



# SOUTH AFRICAN JUDICIAL EDUCATION JOURNAL

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**10** YEARS  
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**SAJEI**  
South African Judicial Education  
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# **SOUTH AFRICAN JUDICIAL EDUCATION JOURNAL**

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# THE SOUTH AFRICAN JUDICIAL EDUCATION JOURNAL

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## *REFRESHING AND ENHANCING JUDGMENT WRITING SKILLS\**

JUSTICE LEONA THERON  
*Constitutional Court, South Africa*

### I INTRODUCTION

Judgment writing is an art that requires not only legal skills but also creative expression, common sense and human understanding.<sup>1</sup> The primary purpose of judgment writing is to communicate the decision, and the reasoning underlying it, accurately through the written word. Not everyone has the natural ability to communicate effectively. However, with study and practice the quality of judicial writing can be improved. There are as many opinions about what makes a good judgment as there are lawyers. I will explore some of the considerations that are relevant to judgment writing, in the hope that, if these considerations are kept in mind, we will be able to communicate judicial decisions effectively to interested parties.

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\* This article is an adaptation of an address delivered by Justice L Theron at a Judges' Seminar conducted by the South African Judicial Education Institute (SAJEI) on 17 January 2019 at Johannesburg.

<sup>1</sup> Address delivered by the former Chief Justice of the Constitutional Court S Ngcobo entitled 'Judgment Writing'.

## II WHY DO WE NEED JUDGMENTS?

Judgment writing goes to the very heart of the exercise of the judicial function.<sup>2</sup> The giving of reasons for judicial decisions is part and parcel of the duty of the judiciary to conduct judicial proceedings fairly, respecting the rights of the parties involved.

In *Mvumbi*, the Constitutional Court explained that –

*[I]t is elementary that litigants are ordinarily entitled to reasons for a judicial decision following upon a hearing, and, when a judgment is appealed, written reasons are indispensable. Failure to supply them will usually be a grave lapse of duty, a breach of litigants' rights, and an impediment to the appeal process.*<sup>3</sup>

In *Mphahlele*, the Constitutional Court held that furnishing reasons –

*explains to the parties, and to the public at large which has an interest in courts being open and transparent, why a case is decided as it is. It is a discipline which curbs arbitrary judicial decisions. Then, too, it is essential for the appeal process, enabling the losing party to take an informed decision as to whether or not to appeal or, where necessary, seek leave to appeal. It assists the appeal Court to decide whether or not the order of the lower court is correct. And finally, it provides guidance to the public in respect of similar matters.*<sup>4</sup>

It is therefore in the interest of the open and proper administration of justice that courts state publicly the reasons for their decisions.<sup>5</sup> The rendering of reasons gives some assurance that the court in question gave due consideration to the dispute and did not act arbitrarily. And this in turn is crucial to the maintenance of public confidence in the judiciary and, ultimately, the maintenance of the rule of law.

A written judgment should be given where:

- (a) the case involves complicated issues of fact and law that require resolution;
- (b) there is a possibility of an appeal no matter what the decision is;
- (c) the court issues an order declaring an Act of Parliament or a provincial Act or the conduct of the President unconstitutional;

<sup>2</sup> Address at the First Orientation Course for New Judges held at Magaliesberg on 21 July 1997 delivered by the former Chief Justice of the Supreme Court of Appeal M Corbett entitled 'Writing a Judgement'.

<sup>3</sup> *Strategic Liquor Services v Mvumbi NO* (2009) 30 ILJ 1526 (CC); 2010 (2) SA 92 (CC) para 14.

<sup>4</sup> *Mphahlele v First National Bank of SA Ltd* 1999 (2) SA 667 (CC) para 12.

<sup>5</sup> 'Judgment Writing' (note 1 above).

- (d) novel points of law are raised;
- (e) there is differing authority on the issues; and
- (f) the matter is of great public interest.

The option of making an order with a direction that reasons will be delivered later should be used sparingly. Only when the judge is convinced that the decision that is intended to be given in support of the order is correct should this be resorted to.<sup>6</sup> This option leaves no room for afterthought or a change of mind about the case, so be careful. If the practice is used, reasons must be furnished within a reasonably short time after the order.

### III PURPOSES OF WRITING A JUDGMENT

As mentioned, the primary purpose of the judgment is to communicate the decision as well as the reasoning of the court. Judgments are generally read and studied by a number of different people. Therefore, before the writer begins, it is important to identify the group most likely to be interested in the judgment. There are advantages that flow from this. How this audience will respond, its needs and requirements, as well as the intended goal and function of the particular judgment, will determine the form and content of the judgment.

Where the decision is intended for the parties alone, only minimal facts along with an abbreviated legal analysis is necessary. On the other hand, where the judgment is directed to the legal community or the academic fraternity, the analysis, logic and reasoning must be clearly expressed in greater detail.

### IV THE STRUCTURE OF A JUDGMENT

What should a judgment consist of or contain?

First, the judgment should begin with an introductory statement setting out the nature of the case and identifying the parties. This statement should be concise and uncluttered by unnecessary detail. References to the pleadings and case law should ordinarily be avoided in the introduction.

For an example of a good introduction, consider the opening paragraph in the Constitutional Court's judgment of *Saidi*.<sup>7</sup> The paragraph reads:

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<sup>6</sup> 'Judgment Writing' (note 1 above).

<sup>7</sup> *Saidi v Minister of Home Affairs* 2018 (4) SA 333 (CC).

*Does a Refugee Reception Officer (RRO) have the power to extend a temporary asylum permit pending the outcome of a review – in terms of the Promotion of Administrative Justice Act (PAJA) – of a decision of a Refugee Status Determination Officer (RSDO) rejecting an application for asylum, including the PAJA review of decisions on internal reviews and appeals? That is the principal question that must be answered in this matter.*

Or consider the opening paragraph of *Pillay*:<sup>8</sup>

*What is the place of religious and cultural expression in public schools? This case raises vital questions about the nature of discrimination under the provisions of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (the Equality Act) as well as the extent of protection afforded to cultural and religious rights in the public school setting and possibly beyond. At the centre of the storm is a tiny gold nose stud.*

Second, the facts of the judgment must be laid out in a chronological sequence. It is not necessary to recount every step of the litigation – only the facts or history relevant to the issues to be determined.

Third, the issues should be listed and dealt with separately.

After the issues, the applicable law must be explained. When citing case law, only necessary and relevant portions should be cited. Avoid, if at all possible, citing long passages. Clearly state why the authority is being referred to. Where possible, try paraphrasing instead of direct citation, or insert the citation in a footnote. This approach tends to make judgments more reader friendly.

Thereafter, the law must then be applied to the facts. The conclusion and remedy follow.

The last part of the judgment should tie in with the introduction. The conclusion should resolve the issues identified in the introduction. The conclusion should not contain new material, factual or legal, not previously discussed.

Even if the conclusion or decision is wrong, the reader should be able to understand the reasoning of the judge and how the judge arrived at that particular conclusion.

Returning to *Saidi*, the last paragraph of Langa CJ's judgment directly answers the question posed in the first paragraph:

*For all these reasons I conclude that section 22(3) [of the Refugee Act] grants the RRO a discretionary power to do two things. These are to extend permits and to amend conditions attached to them. Therefore, I do not support the*

---

<sup>8</sup> *MEC for Education, Kwazulu-Natal v Pillay* 2008 (1) SA 474 (CC).

*declaration that the RRO has no discretion and as a result he or she is obliged to extend every permit upon application.*<sup>9</sup>

And Pillay:

*It is worthwhile to explain at this stage, for the benefit of all schools, what the effect of this judgment is, and what it is not. It does not abolish school uniforms; it only requires that, as a general rule, schools make exemptions for sincerely held religious and cultural beliefs and practices. There should be no blanket distinction between religion and culture. There may be specific schools or specific practices where there is a real possibility of disruption if an exemption is granted. Or, a practice may be so insignificant to the person concerned that it does not require a departure from the ordinary uniform. The position may also be different in private schools, although even in those institutions, discrimination is impermissible. Those cases all raise different concerns and may justify refusing exemption. However, a mere desire to preserve uniformity, absent real evidence that permitting the practice will threaten academic standards or discipline, will not.*<sup>10</sup>

## V EDITING THE JUDGMENT

Before delivery of the judgment, ensure that all issues have been dealt with, eliminate repetition, delete irrelevant detail, check punctuation, simplify lengthy complex sentences, and scrutinize length and content of paragraphs.

Decisions should be based on sound legal principles. It is essential to carefully evaluate the legal principles upon which a judgment rests. For example, in determining an appropriate sentence, a judicial officer reasoned as follows:

*In respect of the sentence, I sentenced you in terms of the minimum sentencing provisions for robbery with aggravating circumstances, that is 15 years. The three years that I added on were because my life was threatened by some members of your gangs, that is the information that I was given and that is why I came here under police protection. It had nothing to do with any other case that day, it was your case. And since the National Intervention Unit took that threat seriously I just abided by what they asked me to do.*<sup>11</sup>

The presiding officer was quite clearly not entitled to add three years to the sentence because her life had been threatened. This could have been avoided had she reflected critically on her legal reasoning before handing down the judgment on sentence.

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<sup>9</sup> *Saidi* (note 7 above) para 87.

<sup>10</sup> *Pillay* (note 8 above) para 114.

<sup>11</sup> *Mthembu v S* [2017] ZAKZPHC 21.

Editing also prevents obvious, patent errors that often creep into judgments. They do not reflect on the competence of the judge, but are nonetheless embarrassing and confusing. For example, in *Madiba*,<sup>12</sup> the Supreme Court of Appeal held that:

*It is quite clear that [the trial Judge] misdirected himself when he stated that the cumulative effect of the sentence imposed was that the appellant was sentenced to 70 years' imprisonment. Regard being had to the fact that one of these sentences imposed was life imprisonment, it is incomprehensible how [the trial Judge] came to this conclusion.*<sup>13</sup>

## VI DO'S AND DON'TS

There are several 'do's and don'ts' that can easily improve judgment writing and delivery.

*Do* use simple clear language. Verbose, complicated language should be avoided. It helps no one:

*Innovative nuances of evidential inadequacies, procedural infirmities and interpretational subtleties, advanced in defence, otherwise intangible and inconsequential, ought to be conscientiously cast aside with moral maturity and singular sensitivity to uphold the statutory sanctity, lest the coveted cause of justice is a casualty.*<sup>14</sup>

The Supreme Court of India recently set aside a judgment of the Himachal Pradesh High Court on the basis that it could not comprehend the legalese used in the judgment. Here is an extract from the High Court judgment:

*However, the learned counsel appearing for the tenant/JD/petitioner herein cannot derive the fullest succour from the aforesaid acquiescence occurring in the testification of the GPA of the decree holder/landlord, given its sinew suffering partial dissipation from an imminent display occurring in the impugned pronouncement hereat wherewithin unravelments are held qua the rendition recorded by the learned Rent Controller in Rent Petition No.[..] standing assailed before the learned Appellate Authority by the tenant/JD by the latter preferring an appeal therebefore whereat he under an application constituted under Section 5 of the Limitation Act sought extension of time for depositing his statutory liability qua the arrears of rent determined by the learned Rent Controller in a pronouncement made by the latter on . . .*

<sup>12</sup> *S v Madiba* 2015 (1) SACR 485 (SCA).

<sup>13</sup> *Madiba* (note 12 above) para 11.

<sup>14</sup> *State of Karnataka v Selvi J. Jayalalitha* 2017 INSC 143 at 544–545.

*The summom bonum of the aforesaid discussion is that all the aforesaid material which existed before the learned Executing Court standing slighted besides their impact standing untenably undermined by him whereupon the ensuing sequel therefrom is of the learned Executing Court . . .*<sup>15</sup>

Do exercise logic, deal with each issue separately, and ask counsel to identify the issues.

Do maintain an impartial demeanour when dealing with litigants. The following exchange appears from the record of the proceedings of a local court:

*COURT: Are any of these people in court today? --- I am not sure. I don't believe you, you are scared, aren't you? Am I right? You are scared to say anything. --- I . . . [intervention]. Yes, you don't have to answer me*

*. . .*

*COURT: Come here, please, accused 4. Come here, please. No, come here. Stay there. Turn your face that way. Turn your face this way. He has got one scar on his left cheek, but on the side of his cheek, one about two and a half centimetre scar. Go back there.*

*COUNSEL: Your worship, if the Court can just note the scar on his nose as well.*

*COURT: On where?*

*COUNSEL: On his nose.*

*COURT: Come back here. Oh, yes, I see now he has got a scar across his right nose, but this is three years later. Go back there. Across his right nostril.*

*COURT: . . . after all [the witnesses'] tooth nonsense, not nonsense, sorry, tooth problem.*

This letter, written by a judge was part of the record in an application for leave to appeal to the Supreme Court of Appeal (where there was a complaint that the judge had delayed in delivering reasons for judgment):

*This case was before me during the urgent court proceedings, at the end of July, 2007. I gave brief reasons indicating that I expected that I might be called upon to give more detailed reasons, in the future. A week or so – or even less – after 26 July, 2007, Mr Masilo was in my chambers, asking for full reasons. I did not chastise him for approaching me, a judge, for that purpose and in that fashion. You know, JP, that is unprofessional. I told him that full reasons are – as I had said in court – tantamount to a full judgment, that I did not have time to attend to it before the short recess, as I had other judgments that took precedence to it. It surprises me that Mr Masilo wrote this letter – which, by the way, reached me*

<sup>15</sup> *Sri Pawan Kumar Sharma v Sarla Sood and Others* 2011 HHC at 3 and 7.



