topics including suretyships, trademark infringements, trusts, unlawful competition and wills and estates. The chapters are made up of examples, which are complemented by commentary on the substantive requirements for the various applications, as well as relevant procedural elements.

A caution that every legal practitioner is aware of is to avoid over-reliance on precedents, so as to evade the pitfall of producing 'sausage-factory' type documents. A precedent cannot be slavishly reproduced time after time if one wishes to retain the credibility and integrity of the evidence presented. Precedents must be used circumspectly and merely as a starting point to drafting one's own document. However, there is also no need to reinvent the wheel. All legal offices and chambers have a cache of precedents that is closely guarded and sparingly distributed among its members. The author is credited for his willingness to share by means of this book a wide collection of application precedents which are, as is stated in the preface, not available as a collection anywhere else. Readers will be grateful to be included in the inner sanctum of seasoned, experienced practitioners who are willing to pass on their knowledge.

It was mentioned at the beginning of this review that a good precedent is worth its weight in gold and if one considers that *Precedents for Applications in Civil Proceedings* is a collection of such precedents, then surely it must represent the pot of gold at the end of the rainbow.

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Employment Rights

by John Grogan. Third edition. Juta. 2019

474 pages. Price: R695 (soft cover)

Dr Grogan is a leading author and commentator on labour law in South Africa and is often referred to authoritatively by the South African judiciary and in legal treatises. I admit from the outset that I have an affinity for the work of the author as it is an earlier edition of his *Workplace Law* from which I was taught labour law and from which I first taught labour law. The author draws from more than three decades of experience as a law professor, counsel, judge and arbitrator to blend theory and practical examples that are illuminated by case law. The work is useful to human resource and industrial relations practitioners, legal practitioners, all employers and employees, bargaining council and Commission for Conciliation, Mediation and Arbitration (CCMA) officials, trade unions and employee representatives, academics, and students of labour law and human resources.

Employment Rights, which has now reached the milestone of a third edition, forms one volume of a quartet of labour law publications which seek to cover the entire field of labour law. The other volumes are *Dismissal Law*, *Labour Litigation and Dispute Resolution*, and *Collective Labour Law*. In addition, *Workplace Law*, a generalised treatise that has reached the extraordinary milestone of a 12th edition, covers all these topics, although not to a great degree of specificity and detail.

Employment Rights seems not to be a well-chosen title. It appears that important labour law topics, which were not covered in the other three specific volumes, have been included here. The volume contains an introductory chapter, chapters on the scope of labour statutes, the contract of employment, basic conditions of employment, a definition of unfair labour practice, specific forms of unfair labour practice, non-statutory unfair labour practices, unfair discrimination, prohibited grounds of discrimination, specific discriminatory practices, remedies for unfair discrimination, affirmative action, victimisation, employment injuries and illness, unemployment benefits, skills development and employment services as well as a table of cases, a table of statutes and a subject index.

The author should be commended for the inclusion of topics related to social protection that impact on the employment relationship, such as employment injuries and illness, unemployment benefits and skills development. It is hoped that more social protection topics, such as old age and retirement, medical insurance and the social protection of migrant workers, will be included in future.

The title is not necessarily connected to the stated aim of the volume, which is to deal 'with relations between employers and employees from the commencement of employment to its termination' and to highlight 'the drastic inroads which have been made on the managerial prerogative'. As the topics covered in the other volumes also deal with matters associated with employment rights, it may be said that they deal with the same purpose as *Employment Rights*. Therefore, it may be argued that this volume fails to distinguish itself from the other volumes as a self-standing volume dedicated to a single purpose.

The work also does not deal exclusively with each and every possible employment right. For example, several rights contained in the Constitution of the Republic of South Africa, 1996 also impact on labour relations: section 9 (the equality clause); section 10 (the guarantee of human dignity); section 13 (the right to be free from slavery, servitude and forced labour); section 14 (the right to privacy); section 17 (the right to assembly, demonstration, picket and petition); section 18 (the right to freedom of association); section 22 (the right of all citizens to choose their trade, occupation and profession freely); section 27 (the right of access to health services and social security, including appropriate social assistance where necessary); section 32 (the right of access to information); and section 33 (the right to administrative action that is lawful, reasonable and procedurally fair).

Employment Rights is nevertheless an important asset to any labour law collection. It is diligently researched and the updates to the third edition were thoughtfully completed in line with the high standard of research associated with Dr Grogan. Legislative amendments and recent judgments were incorporated attentively so as to provide an up-to-date account of the topics covered in the volume.