*shortly after 11 September, 2007. Incidentally, something I had forgotten when I spoke to Mr Masilo – I had no short recess, having been in the unopposed motion roll. So, regrettably I cannot touch that judgment before January, 2008. I attach a copy of a letter I wrote on 13 September 2007, in reply to Mr Masilo’s letter. My registrar (Francois) and I are uncertain as to whether it was, indeed, forwarded to Mr Masilo, as Francois went for study leave in about that time.<sup>16</sup>*

Do be respectful and courteous to all parties, the legal representatives as well as colleagues. It may be necessary to express disagreement with another judgment or the views of a colleague. Do so courteously and with full recognition of the fact that to err is human: you yourself may be wrong.

*Do not* rely on points of law that have not been raised by, or canvassed with, the parties. For example, a Canadian judge found an accused guilty of second-degree murder on the basis of a provision of the Canadian Criminal Code that has been unconstitutional for 26 years.<sup>17</sup> The prosecution did not rely on the impugned section in its written argument. Even less surprisingly, nor did the defence.

*Do not* quote heads of argument at length. As stated in *Stuttafords Stores v Salt of the Earth Creations*:

*The judgment [on appeal] consists of 1890 lines of typing of which, apart from a summary of the relief sought and the terms of the order, only approximately 32 lines are the judge’s original writing.*

*The rest consists of words taken exactly from [X]’s counsel’s heads of argument, sometimes even without taking out phrases like ‘it is submitted’ and emotive comments on the parties’ contentions and actions.*

...

*While some reliance on . . . counsel’s heads . . . may not be improper, it would have been better if the judgment had been in the judge’s own words.<sup>18</sup>*

*Do not* improperly draw from your own experience beyond the evidence. It is important that the judgment is decided on the relevant facts and law – not a judge’s personal experience.

<sup>16</sup> *National Director of Public Prosecutions v Naidoo* 2011 (1) SACR 336 (SCA).

<sup>17</sup> *R v Vader*, 2016 ABQB 55 (CanLII).

<sup>18</sup> *Stuttafords Stores (Pty) Ltd v Salt of the Earth Creations (Pty) Ltd* 2011 (1) SA 267 (CC) paras 9–11.

## VII CONCLUSION

Courts are theatres in which many of the dynamics and dramas of society are played out.<sup>19</sup> Judgments analyse and record some of these performances. They also provide opportunities for skilful writing. Judgments should, however, be confined to the relevant issues and facts. It is essential that the reasoning underpinning a judgment is clear, lucid and understandable for the intended target audience. As stated by the former Chief Justice S Ngcobo '[b]revity, simplicity and clarity are the watchdogs for effective judicial writing.'<sup>20</sup>

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<sup>19</sup> 'Judgment Writing' (note 1 above).

<sup>20</sup> 'Judgment Writing' (note 1 above).

*THE BUILDING OF SOUTH AFRICA'S  
CONSTITUTION ON THE RUINS OF ITS  
PAST: THE INDIGENISING\* OF PUBLIC LAW  
IN POST-APARTHEID SOUTH AFRICA*

JUSTICE STEVEN MAJIEDT  
*Constitutional Court, South Africa*

I INTRODUCTION

A Constitution reflects a country's soul and is a mirror in which it views itself.<sup>1</sup> This is because constitutions, by their nature, capture and record the collective memory and past fears of a country, while simultaneously espousing the hopes, vision and ambitions of the future. South Africa's Constitution<sup>2</sup> is no different. It is a constitution that is acutely mindful of the racist, sexist and oppressive ruins of the apartheid regime and which sets the foundation for a country that is based on equality, dignity and freedom. The interim Constitution of South Africa characterised itself as a—

*historical bridge between the past of a deeply divided society, characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans.*<sup>3</sup>

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\* By 'indigenising' I mean the adaptation or refashioning to accord with present norms. The term will be explicated further in the article. Readers should note that this article is adapted from an original paper I delivered at a conference on 'The Making (and Re-Making) of Public Law' held on 6–8 July 2022 at the Sutherland School of Law, University College Dublin, Ireland.

<sup>1</sup> Mahomed CJ in *S v Acheson* 1991 (2) SA 805 (Nm) 813; referred to with approval in, amongst others, *Matatiele Municipality v President of the RSA* 2006 (5) SA 47 (CC) para 97 (per Sachs J). See further; J Hatchard 'Some Lessons on Constitution-making from Zimbabwe' (2001) 45 *Journal of African Law* 210 and H Ebrahim *The Soul of a Nation* (Oxford University Press 1998).

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

<sup>3</sup> The Constitution of the Republic of South Africa Act 200 of 1993 (the interim Constitution). See also E Mureinik 'A bridge to where? Introducing the interim Bill of Rights' (1994) 10 *South African Journal on Human Rights* 31.

This powerful imagery persists and carries through to the Constitution. Recognising the reflective nature of a constitution, the former Chief Justice of South Africa, Justice Ismail Mohamed remarked:

*The constitution of a nation is not simply a statute which mechanically defines the structures of government and the relations between the government and the people, it is a 'mirror of the national soul', the identification of the ideals and aspirations of the nation, the articulation of the values binding its people and disciplining its government.<sup>4</sup>*

Our Constitution is not bereft of feeling, value and purpose. It calculatedly implores those applying and interpreting it to ensure transformation in the social and economic spheres of life. Judges are thus duty bound to remould our society from one ravaged by the ruinous effects of the brutal repressive apartheid regime to that visualised by the Constitution with its founding values of dignity, equality, human rights and freedom and the supremacy of the Constitution and the rule of law.

The notion that a constitution reflects the soul of a nation is a simple but powerful proposition. It implicitly illustrates the importance of domesticating or indigenising public law generally and constitutions specifically. The notions of justice, freedom, dignity and equality as enshrined in any constitution must resonate and be in harmony with the overriding indigenous juridical principles of that jurisdiction.

This article attempts to explore this idea – the domestication of constitutions and the value that this adds to their legitimacy. Allied to this idea is how the past of a country shapes its understanding and interpretation of a constitution and the general public law. By domestication or indigenisation of a constitution and public law, I am referring to the act of altering the 'DNA' or composition of those laws in order for them to reflect the prevailing social, political and economic conditions of a particular jurisdiction. Wholly transplanting legal systems without more will most likely not be seen as legitimate and may be rejected. For the transposition to be successful, the recipient society must view the laws as legitimate, practicable and relevant and the law must be consistent with the prevailing socio-cultural norms of that society and not misunderstand the systems of that society. To advance this central argument, I focus specifically on South Africa. I endeavour to demonstrate that the South African Constitution was born out of intense and inclusive negotiations that led to a settlement agreement on core constitutional principles. The country's apex court carefully and comprehensively analysed the interim and final Constitutions and eventually declared them to be compliant with the core constitutional

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<sup>4</sup> Hatchard (note 1 above) 210.

principles agreed upon after the negotiations. There can thus be no question of the Constitution's legitimacy. But, as we know, law is dynamic, flexible and adaptive. This is crucial in a nascent evolving democracy. But, understandably, South Africa's pre-democracy statutes and common law remained law (unless of course struck down for unconstitutionality) when, first, the interim, and then the final Constitution came into being. How do existing statutory and common law principles adapt, evolve and develop in consonance with the supreme law with which it must comply? How is their assimilation into and adaptation to the Constitution attained? This is to be explored in the article – what I prefer to call the indigenising of the law, to make it fit with the present legal landscape. The article will be divided into three parts.

Part A of this article examines South Africa's oppressive apartheid past, which was predicated on parliamentary sovereignty. After detailing the past, it then provides, in Part B, an exposition of the current Constitution, which has been lauded as one of the most progressive constitutions in the world. Here, there will be a discussion of some of the salient features of the Constitution, which illustrate the importance of indigenising public law, through the notion of transformative constitutionalism, constitutional supremacy and the South African legal principle of *ubuntu*. Finally, Part C is a discussion of selected cases which demonstrate some of the points raised in Part B. These cases will look at socio-economic rights such as housing and the election regime in South Africa. What will be illustrated in this article is that in South Africa, indigenisation takes place through laws passed by the legislature or through the interpretation of laws by the judiciary.

## II PART A: THE LONG ROAD<sup>5</sup> TO CONSTITUTIONAL SUPREMACY

To properly understand South Africa's Constitution, it is necessary to consider the oppressive legal order that operated in South Africa prior to its adoption. This is particularly unavoidable, because the Constitution was intended to be a decisive break<sup>6</sup> from the past and usher in a future based

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<sup>5</sup> For a personal, enthralling account of the prolonged struggle against apartheid, which resulted in the end of apartheid in 1994 and the beginning of a democratic South Africa, see Nelson Mandela *Long Walk to Freedom: The Autobiography of Nelson Mandela* (Little Brown & Co 1995).

<sup>6</sup> In *S v Makwanyane* 1995 (3) SA 391 (CC) 220, Justice Langa held that: 'When the Constitution was enacted, it signalled a dramatic change in the system of governance from one based on rule by Parliament to a constitutional State in which the rights of individuals are guaranteed by the Constitution. It also signalled a new dispensation, as it were, where rule

on human rights.<sup>7</sup> In this sense, it is a backward- and forward-looking Constitution. This is evident in numerous provisions that are historically self-conscious.<sup>8</sup> For instance, the Preamble of the Constitution recognises the need to redress the injustices of the past and honour those who struggled for freedom for South Africa.<sup>9</sup> The Constitution is backward-looking because the contours of justice (today and in the future) are informed, in part, by the peculiar injustices of the past.<sup>10</sup> Perforce, I take a moment to reflect on South Africa's history.

(a) *The legal nature of apartheid: Parliamentary sovereignty*

Prior to the advent of the Constitution, South Africa adhered to the doctrine of parliamentary sovereignty and the principle of executive prerogative. These were inherited from the English monarch under colonialism. Parliamentary sovereignty empowered the legislature to make any statute or measure it deemed necessary, without regard to its arbitrariness or unreasonableness. Thus, the legislature was the supreme law-making body and there was no law or measure beyond its purview. The import of this doctrine was captured by AV Dicey in the following terms:

*Parliament has under the English constitution the right to make or unmake any law whatever, further that no person or body is recognised by the law of England as has a right to override or set aside the legislation of parliament.*<sup>11</sup>

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by force would be replaced by democratic principles and a governmental system based on the precepts of equality and freedom.'

<sup>7</sup> Justice Mahomed, at 262, in *Makwanyane*, remarked:

'The South African 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.'

<sup>8</sup> The notion of 'historical self-consciousness' is taken from Karl Klare 'Legal culture and transformative constitutionalism' (1998) 14 *South African Journal on Human Rights* 146, 155.

<sup>9</sup> P de Vos 'Looking backward, looking forward: Race, corrective measures and the South African Constitutional Court' (2012) 79 *Transformation: Critical Perspectives on Southern Africa* 144.

<sup>10</sup> K Asmal 'Peace, multiculturalism and development' in J Hume, TG Fraser & L Murray (eds) *Peacemaking in the Twenty-first Century* (Manchester Scholarship Online 2013) 190.

<sup>11</sup> AV Dicey *Introduction to the Study of the Law of the Constitution* 10 ed (St Martin's Press, 1959) 70.

Apartheid<sup>12</sup> was a complex arrangement of legal, social, political and economic practices of subjugation, oppression and domination. Its aim was to segregate people on the basis of race and gender and it discriminated on those grounds.<sup>13</sup> It denied people who were classified as ‘non-Europeans’ basic rights and stripped them of their humanity.<sup>14</sup> As noted by the Constitutional Court in *Brink v Kitshoff NO*,<sup>15</sup> apartheid systemically, through law and policies, discriminated against black people in every facet of life, literally from the cradle to the grave. Black people were prohibited from attending well-resourced schools and were denied the opportunity of attending university. Their access to public transport, libraries and civic amenities were severely restricted and, in some instances, entirely denied.<sup>16</sup> A simple pleasure of walking on a public beach was something ‘non-Europeans’ were not permitted.<sup>17</sup> Black people were also legally prohibited from owning land, and in certain instances, were proscribed from residing on land that was reserved for white people. The enforcement of discriminatory land and spatial legislation caused mass dispossession and forced removals of black people, resulting in white people owning nearly 90 per cent of land in South Africa.<sup>18</sup> In many respects, dispossession,

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<sup>12</sup> Apartheid means ‘apartness’ in Afrikaans.

<sup>13</sup> MS McDougal, HD Lasswell & L Chen *Human Rights and World Public Order* (Oxford University Press 1980) 523.

<sup>14</sup> J Dugard *Human Rights and the South African Legal Order* (Princeton Legacy Library 1978) 93–94 and M Higginbotham, L Higginbotham & S Ngcobo ‘De Jure Segregation in the United States and South Africa: The Difficult Pursuit for Racial Justice’ (1990) 4 *University of Illinois Law Review* 763.

<sup>15</sup> *Brink v Kitshoff NO* 1996 (4) SA 197 (CC) para 40.

<sup>16</sup> *Brink* (note 15 above) para 40. See also *Minister of Finance v Van Heerden* 2004 (6) SA 121 (CC) para 74.

<sup>17</sup> See JM Rogerson “‘Kicking Sand in the Face of Apartheid’ Segregated Beaches in South Africa’ (2017) 35 *Bulletin of Geography: Socio-economic Series* 93.