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Evidential Aspects of Law Enforcement, authored by Brigadier Marga van Rooyen and first published in 2018 by Juta, is a timely book that will provide a great deal of assistance to intermediate-level professionals involved in crime investigation. Practical guidance on this subject, in literature, is somewhat limited in South Africa, with over-reliance placed on international literature. Van Rooyen outlines the purpose of the material (in Chapter 2) as being ‘to explain (particularly to law enforcement practitioners) the legal terms and requirements’ of evidence.

The book is useful in simplifying the admissibility requirements of various types of evidence secured during crime investigation. In this regard, it uses practical examples. The evidentiary material dealt with begins with the crime scene and ends with the material provided to the prosecution to enable it to take a decision and, if need be, draw up a charge sheet and arraign an accused person. By so doing, the book serves to empower a multitude of professionals involved in gathering evidence as part of a criminal investigation.

One burning question that comes to mind when reading this book is whether it does achieve its purpose of assisting a wide array of ‘law enforcement officer(s)’ to improve how they perform their duties when gathering evidence and how their performance affects the value of the evidence gathered.

The above necessitates a brief clarification of the concept of ‘law enforcement’. It encompasses more than the gathering, safeguarding, analysis and deployment for the prosecution of evidence. Law enforcement spans the full gamut from the prevention of crime to the combatting and investigation of crime. As the title indicates, the book does not purport to cover the entire spectrum of law enforcement. Its focus is on evidential aspects of law enforcement.

Notwithstanding the above, Van Rooyen’s book will indeed prove a valuable aid to those involved in the law enforcement arena because crime investigation is an integral part of law enforcement, a point the author makes repeatedly. The book provides an intermediate level of insights that will improve the basic understanding of evidence and its relationship to crime investigation. It also provides insights on how to ensure that the evidence gathered during crime investigations meets the basic admissibility requirements of evidence.

Emphasising the point that it is much more of a crime investigation enabling tool than a wide-ranging law enforcement aid, 15 of the 19 chapters engage in a reasonable amount of detail on the following:

- the first report of a crime and identifying the physical and biological features of suspects;
- interviewing witnesses, testimony in court, including cautionary rules relating to various types of evidence (for example, single-witness evidence, co-perpetrator evidence, and the evidence of witnesses who are involved in covert activities such as setting up a trap); and
- securing and dealing with confessions and admissions, including how to conduct and address the admissibility requirements of pointings-out.

The terms ‘law enforcement officer’ and ‘investigating officer’ are used widely. An investigating officer is a law enforcement officer who is involved in crime investigation. The material generally targets the latter type of law enforcement officer. It includes the following:

- police officials in the South African Police Service (SAPS);
- members of the municipal and metropolitan police services;
- members of the South African National Defence Force (SANDF), including military police officials;
- investigators in the Independent Police Investigative Directorate (IPID);
- peace officers such as those involved in nature conservation and immigration
- state officials involved in crime investigation; and
- private security officers who are sometimes first respondents at crime scenes.

These professionals will learn a great deal from the book, particularly those who are not police officials. Police officials are generally obliged to attend formal training at academies. On the other hand, peace officers and security officers, who are not part of police service organisations, tend to be left to learn crime investigation through the attendance of less intense, less complete and often short certificate courses, conferences, seminars and similar events. That leads to people gaining fragmented insights. The book does well to provide a consolidated, well-structured, linear reference point. For those who read and use it as a reference point, it will complement and better empower the contextualisation of any other crime investigation training exposure.

Chapters 9 to 17 cover the following:

- oral testimony of witnesses, summarising witness preparation and the content of a case file (a docket);
- cautionary rules that advise on how to assess specific types of witnesses cautiously;
- similar fact evidence, and its evaluation in court; and
- previous consistent statements, character evidence, opinion evidence, circumstantial evidence, hearsay evidence and real evidence.

Each of these outlines specific admissibility requirements.

Van Rooyen's book could have made itself more relevant to commercial and corporate crime investigation professionals, especially those in the banking sector and insurance industry. However, these professionals will also benefit from it.

Building directly on the above paragraph, Chapter 18 (Documentary evidence) and Chapter 19 (Evidence gathered by electronic means) could have been strengthened with the addition of contexts and practical examples that relate to the work of commercial crime and corporate forensic investigation practitioners. They have unique knowledge applicable to the business sector, have access to a wide array of unique resources and work closely with all law enforcement officers. They mainly work in partnership with SAPS investigating officers, sometimes serving as expert witnesses with specialist expertise in cybercrime investigations, investigations into procurement and industry-specific complex business processes. *S v Botha* 1995 (2) SACR 598 (W) is one case in which the courts have recognised the unique institutional insights, value and investigative authority of these crime investigators working from within private organisations.