<sup>18</sup> Land dispossession in South Africa occurred first through the barrel of the gun and trickery and then subsequently through an array of oppressive legislation such as the Native Land Act 27 of 1913, Native Trust and Land Act 18 of 1936, Prevention of Illegal Squatting Act 52 of 1951, Group Areas Act 41 of 1950 and the Group Areas Act 36 of 1966. See also *Western Cape Provincial Government: In Re DVB Behuising (Pty) Ltd v North West Provincial Government* 2001 (1) SA 500 (CC) para 41; *Daniels v Scribante* 2017 (4) SA 341 (CC); *District Six Committee v Minister of Rural Development and Land Reform* [2019] 4 All SA 89 (LCC); T Ngcukaitobi *Land Matters* (Penguin Random House 2021); B Atuahene ‘Paying for the Past: Redressing the Legacy of Land Dispossession in South Africa’ (2011) 45 *Law & Society Review* 955; R Davenport ‘Some reflections on the history of land tenure in South Africa, seen in the light of attempts by the State to impose

for black people, was nine-tenths of the law<sup>19</sup> and many of them were rendered strangers in their own country.<sup>20</sup>

There was no facet of social life that was left untouched by apartheid. The Prohibition of Mixed Marriages Act 55 of 1949 prohibited marriages between 'whites' and 'non-whites'. Accordingly, the law dictated who individuals could permissibly marry. Similarly, the Immorality Act 23 of 1957 proscribed sexual intercourse or 'immoral or indecent acts' between white people and people who were not white. All these statutes were based on and made possible by the Population Registration Act 30 of 1950, which imposed a duty on people to identify and register as one of the four distinct racial groups created by the apartheid state: white, coloured, black and other.<sup>21</sup> Strangely, under apartheid a person could be racially classified differently for different purposes.<sup>22</sup>

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political and economic control' (1985) *Acta Juridica* 53; R Hamilton 'Role of Apartheid Legislation in the Property Law of South Africa' (1987) 10 *National Black Law Journal* 152; SB Nxumalo 'Revisiting the relationship between property rights and land reform legislation in South Africa: *Grobler v Phillips and Others*' (Oxford Property Law Blog, 22 December 2021) <https://www.law.ox.ac.uk/research-and-subject-groups/property-law/blog/2021/12/revisiting-relationship-between-property> (accessed 14 February 2022); and B Bhandar *Colonial Lives of Property* (Duke University Press 2018).

<sup>19</sup> *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 9.

<sup>20</sup> S Plaatje *Native Life in South Africa* (Picador Africa 2007) 21.

<sup>21</sup> The Population Registration Act was not a model of clarity and was poorly drafted. In section 1, it defined the four distinct races in the following terms:

"Black" means a person who is, or is generally accepted as, a member of any aboriginal race or tribe of Africa;

"coloured person" means a person who is not a white person or a Black;

"ethnic or other group" means a group prescribed and defined by the Governor-General in terms of sub-section (2) of section five

"white person" means a person who—

(a) in appearance obviously is a white person and who is not generally accepted as a coloured person; or

(b) is generally accepted as a white person and is not in appearance obviously not a white person,

but does not include any person who for the purposes of his classification under this Act, freely and voluntarily admits that he is by descent a Black or a coloured person unless it is proved that the admission is not based on fact.'

<sup>22</sup> PQR Boberg *The Law of Persons and the Family* (Juta 1977) 126: '[the] Chameleon-like quality of race'.



There was a plethora of statutes passed by the apartheid state to further its racist and gendered ideology, including segregating even graveyards based on race.<sup>23</sup>

(b) *The common law under apartheid*

Outside of legislation, another important source of law was the common law, which still operates today.<sup>24</sup> South Africa's common law is a mix of Roman-Dutch law and English law, which has been applied and developed through the courts.<sup>25</sup> This amalgamation of the common law is a result of two conquests – the arrival of the Dutch East India Company at the Cape in 1652, which led to imposition of the Dutch-inspired legal system, underpinned by Roman law;<sup>26</sup> and the British conquest of the Cape in 1795, which interrupted Dutch rule.<sup>27</sup> The court in *Campbell v Hall* held that the Dutch legal system should remain in place, subject to incremental alterations made by the British colonial authorities.<sup>28</sup> Thus, Roman-Dutch law persisted and English common law was introduced incrementally, particularly in the areas of court procedure, the structures of government and criminal and mercantile law.<sup>29</sup> While English law had little to no impact on the law of persons, the English administrators introduced changes to various definitions of crimes and delicts and imposed the notion of a 'reasonable man' and 'the duty of care'.<sup>30</sup>

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<sup>23</sup> Reservation of Separate Amenities Act 49 of 1953 and the provincial Reservation of Separate Amenities by Local Authorities Ordinance of 1955.

<sup>24</sup> R Zimmermann & D Visser 'Introduction: South African law as a mixed legal system' in R Zimmermann & D Visser (eds) *Southern Cross: Civil Law and Common Law in South Africa* (Clarendon 1996) 1–30.

<sup>25</sup> J Sarkin 'The Common Law in South Africa: Pro Apartheid or Pro Democracy' (1999) 23 *Hastings International and Comparative Law Review* 1 and H Corder *Judges at Work: The Role and Attitudes of the South African Appellate Judiciary 1910–1950* (Juta 1984).

<sup>26</sup> See PJ Thomas, BC Stoop & GC van der Merwe *The Historical Foundations of South African Private Law* (LexisNexis 2000) 96–97; J Wessels 'The future of Roman-Dutch law in South Africa' (1920) 37 *South African Law Journal* 265; and PT Mellet *The Lie of 1652* (NB Publishers 2020).

<sup>27</sup> E Zitzke 'The history and politics of contemporary common law purism' (2017) 23 *Fundamina* 185, 191.

<sup>28</sup> *Campbell v Hall* (1774) 1 Cowp 204, 98 ER 1045.

<sup>29</sup> HR Hahlo & Ellison Kahn *The South African Legal System and its Background* (Juta 1968) 576–577.

<sup>30</sup> Sarkin (note 25 above) 2–3.

Some jurists are of the opinion that the common law, even under apartheid, was grounded in principles of justice, equality and fairness.<sup>31</sup> It was contended that absent the legislation promulgated by the apartheid state, the principles of justice, equality and fairness as espoused by the law would provide the guiding spirit of the law. Equality before the law and the protection and promotion of personal freedom by advancing certain rights and freedoms (such as the freedom of contract) were recognised. On this construction, the apartheid state did not rewrite the common law, but rather overrode the common law.<sup>32</sup> Recently, Nxumalo and Mafora remarked:

*[I]t is important to point out that the common law under apartheid was a social tool employed in the service of abhorrent and racist objectives but that that does not mean that the common law is itself essentially racist. It operated alongside legislation which was repressive and racist.*

*Most of that legislation derogated from the common law and its application. However, everything is in flux and the law is no exception. It adapts itself to new environments, reflects the ideas and feelings of the society, contracts and expands, grows and declines.*<sup>33</sup>

The common law was restricted by the repressive legislation in place at the time.<sup>34</sup> Notwithstanding this, the common law has a strong sense of justice. English law further entrenched principles of impartiality and natural justice.<sup>35</sup> The court in *Mpanza v Minister of Native Affairs*, for instance, held that the right of personal liberty was a highly prized right, and our courts will always strive to uphold it.<sup>36</sup> However, this right could only operate and have force to the extent that it was permitted by an Act of Parliament. In other words, despite the importance of the right to personal liberty, the legislature could enact a statute that would have the effect of denying this right.<sup>37</sup>

<sup>31</sup> J Trengove 'Perspectives on the Role of Judges in a Deeply Divided Society' in H Corder (ed) *Democracy and the Judiciary* (IDASA 1989) 125–126.

<sup>32</sup> J Dugard *Human Rights and the South African Legal Order* (1978) 382–283 and J Dugard 'Using the Law to Pervert Justice' (1983) 11 *Human Rights* 22.

<sup>33</sup> S Nxumalo & D Mafora 'Mpfu-Walsh's book "The New Apartheid" misses the point on common and contract law' *Mail & Guardian* 22 August 2021 [https://mg.co.za/opinion/2021-08-22-mpfu-walshs-book-the-new-apartheid-misses-the-point-on-common-and-contract-law/?utm\\_medium=Social&utm\\_source=Twitter#Echobox=1629659419-1](https://mg.co.za/opinion/2021-08-22-mpfu-walshs-book-the-new-apartheid-misses-the-point-on-common-and-contract-law/?utm_medium=Social&utm_source=Twitter#Echobox=1629659419-1) (accessed 14 February 2022).

<sup>34</sup> Nxumalo & Mafora (note 33 above).

<sup>35</sup> Sarkin (note 25 above) 3.

<sup>36</sup> *Mpanza v Minister of Native Affairs* 1946 WLD 225, 229.

<sup>37</sup> See Dugard *Human Rights* (note 32 above) 108 and Dugard 'Using the Law to Pervert Justice' (note 32 above) 38.

(c) *The role of the courts during apartheid*

Both Roman-Dutch law and English law provided judicial recourse for any infringements on the civil liberties. For instance, Roman-Dutch law provides an *interdictum de homine libero exhibendo*, a remedy to individuals who have been arbitrarily deprived of their liberty. Similarly, under English law, a person deprived of their liberty can approach a court and invoke a writ of *habeus corpus*. At the core of these remedies is the desire to protect personal freedom from undue, irrational and arbitrary government invasion. The court in *Principal Immigration Officer v Narayansamy* unequivocally stated that everyone was entitled to invoke a writ of *habeus corpus* pursuant to Roman-Dutch and English law.<sup>38</sup> This was buttressed in *Wood v Ondangwa Tribal Authority*, where the court held that an action of *habeus corpus* could be brought by any person on behalf of someone who has been imprisoned and that the laws pertaining to *habeus corpus* ought to be construed in favour of the liberty of an individual.<sup>39</sup> Regardless of these common law protections, the apartheid state enacted an assemblage of legislation that frustrated these protections.

This begs the question regarding the role of courts. During that period, the power of courts to review legislation and government action was significantly constrained. Courts were denuded of the power to review the substance of statutes. They could mostly adjudicate whether Parliament adhered to the prescribed procedure in the legislative process.<sup>40</sup> In *Johannesburg Consolidated Investment Co v Johannesburg Town Council*,<sup>41</sup> the court held that the overarching justification for judicial intervention is the doctrine of *ultra vires*. Courts, according to this rationale, could only interfere on the basis that the state exercised power that went beyond its purview, as prescribed by Parliament. Courts were not allowed to second-guess the purported wisdom of the legislature. So, if the law was clear and certain, a court plainly did not have power to interfere with the propriety of the legislation.<sup>42</sup> Courts could not strike down or set aside laws that

<sup>38</sup> *Principal Immigration Officer v Narayansamy* 1916 TPD 274.

<sup>39</sup> *Wood v Ondangwa Tribal Authority* 1975 (2) SA 294 (A).

<sup>40</sup> There are instances where courts attempted to invalidate laws on substantive grounds. See the landmark cases that formed part of the constitutional crisis of the 1950s: *Harris v Minister of the Interior* 1952 (2) SA 428 (A), *Minister of the Interior v Harris* 1952 (4) SA 769 (A) and *Collins v Minister of the Interior* 1957 (1) SA 552 (A).

<sup>41</sup> *Johannesburg Consolidated Investment Co v Johannesburg Town Council* 1903 TS 111.

<sup>42</sup> M du Plessis 'The Legitimacy of Judicial Review in South Africa's New Constitutional Dispensation: Insights from the Canadian Experience' (2000) 33 *Comparative and International Law Journal of Southern Africa* 227, 228.

were morally unconscionable and unjust. As Centlivres CJ asseverated in *Ndlwana v Hofmeyr*, the 'court has no power to pronounce upon the validity of an Act of Parliament duly promulgated and printed and published by proper authority'.<sup>43</sup> In this regard, courts were inferior to the legislature and executive and were subordinate to them.

Unfortunately, the apartheid state was able to perpetrate many substantive injustices by merely following the correct procedure<sup>44</sup> and its successes were also exacerbated by a supine judiciary, which was not necessarily keen on upholding civil liberties, failed to guard its independence and permitted the legislature to step into its terrain.<sup>45</sup> Baxter described the South African judiciary under apartheid as an enigma, which was emasculated by a host of hostile legislation. He also stated that the judiciary had 'degenerated into a compliant auxiliary' of the other branches.<sup>46</sup> This criticism of courts can be seen in the so-called emergency cases, discussed next.

The Public Safety Act 3 of 1953 empowered the President to declare, by proclamation in the *Government Gazette*, that a state of emergency existed within the Republic or South West Africa (today Namibia) or any of their areas.<sup>47</sup> This broad power included the prohibition of gatherings and processions, the forced dispersal of illegal gatherings, the creation of broadly defined crimes and the suppression of publications and organisations.<sup>48</sup> Dugard argues that the Public Safety Act gave the apartheid state an unencumbered 'free hand' that permitted it to arrest anyone without warrant and detention without trial.<sup>49</sup> The apartheid state enthusiastically invoked this broad 'emergency' power and the case law reflects that the courts not only failed to recognise the injustice perpetuated

<sup>43</sup> *Ndlwana v Hofmeyr* NO 1937 AD 229 at 231. See also E Griswold 'The "Coloured Vote Case" in South Africa' (1952) 65 *Harvard Law Review* 1361.

<sup>44</sup> L Boule, B Harris & C Hoexter *Constitutional and Administrative Law: Basic Principles* (Juta 1989) 131–143.

<sup>45</sup> Du Plessis (note 42 above) 228.

<sup>46</sup> L Baxter 'A Judicial Declaration of Martial Law' (1987) 3 *South African Journal on Human Rights* 317, 317.

<sup>47</sup> Namibia was under South Africa's administration from 1915 to 1990 and was called 'South West Africa'. See J Dugard *The South West Africa/Namibia Dispute: Documents and Scholarly Writings on the Controversy Between South Africa and the United Nations* (University of California Press 1973) and AM Fokkens 'The Suppression of Internal Unrest in South West Africa (Namibia) 1921–1933' (2012) 40(3) *Scientia Militaria* 109.

<sup>48</sup> S Morton 'States of Emergency and the Apartheid Legal Order in South African Fiction' (2010) 46 *Journal of Postcolonial Writing* 491, 492.

<sup>49</sup> Dugard *Human Rights* (note 32 above) 110–111.

by this Act, but actively aided the apartheid state. I briefly focus on three ‘emergency’ cases.

First, in *Minister of Law & Order v Dempsey*, a nun had been physically restrained by a policeman, who had assaulted a mourner at a funeral. The nun was detained under emergency regulations. A *habeas corpus* application was sought to obtain the release of the nun. Under South African law, it was well-established that every invasion of personal liberty was *prima facie* unlawful and thus should be justified by the detainer. In other words, the burden of proof was on the detainer to prove that the detention was lawful and justified. However, in *Dempsey*, the court held that the burden of proof rests with the applicant in *habeas corpus* proceedings. In other words, the nun had to prove that the state had abused its powers by detaining her.<sup>50</sup>

Second, in *Omar v Minister of Law and Order*, a case involving our first Minister of Justice in the new democracy in President Mandela’s Cabinet, Dullah Omar, the court upheld certain regulations, which were promulgated under the emergency powers referenced above. These regulations deprived emergency detainees of their right of access to counsel and their right to be heard before a decision was made to further their detention. Lamentably, the court upheld these draconian regulations. Axiomatically, the rights of access to counsel and to be heard before a decision regarding continued detention is taken, are fundamental rights in many jurisdictions. Prior to this decision, the law was clear that any exercise of delegated legislation that infringed a fundamental right was impermissible. But the court overlooked this and held that Parliament could exclude the rights to *audi alteram partem* and legal counsel.<sup>51</sup>

Finally, in *Staatspresident v United Democratic Front*, numerous emergency regulations were challenged on the basis that the term ‘unrest’, which had been used in the regulations, was so vague as to render the regulations null and void. In terms of section 5B of the Public Safety Act, courts were not competent to inquire into or to give judgment on the validity of these regulations. In other words, these regulations were subject to an ouster clause. The court dismissed the challenge to these regulations and held that to be protected from being declared invalid by section 5B, a regulation does not have to comply with all the requirements for validity. Ergo, the doctrine of *ultra vires* was rejected in this case.<sup>52</sup>

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<sup>50</sup> *Minister of Law and Order v Dempsey* 1988 (3) SA 19 (A).

<sup>51</sup> *Omar v Minister of Law and Order*; *Fani v Minister of Law and Order*; *State President v Bill* [1987] 4 All SA 556 (AD).

<sup>52</sup> *Staatspresident v United Democratic Front* 1988 (4) SA 830 (A). Another case that rejected the doctrine of *ultra vires* is: *Lipschitz v Watrus* NO 1980 (1) SA 662 (T).

In summary, under apartheid, Parliament was sovereign and could make any law it deemed fit. These laws were oppressive and deeply unjust. Courts had no power to declare legislation invalid, let alone strike it down. It merely applied the law as it was, regardless of how unjust the law may be. Courts therefore merely served as a rubber stamp for the legislature. It is against the backdrop of these ruins that the Constitution must be understood.

### III PART B: A COUNTRY REIMAGINED: A CONSTITUTIONAL DEMOCRACY

The Constitution came about through a complex and protracted negotiation process including the Convention for a Democratic South Africa (CODESA), the adoption of the initial 34 Constitutional Principles, the interim Constitution and then the final Constitution which included two judgments of the Constitutional Court, certifying its provisions.<sup>53</sup> As alluded to in the introduction, the South African Constitution carries a promise of a new society. The Preamble affirms the supremacy of the Constitution and declares that South Africa belongs to all those who live in it.<sup>54</sup> Importantly, it displaces parliamentary sovereignty. To this end, the Constitution signifies a break from a past characterised by inequality, oppression and exclusion to a future founded on justice, equality, dignity and equality.<sup>55</sup> Such a break must be understood in the context of

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See also C Forsyth 'Of Fig Leaves and Fairy Tales: The Ultra Vires Doctrine, the Sovereignty of Parliament and Judicial Review' (1996) 55 *Cambridge Law Journal* 112.

<sup>53</sup> *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC) and *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* 1997 (2) SA 97 (CC).

<sup>54</sup> Mhlantla J in *Speaker, National Assembly v Land Access Movement of South Africa* 2019 (6) SA 568 (CC) para 1 stated:

'It aims to right historical wrongs, resolve unjust dispossession and heal the 'trauma of deep, dislocating loss of land' that has taken root in our country. It entails the practical disruption of racialised privilege in respect of land ownership. But it also incorporates a symbolic function of recognising histories and legacies of injustice that influence the lives of individuals, families and communities.'

<sup>55</sup> AJ van der Walt 'Transformative Constitutionalism and the Development of South African Property Law I' (2005) *TSAR* 655, 658 and AJ van der Walt *The Constitutional Property Clause* (Juta 1997) 79.

‘transformative constitutionalism’. While there is no universally accepted definition of transformative constitutionalism,<sup>56</sup> Klare described it as:

*[A] long-term project of constitutional enactment, interpretation and enforcement committed (not in isolation, of course, but in a historical context of conducive political developments) to transforming a country’s political and social institutions and power relationships in a democratic, participatory, and egalitarian direction.*<sup>57</sup>

The transformative nature of the Constitution means that there must be political, social and legal reform, with an awareness of the historical injustices which ought to be redressed. It is an enterprise of inducing large-scale social change through non-violent processes, grounded in law.<sup>58</sup> Transformative constitutionalism has two potential conceptions. First, transformation could refer to achievements of specific outcomes such as poverty reduction and eradicating inequality through adjudication. Second, it could refer to a fundamental change in institutions and systems, producing results.<sup>59</sup> At the heart of transformative constitutionalism is the demand for a change in legal culture and socio-economic conditions. Former Chief Justice Pius Langa plainly stated that our Constitution espouses the idea that ‘we must change’.<sup>60</sup> In this sense, the Constitution is both backward-looking in that it is a break away from ‘our socially degrading and economically exploitative apartheid past’,<sup>61</sup> and forward-looking in that it facilitates the construction of a new political, social and economic order ‘based on democratic values, social justice and fundamental human rights’, which is concerned with bettering and improving the quality of life and freeing the potential of everyone.<sup>62</sup>

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<sup>56</sup> P Langa ‘Transformative Constitutionalism’ (2006) 17 *Stellenbosch Law Review* 351, 351.

<sup>57</sup> K Klare ‘Legal Culture and Transformative Constitutionalism’ (1998) 14 *South African Journal on Human Rights* 150. See also J Brickhill & Y van Leeve ‘Transformative Constitutionalism – Guiding Light or Empty Slogan?’ (2015) *Acta Juridica* 141, 146 and S Sibanda ‘Not Purpose-made! Transformative Constitutionalism, Post-independence Constitutionalism and the Struggle to Eradicate Poverty’ (2011) 22 *Stellenbosch Law Review* 482, 486.

<sup>58</sup> Klare (note 57 above).

<sup>59</sup> D Brand ‘Courts, Socio-Economic Rights and Transformative Politics’ LLD thesis, University of Stellenbosch 2009.

<sup>60</sup> Langa (note 56 above) 352.

<sup>61</sup> D Moseneke ‘The Fourth Bram Fischer Memorial Lecture: Transformative Adjudication’ (2002) 18 *South African Journal on Human Rights* 309, 315.

<sup>62</sup> S Liebenberg *Socio-Economic Rights: Adjudication Under a Transformative Constitution* (Juta 2010) 27.

(a) *The status of the common law in South Africa's constitutional supremacy*

In light of the new constitutional order, what is the status of the common law? Did the common law collapse with apartheid? The short answer is no. The common law continues to occupy a central place in our country's legal landscape. That is because we apply the principle of subsidiarity, meaning that—

*it does not follow that [resorting] to constitutional rights and values may be freewheeling or haphazard . . . The Constitution is primary but its influence is mostly indirect. It is perceived through its effects on legislation and the common law – to which one must look first.<sup>63</sup>*

The common law is not trapped within the limitations of the past. It is now imbued with and informed by the Constitution and its values. It is interpreted in light of the conditions of social and constitutional ossification.<sup>64</sup> This is particularly so because there is a constitutional injunction that requires courts, when interpreting legislation, to promote the spirit, object and purport of the Bill of Rights.<sup>65</sup> Thus, the common law, once used to achieve racist and repressive ends, has now been re-invigorated and revitalised by the Constitution.<sup>66</sup> The interaction between the Constitution and the common law has been described by the Constitutional Court as follows:

*The common law supplements the provisions of the written Constitution but derives its force from it. It must be developed to fulfil the purposes of the Constitution and the legal order that it proclaims – thus, the command that law be developed and interpreted by the courts to promote the 'spirit, purport and objects of the Bill of Rights'. This ensures that the common law will evolve within the framework of the Constitution consistently with the basic norms of the legal order that it establishes. There is, however, only one system of law and within that system the Constitution is the supreme law with which all other law must comply.<sup>67</sup>*

In respect of the development of the common law, more particularly in indigenising public law,<sup>68</sup> it bears consideration that:

<sup>63</sup> *My Vote Counts NPC v Speaker of the National Assembly* 2016 (1) SA 132 (CC).

<sup>64</sup> *Du Plessis v De Klerk* 1996 (3) SA 850 (CC).

<sup>65</sup> Section 39(2) of the Constitution.

<sup>66</sup> *Barkhuizen v Napier* 2007 (5) SA 323 (CC).

<sup>67</sup> *Pharmaceutical Manufacturers Association of SA: In Re Ex Parte President of the RSA* 2000 (2) SA 674 (CC) para 49.

<sup>68</sup> One could also call it 'decolonising our common law'.



*There are notionally different ways to develop the common law under s 39(2) of the Constitution, all of which might be consistent with its provisions. Not all would necessarily be equally beneficial for the common law. Before the advent of the IC, the refashioning of the common law in this area entailed 'policy decisions and value judgments' which had to 'reflect the wishes, often unspoken, and the perceptions, often but dimly discerned, of the people'. A balance had to be struck between the interests of the parties and the conflicting interests of the community according to what 'the (c)ourt conceives to be society's notions of what justice demands'. Under s 39(2) of the Constitution concepts such as 'policy decisions and value judgments' reflecting 'the wishes . . . and the perceptions . . . of the people' and 'society's notions of what justice demands' might well have to be replaced, or supplemented and enriched by the appropriate norms of the objective value system embodied in the Constitution.<sup>69</sup>*

The need to develop the common law under section 39(2) could arise in at least two instances. The first would be when a rule of the common law is inconsistent with a constitutional provision. Repugnancy of this kind would compel an adaptation of the common law to resolve the inconsistency. The second instance would occur even when a rule of the common law is not inconsistent with a specific constitutional provision, but may fall short of its spirit, purport and objects. Then, the common law must be adapted so that it grows in harmony with the objective normative value system found in the Constitution.<sup>70</sup>

But there is a caveat to the development of the common law. It was expressed thus by the Constitutional Court in *Mighty Solutions t/a Orlando Service Station v Engen Petroleum Ltd*:

*Our common law evolved from an ancient society in which slavery was lawful, through centuries of feudalism, colonialism, discrimination, sexism and exploitation. Furthermore, apartheid laws and practices permeated and to some extent delegitimised much of the pre-1994 South African legal system. Courts have a duty to develop the common law – like customary law – to accord with the Bill of Rights. . . . Caution is called for though. It is tempting to regard precedents from the pre-democratic era with suspicion. This may be more so when language is used, which some may regard as archaic and reminiscent of a patriarchal feudal era, as when the court in Kala Singh said that 'it does not lie in the mouth of the lessee to question the title of his landlord'. However, the mere fact that common-law principles are sourced from pre-constitutional case law is not always relevant. Age is not necessarily a reason to change. Some of the lessons gained from human experience over the ages are timeless and have passed the logical and moral tests of time. The Constitution indeed recognises the existing common law and customary law. In Zuma,*

<sup>69</sup> *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC) para 56.

<sup>70</sup> *S v Thebus* 2003 (6) SA 505 (CC) para 28.

*Kentridge AJ said that it is not the case that under our constitutional dispensation – ‘all the principles of law which have hitherto governed our courts are to be ignored. Those principles obviously contain much of lasting value.’ Furthermore, legal certainty is essential for the rule of law – a constitutional value. It is also understandable that litigants who find themselves on the wrong side of the common law or customary law will – often at a late stage in proceedings – seek what they would call its ‘development’.*<sup>71</sup>

Thus, the common law is not inherently unconstitutional. Our courts are still required to robustly engage with the Constitution and its values. The Constitution must reinvigorate the common law to ensure that it is not at odds with constitutional promises. Excising the common law from our system of law would cause great uncertainty and disrupt our legal system. Developing the common law must take place when necessary and incrementally.