In this '4IR' (fourth industrial revolution) era where there is a substantial growth in cyber- and computer-assisted crimes, Chapters 18 and 19 could have dealt in more depth with the complexity of computer-generated documents and how they should be presented as evidence in court. This is an area in which traditional investigating officers require more training and a greater understanding of the admissibility requirements of this type of evidence. A focused exploration of the role of forensic technology experts and how to secure, safeguard, handle and present this type of evidence in court would have strengthened the book. Traditional perspectives and crime investigation approaches no longer suffice.

The above is perhaps one of two areas in which the author could have exploited the opportunity to share unique insights into the more modern crime investigation terrain. That would have helped to empower law enforcement officers.

The second area that could have been explored to bring a more modern and complete flavour to the book is that of victim empowerment.

A list of references or a bibliography would have complemented the very helpful table of statutes and table of cases contained in the book.

Notwithstanding the limitations I have identified, this book will help intermediate-level crime investigation practitioners and should be used as a practical resource, aid and reference point, alongside other more in-depth materials, during crime investigation.

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Introduction to South African Law – Fresh Perspectives

by Lirieka Meintjes-van der Walt (ed) with A Barratt, H van Coller, A Govindjee, S de Freitas, PF Iya, H Kruuse, K Pillay, M du Preez, PP Singh & L Tshingana.
Third edition. Pearson Education South Africa. 2019

489 pages. Price: R805.50 (soft cover)

Introduction to South African Law – Fresh Perspectives is a combination of a textbook and a workbook aimed at first-year students. First published in 2008, it is now in its third edition. The book is divided into five sections, which are structured around the analogy of law being a tree, a place where justice has traditionally taken place in South Africa. (The relevance of the tree to society and the development of the Constitutional Court logo is discussed on page 186).

A notable feature in each section is the attempt to provide a plain language explanation of the theory. Barratt in particular does an excellent job of this in Section 1 (Chapters 1 and 2), where she explains what the law is and how it has developed. She does this in a delightful, story-telling way.

Various tools are used to help the reader to engage with the theoretical explanations. For example, each chapter begins with a set of key concepts and learning objectives; terms which may not be commonly understood by the reader are explained in boxes alongside the text in which they appear; and practical examples of current issues, in the form of extracts from newspaper articles or judgments, are drawn on to facilitate the reader's thinking about how the theory applies in practice.

Section 2 of the book includes chapters on the different sources of law (Chapters 3, 4 and 6 to 9) as well as chapters on legal ethics and professional responsibility (Chapter 5), the court structure (Chapter 10) and the legal profession (Chapter 11).

Deciding what to include or omit in an introductory book on the law aimed at first-year students is a challenge. On the whole, the authors navigate this challenge successfully and strike a sound balance by providing enough content to make the different topics meaningful without being overwhelming. The body of the book is already 468 pages and one hesitates to suggest additions that would lengthen it further. However, there is some unevenness between the approach and the level of detail provided in the different chapters. For example, the excellent and detailed explanation of how to read a judgment is not mirrored in the chapter on legislation. This chapter could benefit from additional guidance on the structure of legislation and approaches to reading it. More could also be said about the transformative nature of the Constitution in Chapter 3 as it is a pivotal concept with which students need to engage as early as possible in their studies.

Although not critical, since few readers are likely to read the book in one continuous session, the lack of flow of the chapters in Section 2 can be slightly distracting and could benefit from reconsideration in future editions. In this regard, the discussion on the court structure is placed four chapters after the discussion on case law, which results in some duplication; and the new chapter on legal ethics and professional responsibility seems out of place, sitting between the chapters on legislation and case law.

Section 3 moves from an overview of what law is and where it is found to a discussion of the different types of law (Chapters 12 to 21). The contents follow a traditional approach to the different categories of law and newer areas such as environmental law are not mentioned. The areas of law that are included are explained clearly and ought to provide the reader with a coherent picture of what they entail.

To complement the overview of South African law which is set out in Sections 1 to 3, Section 4 (Chapter 22) includes a discussion on international law and its relevance in South Africa. Although the section is short, it provides adequate information for the needs of the intended audience.

The final section in the book, Section 5, includes two chapters which demonstrate the dynamic nature of law. Chapter 23 contains a discussion on AIDS and the law. It explains how the different areas of law have had to be adapted to address the advent of AIDS and the consequent emergence of a range of associated issues such as discrimination, or its prevention, in the workplace. It provides an effective illustration of how lawyers are required to engage with the law to accommodate contemporary issues. Chapter 24 provides a brief introduction to jurisprudence. It gives a high-level overview of what jurisprudence is as well as the main schools of thought.

The back cover of the book indicates that a new feature of the third edition is the provision of online support tools. These include answers to the self-test questions that can be found in each chapter in the book, PowerPoint slides for lecturers and an electronic version of the book with clickable website references. Information on how to access these features was not made available at the time of reviewing the book and it is noted that these features and how they can be accessed are not mentioned in the text of the book itself. While no detailed comment can therefore be made, the inclusion of these tools suggests that they potentially offer significant value as a complement to the book.

Overall, *Introduction to South African Law – Fresh Perspectives* is a comprehensive work which successfully navigates the challenges of providing an adequate foundation for students studying law in the first year. The authors are to be commended for presenting complex theory in such a highly accessible manner.

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Labour Law in Context

by A Govindjee & A van der Walt (eds) with D Abrahams, K Calitz, M Chicktay, T Cohen, O Dupper, E Fergus, S Mahomed, K Pillay & T Qotoyi.
Second edition. Pearson Education South Africa. 2018

336 pages. (Soft cover)

Labour Law in Context recognises the importance of employment and labour law to role players other than lawyers and law students. It thus provides an understanding of the subject to a wider readership. The book is divided into six sections: individual labour law, collective labour law, dispute resolution, social security at work and labour law in the public service. The section on labour law in the public service distinguishes this book from other labour law textbooks as it deals with this topic comprehensively. The first two chapters discuss the history, various sources and the constitutional framework of labour law.

At the end of each chapter there is a glossary that defines and explains concepts. This will assist non-legal readers and students, including non-law students, to gain a better understanding of legal concepts within the employment framework. Chapters also contain brief case notes that summarise facts and court decisions. This too will be of assistance to students and non-lawyers. At the beginning of each chapter, relevant labour law scenarios are provided by the authors. After the students have worked through the chapters, these scenarios are revisited. This allows students to gain a better understanding of labour law in practice.

The book also provides digital support material, such as legislation, cases, Commission for Conciliation, Mediation and Arbitration (CCMA) forms and International Labour Organization (ILO) Conventions. Section A consists of two chapters: 'Introduction to Labour Law' and 'Labour Law and the Constitution'. Chapter 1 considers the development of labour relations and labour law in South Africa, as well as relevant sources. Summaries are provided in table format for easy access. Chapter 2 provides an overview of the constitutional framework, with reference to labour law.

Section B is the most comprehensive section of the book and deals with individual labour law, including the transfer of businesses. Chapters on the contract of employment, basic conditions of employment, equality, unfair labour practices, atypical workers and dismissals are included in this section. Important and up-to-date case notes are provided for all the chapters. Applicable sections from relevant legislation are also highlighted and provide easy access to these materials. The chapter on equality in the workplace includes the recent amendments to the Employment Equity Act, 1998 and provides a broad overview of the Act. The chapter on unfair labour practices provides a scenario about benefits and explains

the difference between a dispute of interest and a dispute of right. This serves as a quick-reference guide and avoids a critical analysis of the issue. Dismissals are dealt with in five separate chapters. All five chapters include relevant case notes. This provides students with a broad understanding of the regulation of dismissals in the labour law framework.

Section C consists of five chapters. Topics discussed include: freedom of association, trade unions and organisational rights, collective bargaining, worker participation and industrial action. Chapter 14 illustrates trade union security arrangements with reference to a conscientious objector. Chapter 15 includes a section on the liability of trade unions. An explanation of legal concepts that are difficult to understand in the context of labour and employment law, such as delictual liability and just and equitable compensation, is given. Chapter 16 provides a broad overview of collective bargaining and introduces the various structures, as well as the relationship between a contract of employment and a collective agreement. A short overview of worker participation is provided in Chapter 17. The various forms of industrial action and relevant procedures are discussed in Chapter 18. The book was published before the latest amendment on picketing. Chapter 19 introduces concepts such as conciliation, arbitration, adjudication and jurisdiction. It also deals with representation at the various relevant fora.

The book also includes a chapter on social security. This chapter contains a discussion of Schedule 2 of the Compensation for Occupational Injuries and Diseases Act 130 of 1993 (COIDA) and sets out the degree of permanent disability deemed to have been caused by particular injuries. The last chapter considers labour law in the public sector at both national and provincial levels. The chapter considers the current collective bargaining structures in the public service. The inclusion of this chapter ensures that the contribution provides a holistic and integrated approach on the labour law landscape in South Africa.

Labour Law in Context provides a broad understanding of labour law in South Africa and is aimed at law students, non-law students, employers, employees, trade unionists and other role players in the labour law and employment relations framework. Overall, this edition serves its purpose and will help both lawyers and non-lawyers. It can serve as a quick-reference guide for lawyers and provide easy access to important sources of information in the areas of employment and labour law.

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