Development of the common law may also occur in terms of section 173 of the Constitution.<sup>72</sup> This may be the case where the common law has a shortcoming not at odds with the Bill of Rights, but its development in the interests of justice is nonetheless justified.<sup>73</sup>

*(b) The powers of the judiciary under the Constitution*

The Constitution entrenches a generous, and justiciable Bill of Rights, which includes the right to access to adequate housing,<sup>74</sup> the right to basic education<sup>75</sup> and the rights to healthcare, food, water and social security.<sup>76</sup> Further to this, it has clothed the judiciary with expansive powers to review governmental actions and strike them down where it is of the opinion that such action is constitutionally necessary. Van der Schyff argues that judicial review is an integral part of a constitutional democracy. The constitutional text is open-ended and generously worded, giving courts the broad jurisdiction to interpret and give content to the

<sup>71</sup> 2016 (1) SA 621 (CC) paras 36–37.

<sup>72</sup> ‘173. Inherent power

The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice’.

<sup>73</sup> *MEC for Health and Social Development, Gauteng v DZ obo WZ* 2018 (1) SA 335 (CC) paras 31–32; *Mokone v Tassos Properties* CC 2017 (5) SA 456 (CC) paras 40–41.

<sup>74</sup> Section 26 of the Constitution.

<sup>75</sup> Section 29 of the Constitution.

<sup>76</sup> Section 27 of the Constitution.

constitutional text. While South Africa adheres to the separation of powers doctrine, the doctrine is not rigidly defined and is generally unfixed. In many instances, the courts themselves determine the content and meaning of the doctrine of separation of powers.<sup>77</sup> Recently, in *Mwelase*,<sup>78</sup> Justice Cameron cautioned that ‘the bogeyman of separation of powers concerns should not cause courts to shirk from [their] constitutional responsibility’.<sup>79</sup>

The importance of the adoption of the Constitution was aptly summarised by Mureinik, who described it as a shift from a culture of authority to a culture of justification.<sup>80</sup> Under apartheid, the state acted through authority and punishment. It could enact repressive and unjust statutes without fear of being held accountable and needing to justify their exercise of public power.<sup>81</sup> Today, a culture of justification prevails, which requires courts to ensure that every Act or exercise of public power by the government is not only procedurally compliant, but substantively justifiable.<sup>82</sup> Thus, there is a constitutional demand on courts to ensure that the Bill of Rights is upheld and that the state does not act in any way that denigrates or makes inroads into these rights without providing substantive justification. Of considerable import, is that courts cannot be value-neutral or defer questions of social justice to other arms of government, because the Constitution is a repository of values that bind people.<sup>83</sup> These values are explicitly reflected in section 1 of the Constitution, and in particular, include human dignity, the advancement of human rights and freedoms and the achievement of equality. As Justice Kriegler in *President of the Republic of South Africa v Hugo* put it, our Constitution is emphatically

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<sup>77</sup> See *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996 1997* (2) SA 97 (CC) paras 113–127; *Justice Alliance of South Africa v President of Republic of South Africa* 2011 (5) SA 388 (CC) and F Dube ‘Separation of powers and the institutional supremacy of the Constitutional Court over Parliament and the executive’ (2020) 36 *South African Journal on Human Rights* 293.

<sup>78</sup> *Mwelase v Director-General for the Department of Rural Development and Land Reform* 2019 (6) SA 597 (CC).

<sup>79</sup> *Mwelase* (note 78 above) para 51.

<sup>80</sup> Mureinik (note 3 above) 33.

<sup>81</sup> Mureinik (note 3 above) 33.

<sup>82</sup> Mureinik (note 3 above) 33. See also K Möller ‘Justifying the Culture of Justification’ (2020) 17 *International of Constitutional Law* 1078 and R Forst ‘The Justification of Human Rights and the Basic Right to Justification: A Reflexive Approach’ (2010) 120 *Ethics* 711, 734.

<sup>83</sup> Moseneke (note 61 above) 315; *Makwanyane* (note 6 above) 262.

egalitarian,<sup>84</sup> and courts must be alive to this. Therefore, courts have the task of achieving social redistributive justice.<sup>85</sup> Courts, without more, are at the centre of the constitutional project. As Langa notes:

*Under a transformative Constitution, judges bear the ultimate responsibility to justify their decisions not only by reference to authority, but by reference to ideas and values.*

*This approach to adjudication requires an acceptance of the politics of law. There is no longer place for assertions that the law can be kept isolated from politics. While they are not the same, they are inherently and necessarily linked.<sup>86</sup>*

The Constitution therefore promotes a deliberative democracy through a constitutional dialogue between the three arms of government. All three arms of government are continuously engaged in a dialogue pertaining to the roles of each arm and their interaction with each other. Each arm is tasked with upholding the Constitution. The dialogue is continuous, because that permits for the role of each arm to be defined and redefined in light of the prevailing circumstances of the time. Thus, the South African Constitution is not a mere document that contains hollow shibboleths.<sup>87</sup>

(c) *The indigenisation of the Constitution*

South Africa's constitutional framework is deeply rooted in the recollection of its collective historical injustice. It is only logical that our public law is indigenised, through the Constitution, to take into account the memory of denial of certain people's humanness, which resulted in the undignified, unequal treatment of people considered to be not white. For example, the right to access to housing is specifically entrenched as a justiciable socio-economic right because of our long history of forced removals and dispossession. The Constitution's promise that everyone is entitled to basic education is based on the fact that education was reserved for a particular elite few. The demand for a progressively realisable right to healthcare is a response to systemic inequality that existed under apartheid. If the Constitution had not directly confronted these issues, it would have faced a legitimacy crisis. It would have led many to question who the 'people' referred to in the Constitution are, if it ignored the painful past of South Africa.<sup>88</sup>

<sup>84</sup> *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) para 74.

<sup>85</sup> Moseneke (note 61 above) 318.

<sup>86</sup> Langa (note 56 above) 352.

<sup>87</sup> The idea of 'hollow shibboleths' emerges from *Trop v Dulles* 356 U.S. 86 (1958) 103.

<sup>88</sup> The Preamble of the Constitution refers to 'We the people of South Africa' and acknowledges the injustices of the past.

A failure to indigenise public law generally, and the Constitution specifically, to reflect the domestic social, political and economic conditions may result in the vehement rejection of public law and the Constitution. Or at best, it may yield poor results. Thus, infusing the public law with local realities may enhance its normative force and legitimacy. Writing in the context of human rights, Mahao argues that:

*[T]he values underpinning the dominant rights paradigm are, by and large, removed from notions of justice as understood and lived by the vast majority of people previously colonised in places such as Africa. Thus, mainstreaming indigenous juridical principles in the legal system holds the promise of going some distance towards legitimising the system. Inherently, however, this entails an epistemological shift in world outlook.<sup>89</sup>*

This proposition must be true even for constitutions and public law. It provides a complementary response to Lord Denning's observation that '[j]ust as with an English oak, so with the English common law. You cannot transplant it to the African continent and expect it to retain the tough character which it has in England'.<sup>90</sup> Legal systems of one jurisdiction cannot simply be transplanted to another jurisdiction without some form of domestication and infusing that legal system with some indigenous legal principles and doctrines.

One such indigenous principle which has been interpreted into our constitutional framework is the doctrine of *ubuntu*. The simplest formulation of *ubuntu* is the isiZulu expression, *umuntu ngumuntu ngabantu*, which literally means 'a human being is a human being through (the otherness of) other human beings'.<sup>91</sup> *Ubuntu* is a powerful concept which emphasises the communal nature of society and espouses in it the ideas and notions of humaneness, social justice and fairness, and envelopes the core values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity.<sup>92</sup> This principle has been accepted as a crucial

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<sup>89</sup> NL Mahao 'Can African Juridical Principles Redeem and Legitimise Contemporary Human Rights Jurisprudence?' (2016) 49 *Comparative and International Law Journal of Southern Africa* 455, 456.

<sup>90</sup> *Nyali Ltd v Attorney-General* (1955) 1 All ER 646, 653.

<sup>91</sup> NM Kamwangamalu 'Ubuntu: A Sociolinguistic Perspective to a Pan-African Concept' (1990) 12 *Critical Arts* 24 and CBN Gade 'What is Ubuntu? Different Interpretations Among South Africans of African Descent' (2012) 31 *South African Journal of Philosophy* 486.

<sup>92</sup> *The Citizen 1978 (Pty) Ltd v McBride* 2011 (4) SA 191 (CC) paras 164–165, 168, 210 and 216–218; *Le Roux v Dey* 2011 (3) SA 274 (CC) para 200; *Van Vuren v Minister of Correctional Services* 2012 (1) SACR 103 (CC) para 51; *Azanian Peoples Organisation (AZAPO) v President of the Republic of South Africa* 1996 (4) SA 671

value that underpins our Constitution. In *S v Makwanyane*, a landmark case that declared the death penalty unconstitutional, the court held that the death penalty offended the principle of *ubuntu*, because of the value a community puts on life and human dignity. The death penalty is bereft of *ubuntu*.<sup>93</sup> The principle of *ubuntu* has also been held to be a valid principle to govern contract law and possibly vitiate a contract found to be wanting on the grounds of *ubuntu*.<sup>94</sup> In *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd*,<sup>95</sup> the Constitutional Court recognised the concept of *ubuntu* as underlying the Constitution and the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE Act), and that it is relevant to their interpretation. The court referred to the following passage from *PE Municipality*<sup>96</sup> with approval:

*Thus, PIE expressly requires the court to infuse elements of grace and compassion into the formal structures of the law. It is called upon to balance competing interests in a principled way and to promote the constitutional vision of a caring society based on good neighbourliness and shared concern. The Constitution and PIE confirm that we are not islands unto ourselves. The spirit of ubuntu, part of the deep cultural heritage of the majority of the population, suffuses the whole constitutional order. It combines individual rights with a communitarian philosophy. It is a unifying motif of the Bill of Rights, which is nothing if not a structured, institutionalised and operational declaration in our evolving new society of the need for human interdependence, respect and concern.*<sup>97</sup>

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(CC) paras 3, 19 and 48; Y Mokgoro 'Ubuntu and the Law in South Africa' (1998) 4 *Buffalo Human Rights Law Review* 15; and Y Mokgoro & S Woolman 'Where Dignity Ends and Ubuntu Begins: An Amplification of, as well as an Identification of a Tension in Drucilla Cornell's Thoughts' (2010) 25 *Southern African Public Law* 400, 406.

<sup>93</sup> *Makwanyane* (note 6 above) 223–225. A powerful passage by Mohamed DP at para 263 is worth quoting:

'[Ubuntu] expresses the ethos of an instinctive capacity for and enjoyment of love towards our fellow men and women; the joy and the fulfilment involved in recognizing their innate humanity; the reciprocity this generates in interaction within the collective community; the richness of the creative emotions which it engenders and the moral energies which it releases both in the givers and the society which they serve and are served by.'

<sup>94</sup> *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC) para 71. See also the judgment of Victor AJ in *Beadica 231 CC v Trustees, Oregon Trust* 2020 (5) SA 247 (CC).

<sup>95</sup> *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 (2) SA 104 (CC).

<sup>96</sup> *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC).

<sup>97</sup> *Blue Moonlight* (note 95 above) para 38.

#### IV PART C: CASES EVIDENCING THE INDIGENISATION OF PUBLIC LAW IN SOUTH AFRICA

The Constitutional Court has affirmed the relevance of our history in the process of interpreting the rights in the Bill of Rights.<sup>98</sup> In addition to the principle of *ubuntu* and common law, the South African Constitution and its interpretation by the Constitutional Court has domesticated public law to reflect the material conditions of South Africa as well as the social, political and cultural realities through, amongst others, the right to access to adequate housing and the electoral regime in South Africa. I now turn to those two examples.

##### (a) *The Sisyphean struggle for housing*

There is a housing crisis in South Africa.<sup>99</sup> As highlighted above, the right to exclude (given effect through the *rei vindicatio*), was used by the apartheid state to evict people, and to establish and sustain unjust racial territorial segregation to advance its political objectives.<sup>100</sup> Thus, the right to exclude, bolstered by the oppressive legislative framework, operated not just to uphold ownership and the rights to own, use or exploit the land, but also to achieve particular ideological and political objectives on racial segregation.<sup>101</sup> In short, the right to exclude was politicised and was essential to the apartheid property regime.<sup>102</sup> This led to the dispossession

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<sup>98</sup> *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (6) SA 199 (CC); *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC); and *Brink* (note 15 above).

<sup>99</sup> *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 (5) SA 3 (CC); NK Marutlulle 'A Critical Analysis of Housing Inadequacy in South Africa and its Ramifications' (2021) 9 *Africa's Public Service Delivery and Performance Review* 372 and A Kumar & K Shika 'South Africa's housing crisis: A New Breed of Honest Politicians is Needed to Unlock the Land' *Daily Maverick* 21 June 2021 <https://www.dailymaverick.co.za/opinionista/2021-06-21-south-africas-housing-crisis-a-new-breed-of-honest-politicians-is-needed-to-unlock-the-land/> (accessed 12 May 2022).

<sup>100</sup> AJ van der Walt 'Towards the Development of Post-apartheid Land Law: An Exploratory Survey' (1990) 23 *De Jure* 1 and Z Boggempoel '(Re)defining the Contours of Ownership: Moving Beyond White Picket Fences' (2019) *Stellenbosch Law Review* 234.

<sup>101</sup> AJ van der Walt 'Exclusivity of Ownership, Security of Tenure, and Eviction Orders: A Model to Evaluate South African Land-reform Legislation' (2002) 2 *Tydskrif van die Suid-Afrikaanse Reg* 254, 261.

<sup>102</sup> Van der Walt (note 101 above) 261.

of millions of indigenous people. It was a continuation of the dispossession that commenced at the beginning of colonialisation.<sup>103</sup> Justice Froneman eloquently explained this in *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape*:

*[T]he pre-constitutional conception of property . . . entailed exclusive individual entitlement. Put simply, that is largely a history of dispossession of what indigenous people held, and its transfer to the colonisers in the form of land and other property, protected by an economic system that ensured the continued deprivation of those benefits on racial and class lines. That history of division probably also explains the concerns both the previously advantaged and disadvantaged still have. The former fears that they will lose what they have; the latter that they will not receive what is justly theirs.<sup>104</sup>*

Under apartheid, property followed abstract, syllogistic reasoning predicated on an immutable, hierarchal rights arrangement. Ownership reigned supreme at the top of the hierarchy. This meant that a property owner had the right to exclude and evict from their property any person who had no right on the land. The right to exclude was used in accordance with racial and class lines, which led to the mass and brutal dispossession of black people.

The Constitution squarely confronts this issue through section 26.<sup>105</sup> Section 26(1) provides a right to access to adequate housing. Implicit in this statement is that there is a duty on the state and people not to interfere with this right. However, section 26(2) goes further and places a positive duty on the state to take reasonable legislative and other steps, within its available resources, to progressively realise this right. While this places a duty on the state, it also limits the right by the caveat of available resources. Recognising the constitutional importance of a person's place of abode, section 26(3) provides that no person will be evicted from their home without a court order and that no legislation may permit arbitrary evictions.

<sup>103</sup> Ngcukaitobi (note 18 above).

<sup>104</sup> *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape* 2015 (6) SA 125 (CC) para 34.

<sup>105</sup> Section 26 provides:

- '(1) Everyone has the right to access to adequate housing.
- (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.
- (3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.'



To give effect to these constitutional promises, four interlocking statutes were enacted, two of which are the Extension of Security of Tenure Act 62 of 1997 and the PIE Act. As Justice Cameron recognises in *Mvelase*, these statutes were devised to ‘fulfil the overall constitutional promise of restitution to those deprived of rights in land by racial subordination’.<sup>106</sup>

In the landmark decision of *Government of the Republic v Grootboom*,<sup>107</sup> the Constitutional Court had to confront the harsh reality that the Constitution’s promise of dignity and equality for all remains for many a distant dream. In this case, the applicants were living on a sports field, in deplorable conditions. The community comprised 390 adults and 510 children and the whole community lived in shacks.<sup>108</sup> There was no water, no refuse and sewage removal services and only five per cent had electricity. The land on which they lived was close to a main thoroughfare and was partly waterlogged.<sup>109</sup> The applicants approached the court on the basis that these conditions limited their rights to access to housing, as well as the right of children to shelter as set out in section 28 of the Constitution. The High Court found in favour of the applicants and held that the state had failed in fulfilling its obligation to provide shelter to children and that the state had failed to take all reasonable legislative and other measures to achieve the right to adequate housing. However, the High Court only ordered that the state provide housing to children and their accompanying parents, but did not make an order relating to childless adults.<sup>110</sup>

On appeal, the Constitutional Court, in a unanimous decision, emphasised that the foundational values of human dignity, freedom, and equality are denied to those with no food, clothing or housing.<sup>111</sup> It held that the nationwide housing programme fell short of the obligations on the state under section 26 of the Constitution.<sup>112</sup> The state had dismally failed to take into account and make provisions for the immediate temporary amelioration of the circumstances of those in desperate need.<sup>113</sup> The court, in its order, declared that section 26 of the Constitution imposes on the national government obligations to devise, fund, implement, and supervise

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<sup>106</sup> *Mvelase* (note 78 above) para 6.

<sup>107</sup> *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC).

<sup>108</sup> *Grootboom* (note 107 above) para 4, with reference to footnote 2.

<sup>109</sup> *Grootboom* (note 107 above) para 7.

<sup>110</sup> *Grootboom v Oostenberg Municipality* 2000 (3) BCLR 277 (C).

<sup>111</sup> *Grootboom* (note 107 above) para 23.

<sup>112</sup> *Grootboom* (note 107 above) para 66.

<sup>113</sup> *Grootboom* (note 107 above) paras 66–69.

measures to provide relief to those in desperate need. Of note, the court expansively interpreted 'access to adequate housing' in these terms:

*[H]ousing entails more than bricks and mortar. It requires available land, appropriate services such as the provision of water and the removal of sewage and the financing of all of these, including the building of the house itself. For a person to have access to adequate housing all of these conditions need to be met: there must be land, there must be services, there must be a dwelling. Access to land for the purpose of housing is therefore included in the right of access to adequate housing in s 26. A right of access to adequate housing also suggests that it is not only the State who is responsible for the provision of houses, but that other agents within our society, including individuals themselves, must be enabled by legislative and other measures to provide housing.<sup>114</sup>*

In *Grootboom*, the applicants argued that the right to access to housing comprised a minimum core.<sup>115</sup> In essence, a minimum core means that each right has a quintessential base, which requires the state to fulfil certain minimum essentials contained in the 'core' of the right, failing which the state is *prima facie* in violation of its obligations.<sup>116</sup> A minimum core obligation to rights necessitates recognising basic subsistence levels in respect of each socio-economic right and insisting that the provision of core goods and services enjoys immediate priority.<sup>117</sup> Therefore, this approach consists of finding the 'floor' of immediately enforceable entitlements, which are justiciable. Importantly, the minimum core ought to apply regardless of the availability of resources of the particular country or other factors and difficulties.<sup>118</sup>

The court in *Grootboom*, and in subsequent cases,<sup>119</sup> decidedly rejected this approach and preferred the reasonableness approach. The court has proffered at least four principal reasons for rejecting the minimum

<sup>114</sup> *Grootboom* (note 107 above) para 35.

<sup>115</sup> *Grootboom* (note 107 above) para 18.

<sup>116</sup> D Bilchitz 'Judicial Review in Practice: The Reasonableness Approach and its Shortcomings' in D Bilchitz *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (Oxford University Press 2007) 140.

<sup>117</sup> M Pieterse 'Resuscitating Socio-Economic Rights: Constitutional Entitlements to Health Care Services' (2006) *South African Journal on Human Rights* 473, 481.

<sup>118</sup> Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, Maastricht, January 22–26, 1997 para 9.

<sup>119</sup> *Minister of Health v Treatment Action Campaign* 2002 (5) SA 721 (CC) paras 26–39; *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC) paras 48–56; *Khosa v Minister of Social Development, Mahlaule v Minister of Social Development* 2004 (6) SA 505 (CC).

core standard: (a) the difficulty of defining the content of minimum core standard; (b) the needs and opportunities for the enjoyment of the minimum core vary and are diverse, depending on the economic and social history and circumstances of a particular country; (c) it is impossible to give everyone access to a 'core' service immediately; and (d) courts are not institutionally equipped to make the wide-ranging factual and political inquiries necessary for determining what the minimum core standards should be.

Furthermore, the court held that a minimum core standard would be incongruent with the text of the Constitution, which provides that the positive obligation on the state is to take reasonable legislative and other measures to *progressively* realise the right of access to housing within available resources, and that in that section, there is no right to water or housing immediately.<sup>120</sup> Thus, the addition of the 'progressive realisation' caveat within the available resources makes it plain that rights cannot be achieved or enforced immediately.<sup>121</sup>

The court further held that it would be institutionally inappropriate for a court to determine precisely what the achievement of any particular social and economic right entails and what steps government should take to ensure the progressive realisation of the right. Courts can enforce socio-economic rights in two ways. First, if government takes no steps to realise the rights, the courts will require government to take steps. Second, if the measures adopted by government are unreasonable, the courts will similarly require that they be reviewed so as to meet the constitutional standard of reasonableness.

The reasonableness approach is grounded in the explicit wording of the Constitution.<sup>122</sup> As the court held in *Grootboom*, all that could be expected from the state was that it act reasonably in progressively realising socio-economic rights<sup>123</sup>. A criterion in determining whether the state is acting reasonably was set out by the court.<sup>124</sup> Notably, the court also emphasised that the reasonableness of the measures will be determined in light of the availability of resources.<sup>125</sup>

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<sup>120</sup> *Mazibuko* (note 119 above) para 56.

<sup>121</sup> *Mazibuko* (note 119 above) para 57.

<sup>122</sup> Not all socio-economic rights in the South African Constitution are subject to progressive realisation. For instance, the right to basic education is immediately realisable. See section 29 of the Constitution.

<sup>123</sup> *Grootboom* (note 107 above) para 33.

<sup>124</sup> *Grootboom* (note 107 above).

<sup>125</sup> *Grootboom* (note 107 above) para 46.

This is a domestication of public law in the sense that it differs substantially from international law instruments that embrace the minimum core standard. This standard was introduced by the UNCESCR<sup>126</sup> to assess the compliance of states with the ICESCR<sup>127</sup> when it issued its General Comment. To this end, the UNCESCR recognises that states have a minimum obligation to ensure the satisfaction of, at the very least, minimum essential levels of socio-economic rights (for instance rights to food, healthcare, housing and education and until recently the right to water).<sup>128</sup> It ought to be noted that the UNCESCR has started fleshing out the minimum content of rights in its General Recommendations. It has been argued that the specification of a minimum core is one of the key elements in finding an effective and feasible means of determining whether a state has violated its obligations under the ICESCR.<sup>129</sup>

Recently, the Constitutional Court dealt with a severe failure by the state in providing housing. In the matter of *Thubakgale v Ekurhuleni Metropolitan Municipality*, the applicants were living in dire conditions, which in certain circumstances, consisted of houses of up to ten people with little to no water, sanitation or electricity.<sup>130</sup> The applicants were terribly poor and did not have the financial means to sustain themselves. Without delving into the facts, which are a morass, the state had failed to provide the applicants with access to adequate housing for a period of 20 years. To make matters worse, the local authority had unlawfully given possession of the subsidised houses intended for the applicants, and to which they were still matched on the national housing database, to other residents, through either fraud or sheer incompetence.

The High Court made an order requiring the local authority to provide the applicants with housing. Ultimately, the state failed to comply

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<sup>126</sup> United Nations Committee on Economic, Social and Cultural Rights (UNCESCR).

<sup>127</sup> International Covenant on Economic, Social and Cultural Rights (ICESCR).

<sup>128</sup> General Comment No 3.

<sup>129</sup> A Chapman "A Violations Approach" for Monitoring the International Covenant on Social, Economic and Cultural Rights' (1996) 18 *Human Rights Quarterly* 23, 43–55. Furthermore, following from the UNCESCR, the African Commission has also acknowledged the minimum core standard. See Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights at para 17 and *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria* (Communication 155/96) (2001) AHRLR 60, 65–66.

<sup>130</sup> *Thubakgale v Ekurhuleni Metropolitan Municipality* 2022 (8) BCLR 985 (CC).

with this court order and the applicants were in no better position. After various court proceedings in the lower courts, the applicants applied to the Constitutional Court for an order compelling the local authority to provide them with housing and then also for constitutional damages. I wrote the first judgment, which held that the local authority had failed to discharge its duties under section 26 of the Constitution. Thus, I found that the municipality had failed under the legislative framework to provide housing to the applicants. In my view, the matter was not the same as the case in *Grootboom*, where the question pertained to whether the content of the nationwide housing policy was reasonable. In this matter, the court was concerned with the implementation of the legislative framework. In other words, the question to be determined was whether the state acted in accordance with its own legislative requirements. Thus, the court was required to travel beyond the terrain covered in *Grootboom*.<sup>131</sup> Furthermore, I reasoned that the state had failed to comply with a court order which required it to provide housing. In light of the magnitude of the state's failures, I ordered the local authority to pay constitutional damages as an effective and appropriate remedy.<sup>132</sup> Unfortunately, mine was the minority decision.

My colleague, Justice Jafta, who penned the second judgment, found that this was not a case that called for constitutional damages. In his view, constitutional damages are not appropriate in cases that concern breaches of socio-economic rights.<sup>133</sup> No proper case was pleaded for constitutional damages and there was no proof of any damages, let alone constitutional damages.<sup>134</sup> That second judgment has elicited fierce criticism from legal commentators, with some viewing it as a regressive step in the evolving of our socio-economic rights jurisprudence.<sup>135</sup>

It must be noted that this case illustrates that the substantive content of the right to housing has not been fully delineated and is consistently

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<sup>131</sup> *Thubakgale* (note 130 above) para 7.

<sup>132</sup> *Thubakgale* (note 130 above) paras 72–83.

<sup>133</sup> *Thubakgale* (note 130 above) para 122.

<sup>134</sup> *Thubakgale* (note 130 above) para 122.

<sup>135</sup> Professor Balthazar 'The Jury is Still Out on whether South Africa's Constitutional Democracy Will Survive Another 25 years' *Daily Maverick* 10 December 2021 <https://www.dailymaverick.co.za/opinionista/2021-12-10-the-jury-is-still-out-on-whether-south-africas-constitutional-democracy-will-survive-another-25-years/> (accessed 9 May 2022) and SB Nxumalo & T Jeewa 'Thubakgale: Obscuring the Right to Access to Adequate Housing' Oxford Human Rights Hub (22 December 2022) <https://ohrh.law.ox.ac.uk/thubakgale-obscuring-the-right-to-access-to-adequate-housing/> (accessed 9 May 2022).

being revisited in order to ensure that it is robust enough to address the changing circumstances facing South Africa. It illustrates that the flexible reasonableness standard encourages courts to recognise that there are various policy mechanisms to the issues that South Africa faces and there must be a deliberate process between the state, the judiciary and the broader public. The struggle for a better society cannot fall solely on the shoulders of courts. A democratic process requires an accountable state in all three its different arms to act proactively, collaboratively and in line with the dictates of the Constitution.

(b) *The electoral regime in South Africa*

Much like the right to housing explored above, the Constitutional Court's jurisprudence on political rights is similarly a site where South Africa's past informs the nature and scope of rights contained in the Bill of Rights. Political rights are enshrined in section 19 of the Constitution which states that—

- (1) *Every citizen is free to make political choices, which includes the right—*
  - (a) *to form a political party;*
  - (b) *to participate in the activities of, or recruit members for, a political party; and*
  - (c) *to campaign for a political party or cause.*
- (2) *Every citizen has the right to free, fair and regular elections for any legislative body established in terms of the Constitution.*
- (3) *Every adult citizen has the right—*
  - (a) *to vote in elections for any legislative body established in terms of the Constitution, and to do so in secret; and*
  - (b) *to stand for public office and, if elected, to hold office.*

Regarding the importance of the right to vote in our constitutional democracy, memorably, in *August v Electoral Commission*,<sup>136</sup> Justice Sachs declared that the vote of each and every citizen is a 'badge of dignity and personhood. Quite literally, it says that everybody counts.'<sup>137</sup> The precious value of the vote in South Africa arises in no small measure from a history in which the right to vote was denied to the majority of our citizens. Sachs J went on to note that in a country of great inequality such as South Africa, the right to vote declares that we all belong to the same nation and

<sup>136</sup> *August v Electoral Commission* 1999 (3) SA 1 (CC).

<sup>137</sup> *August* (note 136 above) para 17.

that ‘our destinies are intertwined in a single interactive polity’.<sup>138</sup> This was later confirmed in *Richter*<sup>139</sup> where Justice O’Regan held:

*[T]he right to vote, and its exercise, has a constitutional importance in addition to this symbolic value. The right to vote, and the exercise of it, is a crucial working part of our democracy. Without voters who want to vote, who will take the trouble to register, and to stand in queues, as millions patiently and unforgettably did in April 1994, democracy itself will be imperilled. Each vote strengthens and invigorates our democracy. In marking their ballots, citizens remind those elected that their position is based on the will of the people and will remain subject to that will. The moment of voting reminds us that both electors and the elected bear civic responsibilities arising out of our democratic Constitution and its values. We should accordingly approach any case concerning the right to vote mindful of the bright, symbolic value of the right to vote as well as the deep, democratic value that lies in a citizenry conscious of its civic responsibilities and willing to take the trouble that exercising the right to vote entails.<sup>140</sup>*

With this historical context in mind, I will consider three further judgments regarding the importance of political rights in South Africa. The first judgment is that of *AParty v Minister for Home Affairs; Moloko v Minister of Home Affairs*.<sup>141</sup> This matter concerned a challenge to the constitutional validity of section 33(1)(e) of the Electoral Act 73 of 1998 (Electoral Act) and regulations promulgated thereunder. The challenge was brought on the basis that section 33(1)(e) unfairly denied certain categories of South African citizens living abroad, who were registered voters, the right to vote. The applicants sought a declaration that South African citizens abroad who were not registered voters be allowed to register and vote in the upcoming general elections. The court emphasised that the constitutional questions raised by the applicants were ‘of the highest importance’ and ultimately declared the provisions of the Electoral Act and the impugned regulations unconstitutional.

The second case I will explore is *My Vote Counts NPC v Speaker of the National Assembly*.<sup>142</sup> It was a matter concerning whether Parliament had failed to fulfil its constitutional obligation to enact national legislation which gives effect to the right of access to information by requiring political parties to disclose, proactively and regularly, the sources of their

<sup>138</sup> *August* (note 136 above).

<sup>139</sup> *Richter v Minister of Home Affairs* 2009 (3) SA 615 (CC).

<sup>140</sup> *Richter* (note 139 above) para 53.

<sup>141</sup> *AParty v Minister for Home Affairs; Moloko v Minister of Home Affairs* 2009 (3) SA 649 (CC).

<sup>142</sup> *My Vote Counts NPC v Speaker of the National Assembly* 2016 (1) SA 132 (CC).

private funding. The court considered the earlier judgment of *Ramakatsa*<sup>143</sup> which highlighted the centrality of political parties in South Africa's constitutional democracy, stating that they are 'the veritable vehicles the Constitution has chosen for facilitating and entrenching democracy',<sup>144</sup> and that they are the 'indispensable conduits for the enjoyment of the right given by section 19(3)(a) to vote in elections'.<sup>145</sup>

The majority in *My Vote Counts* held that the Promotion of Access to Information Act<sup>146</sup> (PAIA) is the legislation – envisaged in the Constitution – meant to give effect to the right of access to information. As a result, the majority concluded that, in accordance with the principle of subsidiarity, the applicant should have attacked the constitutional validity of PAIA. This principle enjoins a litigant who is complaining about shortcomings in legislation enacted to give effect to a constitutional right to challenge the constitutional validity of that legislation instead of relying directly on the constitutional right. The majority judgment held that, since the essence of the complaint by the applicant was that PAIA has certain shortcomings, it ought to have attacked its constitutional validity in the High Court. Its failure to do so was dispositive of the case. The majority judgment accordingly dismissed the application.

The last case I consider here is *New Nation Movement NPC v President of the Republic of South Africa*.<sup>147</sup> It is a seminal judgment, giving scope to the nature of political rights enshrined in section 19 of the Constitution, and further emphasises the break that these rights envisage from South Africa's apartheid history. The application concerned whether the Electoral Act was unconstitutional to the extent that it did not provide for adult citizens to be elected to the National Assembly and Provincial Legislatures as independent candidates. The argument advanced by the applicants was that the Electoral Act is unconstitutional for unjustifiably limiting the right to stand for public office and, if elected, to hold office, as conferred by section 19(3)(b) of the Constitution. In addition, some applicants submitted that the Electoral Act infringes their right to freedom of association protected by section 18 of the Constitution.

Again, confirming *Ramakatsa*, Justice Madlanga emphasised:

*The scope and content of the rights entrenched by [section 19] may be ascertained by means of an interpretation process which must be informed by context that is both historical and constitutional. During the apartheid order, the majority*

<sup>143</sup> *Ramakatsa v Magashule* 2013 (2) BCLR 202 (CC).

<sup>144</sup> *Ramakatsa* (note 143 above) para 67.

<sup>145</sup> *Ramakatsa* (note 143 above) para 68.

<sup>146</sup> 2 of 2000.

<sup>147</sup> 2020 (6) SA 257 (CC).



*of people in our country were denied political rights which were enjoyed by a minority. The majority of black people could not form or join political parties of their choice. Nor could they vote for those who were eligible to be members of Parliament. Differently put, they were not only disenfranchised but were also excluded from all decision-making processes undertaken by the government of the day, including those affecting them.*<sup>148</sup>

Given the importance of political rights within the South African context and the far-reaching implications that such rights have on the right to human dignity, the first judgment held that the rights in sections 18 and 19(3)(b) of the Constitution must be interpreted generously, rather than restrictively. The court held that the Electoral Act is unconstitutional to the extent that it requires that adult citizens be elected to the National Assembly and Provincial Legislatures only through their membership of political parties.

Political rights are therefore a clear example of how public law has been indigenised in South Africa, particularly in light of how political rights were used as a tool of exclusion under apartheid.

## V. CONCLUSION: NEVER AGAIN

My aim in this article has been to explore the domestication of constitutions and the value this adds to their legitimacy. I have endeavoured to consider this, specifically in the case in South Africa, to show how the domestication of its public law has been shaped by its past. South Africa's Constitution signifies a decisive break from the past and has ushered in a future based on human rights. This is clear, not only from the wording of the constitutional text itself, but also through the jurisprudence of the Constitutional Court. South Africa is forever mindful of its past, having adopted a 'never again' paradigm. Justice Sachs eloquently puts it as follows: 'the "never again" principle, which I feel should be one of our guides to interpretation, applies not only to bitter experiences of former state enforced segregation, but also to those of past compulsory assimilation'.<sup>149</sup> Thereafter, in *Garvas*, the Constitutional Court confirmed that 'ours is a "never again" Constitution: never again will we allow the right of ordinary people to freedom in all its forms to be taken away'.<sup>150</sup> It is therefore South Africa's past that has provided the foundation for the domestication of its public law.

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<sup>148</sup> *Ramakatsa* (note 143 above) para 64.

<sup>149</sup> *Ex parte Gauteng Provincial Legislature: In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995* 1996 (3) SA 165 (CC) para 46.

<sup>150</sup> *SATAWU v Garvas* 2013 (1) SA 83 (CC) para 63.

Having regard to events beyond our own shores, it bears emphasis that the rule of law and democratic gains must never simply be taken for granted. The calamitous reversal of *Roe v Wade* by the US Supreme Court must be a clarion call to all of us to remain vigilant and steadfast in our endeavours to uphold democracy and the rule of law. That is particularly true of my beautiful but troubled<sup>151</sup> beloved homeland. The gains made in 28 years<sup>152</sup> of democratic rule and 27 years of widely admired constitutional jurisprudence must be zealously protected. Because today it may be the right to early termination of pregnancy and then, tomorrow? Our revered global icon, Nelson Rolihlahla Mandela said at his inauguration, a glorious moment for South Africans:

*Never, never and never again shall it be that this beautiful land will again experience the oppression of one by another and suffer the indignity of being the skunk of the world.*<sup>153</sup>

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<sup>151</sup> I say 'troubled' because not only are we the most unequal country in the world (see: The World Bank *New World Bank Report Assesses Sources of Inequality in Five Countries in Southern Africa* (Press Release No 2002/055/AFE, March 2022), but a recent survey also suggests that only 32% of South Africans are satisfied with how democracy is working (JS Kotze 'Democracy loses its glow for South Africans amid persistent inequality' *The Conversation*, 25 April 2022 <https://theconversation.com/democracy-loses-its-glow-for-south-africans-amid-persistent-inequality-181489> (accessed 12 May 2022)).

<sup>152</sup> At the time this paper was presented in July 2022.

<sup>153</sup> Nelson Mandela, Inauguration speech as President of the Republic of South Africa <http://www.sanews.gov.za> (accessed 8 May 2022).

# ENDING EARLY/CHILD OR FORCED MARRIAGE IN MALAWI: THE ROLE OF THE JUDICIARY\*

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## Abstract

This article examines the role of the judiciary in the elimination of early/child or forced marriage. With regard to the traditional role of adjudication, the author also examines other roles judicial officers can play beyond the courtroom, to end early/child and forced marriage. These include utilisation of their ready-made platform to advocate for change and condemn the practice of child marriage. Judicial officers also play the role of record-keeping with the capacity to generate data concerning the numbers of cases concerning early/child or forced marriages, in whatever form they present themselves, the context within which they occur, and the measures taken. This article argues that the data will enable governance structures to develop plans and strategies in allocating funds to eliminate early/child, and forced marriage.

## I BACKGROUND

According to UNICEF, child marriage is defined as the formal or informal marriage that involves children who are below the age of 18.<sup>1</sup>

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<sup>1</sup> A Kohno & T Techarivichien et al 'Investigation of the Key Factors that Influence the Girls to Enter into Child Marriage: A Meta-synthesis of Qualitative Evidence' (2020) 15(7) *PLoS ONE*, <https://www.unicef.org/protection/child-marriage> (accessed 5 October 2023).

Child marriage has been earmarked as the ‘critical priority area in Malawi’.<sup>2</sup> Owing to systemic gender inequality, which places low value on a girl child, girls are the most vulnerable group in this practice.<sup>3</sup> The practice is further exacerbated by poverty, insecurity and conflict.<sup>4</sup> Malawi is a sub-Saharan country that is plagued by high levels of poverty and gender inequality. It has the fourth highest rate of child marriage in Eastern and Southern Africa.<sup>5</sup> Malawi ranks as the African state with the ninth highest child marriage rate; it is also the country with the eleventh highest rate of child marriage in the world.<sup>6</sup> Approximately 42 per cent of girls are married before the age of 18 years and 9 per cent are married before the age of 15 years.<sup>7</sup> Childbirth typically follows within a year after marriage, elevating Malawi’s teenage pregnancy rate to 29 per cent of girls aged 15–19.<sup>8</sup>

The impact of child marriage in Malawi is evident in the country’s low development indicators.<sup>9</sup> Child marriage adversely impacts the physical health of a child (due to increased risk of sexually transmitted disease, cervical cancer, obstetric fistula and maternal death or other complications). Children born from teenage mothers are also at a high risk of being born premature, higher mortality risks and stunted growth as well as lower

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<sup>2</sup> Government of Malawi, National Strategy on Ending Child Marriage (2018–2023) 7.

<sup>3</sup> SADC Parliamentary Forum, Girls Not Brides: The Global Partnership to End Child Marriages, UNFPA (2018) ‘A Guide to Using the SADC Model Law on Eradicating Child Marriage and Protecting Children Already in Marriage’ <https://esaro.unfpa.org/sites/default/files/pub-pdf/J7288E%20-%20SADC%20Model%20Law%20Toolkit%20final.pdf> (accessed 5 October 2023).

<sup>4</sup> Kohno et al (note 2 above).

<sup>5</sup> Government of Malawi (Ministry of Gender, Children, Disability and Social Welfare) & UNICEF (2019) ‘Government Scoping on Programmes and Interventions to End Child Marriage’ <https://www.unicef.org/esa/media/7446/file/UNICEF-Malawi-End-Child-Marriage-Budget-Scoping-2020.pdf> (accessed 17 October 2023).

<sup>6</sup> UNICEF *The State of the World’s Children: A Fair Chance for Every Child* (2016) 12.

<sup>7</sup> ‘Government Scoping’ (note 6 above).

<sup>8</sup> Malawi: Demographic and Health Survey, 2015–16 (2017) Zomba, Malawi: National Statistics Office.

<sup>9</sup> In 2020, Malawi ranked 174 out of 181 on the human development index but in 2021 it was ranked 169 out of 191 countries. (See Government of Malawi & UNDP Malawi National Human Development Report the Experience of Decentralisation in Malawi (2021).)

cognitive development.<sup>10</sup> The mental health of teenage mothers is also affected due to heightened risk of isolation and depression.<sup>11</sup> It is axiomatic that educational attainment is also lowered by child marriage. In many cases the marriages are characterised by exploitation: teenage brides are often exposed to marital rape, domestic violence and exploitative labour. Child marriage therefore violates and threatens the fundamental rights of the child to health, dignity, life, freedom and the right to education.

In view of the seriousness of the impact of child marriage, elimination of child marriage (ECM) has a number of benefits for Malawi. First, recognition that child marriage denies girls their fundamental human rights. Secondly, at the country level, child marriage has a huge economic impact on the state due to the increased fertility and population growth that it causes.<sup>12</sup> Child marriage consequently undermines numerous development priorities,<sup>13</sup> and ECM would boost Malawi's chances of achieving the Sustainable Development Goals (SDGs) necessary to lift it out of poverty, for instance achievement of universal primary education, maternal and child health, and most specifically SDG 5, which aims at achieving gender equality and empowering women and girls.<sup>14</sup>

As a way to recognise the seriousness of the consequences of child marriage to the rights of the girl child and to development in general, the government of Malawi has responded by not only providing strategic direction, but by also amending the legal framework to ensure that it aligns not only with the Bill of Rights in the Constitution of Malawi, 1994 but also with international treaty obligations to which Malawi is a party. These include the development of the National Strategy on Ending Child Marriage (2018–2023) to provide a framework for interventions aimed at reducing the prevalence of child marriage in Malawi by 20 per cent by 2023 and the creation of an enabling legal and policy environment to end

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<sup>10</sup> Ministry of Gender, Children, Disability, and Social Welfare and African Institute for Development Policy (AFIDEP) (2017) 'Issue Brief: Ending Child Marriage in Malawi' *What the Evidence Tells Us* <https://www.afidep.org/publication/ending-child-marriage-in-malawi-what-the-evidence-tells-us/> (accessed 17 October 2023).

<sup>11</sup> 'Ending Child Marriage in Malawi' (note 10 above).

<sup>12</sup> Q Wodon, C Male, A Nayihouba et al *Economic Impacts of Child Marriage: Global Synthesis Report* (2017) 51.

<sup>13</sup> Wodon et al (note 12 above) 51.

<sup>14</sup> A Koski, S Clark & A Nandi 'Has Child Marriage Declined in sub-Saharan Africa? An Analysis of Trends in 31 Countries' (2017) 43(1) *Population and Development Review* 7–29 <https://doi.org/10.1111/padr.12035> (accessed 17 October 2023).

child marriage at all levels through the amendment and enactment of laws aimed at criminalising child marriage and conduct related to it.

Despite various government initiatives<sup>15</sup> aimed at ECM, progress remains slow, and this was exacerbated by the Covid-19 pandemic which increased the number of cases of child marriage (13 000 cases registered) and teen pregnancies (40 000 cases registered) since the onset of the pandemic.<sup>16</sup> The obstacles to progress are mostly caused by lack of enforcement of the existing laws to prevent or tackle the problem of child marriage, with the result that perpetrators are rarely charged or convicted,<sup>17</sup> if reported in the first place. The plural legal system in which customary law considerations often take priority in the communities enables child marriages to thrive. Lack of knowledge of rights amongst survivors and their families is also a problem.<sup>18</sup> This article explores the challenges of ECM through the legal framework amidst the difficulties that surround implementation of the law from a judicial perspective. Most interventions aimed at ECM are not pragmatically addressing the socio-economic and cultural root causes; they are not aimed at strengthening the legal enforcement framework from the moment the matter is reported to the police and taken to court by the prosecution; and there has been very little focus, if any, on the judicial role in ECM.

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<sup>15</sup> According to the National Strategy on Ending Child Marriage (note 2 above) other notable initiatives by government aimed at ECM include hosting the first symposium on ending child marriage in 2013 and launching a campaign on ending child marriage using mass media for maximum outreach in 2014. A national child help line was also established for those affected to report to relevant authorities on possible or existing child marriages, domestic and gender-based violence and other harmful practices. These initiatives were backed by strengthening the birth registration system and the national identity registration processes which make it easier to prove that a person is a child and therefore protected by law from early marriage as well as other forms of abuse. The government is also implementing a re-admission policy that allows girls who become pregnant while in school to return after giving birth as well as a National Girls Education Strategy that focuses on reducing child marriage and teenage pregnancies. Further, through collaboration with other stakeholders, the government has also implemented a number of noteworthy interventions including annulment of unions and withdrawal of children from existing marriages and supporting them to get re-admitted in school. Social support programmes have also been implemented to target girls and their parents so that the girls are able to get back into the education system.

<sup>16</sup> Office of the United Nations *Malawi Covid-19 Update Situation Update No 29* 9 October 2020 <https://reliefweb.int/report/malawi/un-malawi-covid-19-update-situation-update-no-29-9-october-2020> (accessed 17 October 2023).

<sup>17</sup> Government of Malawi, National Strategy (note 2 above) 18.

<sup>18</sup> Government of Malawi, National Strategy (note 2 above) 18.

## II THE LEGAL FRAMEWORK

Historically, the role of the judiciary in responding to early/child or forced marriages was traditionally perceived as being confined to applying the law to situations in which perpetrators are brought to book for marrying child brides or for having forced the victim into marriage. Thus, courts must be moved to adjudicate in matters where an identified child marriage has occurred. Whilst this is indeed a proper role for the judiciary, cases involving child marriage will rarely present themselves in the traditional manner, despite an enabling legal framework, for a number of reasons.

Between 2010 and 2015 Parliament enacted a number of laws that prohibit early/child and forced marriages. The Marriage, Divorce and Family Relations Act<sup>19</sup> enacted in 2015 prohibits child marriages by setting the minimum age for all marriages at 18 years. The provision was previously controversial as it was in direct contravention of subsections (6), (7) and (8) of section 22 of the Constitution which, until its amendment, defined a child as a person under the age of 16 years and permitted marriage from the age of 15 years.

The Gender Equality Act<sup>20</sup> enacted in 2011 prohibits harmful traditional practices and encompasses any practices that result in, encourage or conduce early/child and forced marriages.

The Penal Code<sup>21</sup> was amended in 2023 to define a child as a person under the age of 18 years and subsequently raising the age of consent to sexual intercourse to 18 years. Thus, any person who engages in sexual intercourse with a child commits the offence of rape of a minor which attracts a maximum penalty of life imprisonment. Sexual intercourse with a minor, even in the so-called marriage, is therefore a criminal offence.

Section 81 of the Child Care, Protection and Justice Act<sup>22</sup> makes it a criminal offence to force a child into marriage and to force a child to be betrothed. The penalty for committing any of these offences is imprisonment for ten years.

The enactment of the Deceased Estates (Wills, Inheritance, and Protection) Act<sup>23</sup> in 2011 also contributes to eliminating child marriages by preventing the dispossession of deceased estates by unscrupulous relatives to the detriment of surviving spouses and children. The economic hardships faced by such surviving spouses and children often leave them

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<sup>19</sup> Chapter 25:01 of the Laws of Malawi.

<sup>20</sup> Chapter 25:06 of the Laws of Malawi.

<sup>21</sup> Chapter 7:01 of the Laws of Malawi.

<sup>22</sup> Chapter 26:03 of the Laws of Malawi.

<sup>23</sup> Chapter 10:02 of the Laws of Malawi.

with no choice but to resort to early marriage as a way out of the ensuing hardships caused by losing a breadwinner and the inheritance they are entitled to.

Proscription of child marriage and strict penalties, albeit necessary for ECM, paradoxically also inadvertently push the practice underground by creating unintended consequences. Where such legal proscription is accompanied by public awareness, this often discourages individuals from reporting or seeking help regarding child marriage due to fear of legal consequences or stigma associated with their involvement.<sup>24</sup> The secrecy that ensues makes it harder for authorities, organisations, and communities to identify and intervene in such cases. The element of secrecy shields the practice from scrutiny and prevents support systems from reaching those in need. Socio-economic complexities also contribute to under-reporting, despite the existence of the law. Most victims are economically dependent on the perpetrators, who sometimes happen to be prominent figures in society and as a result the likelihood of the child marriage being reported is very low. Further, the Marriage, Divorce and Family Relations Act makes it a criminal offence for officials to perform marriage ceremonies knowing that the matters required by law for the validity of the marriage have not been fulfilled.<sup>25</sup> Such functionaries are therefore obliged to ensure that the persons whose marriages they officiate are amongst other things, of full age, lest they commit an offence which is punishable by a term of imprisonment of up to five years. Such strict regulations may lead to an increase in informal or unregistered marriages, where child marriages occur without official documentation or oversight. This makes it difficult to track and address child marriage effectively. Nonetheless, the existence of an enabling legal framework means that some cases do end up in the criminal justice system, and in many instances, a conviction is secured. Strengthening the judicial function to ensure that survivors receive justice and appropriate services from the criminal justice system is an important step to ECM and should be prioritised along with other criminal justice strengthening initiatives which are currently lacking.

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<sup>24</sup> See A Melnikas, N Mulauzi & J Mkandawire et al 'Perceptions of Minimum Age at Marriage Laws and Their Enforcement: Qualitative Evidence from Malawi' (2021) 21 *BMC Public Health* 1350 <https://doi.org/10.1186/s12889-021-11434-z> (accessed 17 October 2023).

<sup>25</sup> Section 54 of the Marriage, Divorce and Family Relations Act (Chapter 25:01 of the Laws of Malawi).



(a) *The role of the judiciary – A theoretical framework*

The role of the judiciary in the elimination of child marriages can be understood within the framework of human rights and child protection. This framework emphasises the rights and well-being of children, as enshrined in the Constitution and international human rights instruments to which Malawi is a party, such as the United Nations Convention on the Rights of the Child (CRC). The CRC recognises the right of every child to be protected from all forms of exploitation, including child marriages. It establishes the principles of non-discrimination, best interests of the child, and the child's right to participate in decisions affecting them. The judiciary, in their role as guardians of the law, are tasked with upholding and promoting these rights.

Additionally, the framework of gender equality and women's rights is relevant to the issue of child marriages. As evidenced by the statistics, child marriages disproportionately affect girls and perpetuate gender inequalities. The judiciary can address this issue by considering gender-based discrimination and ensuring that girls have equal access to justice and protection from child marriages.

Overall, the theoretical framework for the role of judges in ending child marriages encompasses human rights, child protection, and gender equality, with a focus on safeguarding the rights and well-being of children, particularly girls, and promoting a society free from child marriages.

This role of the judiciary is not restricted to the courtroom or to court proceedings. By placing the role of the judiciary in this confined box, it is usually impossible to conceive of its broader capabilities in responding to the phenomenon.

The traditional perceptions of the role of the judiciary as being at the receiving end of a criminal justice conveyor belt at which suspects are tried, overlooks two important factors. The influence of a judicial officer, especially a senior one, goes beyond the courtroom and exceeds international boundaries. Judicial officers, in addition to their judicial functions, have the unique advantage of having a ready-made platform to raise awareness and contribute to civic education so that more cases are brought to court. Furthermore, within their adjudicatory role, whether they resort to judicial activism or not, they can recognise and act, based on the fact that the incidence of early/child or forced marriages does not always manifest itself expressly but can be disguised in a number of matters that fall before them. This is critical to enhancing the legal and policy framework. In both these premises, judicial officers are uniquely positioned to shape, advance and implement such a framework, within their countries and beyond. Judicial officers can lead in the development of robust jurisprudence, fostering a culture of zero tolerance. Judicial officers can also guarantee that the voices of citizens are heard (in the courtroom and outside), including those of the

girl child, in ensuring access to justice especially by the girl child, creating a conducive courtroom environment for the voice of the girl child and consistently enforcing the law to end child marriage. Lastly, judicial officers can also highlight the range of services or social protection measures available to survivors. Yet, judicial officers are often overlooked as essential stakeholders and drivers of change from this perspective.<sup>26</sup>

(b) *Role of judiciary in criminal matters*

Child marriage is a form of violence; it results in sexual violence against children when the marriage is consummated. Implicit in the conduct are various criminal offences under law such as child trafficking,<sup>27</sup> rape of a child,<sup>28</sup> engaging in harmful practices,<sup>29</sup> forcing a child into marriage or betrothal,<sup>30</sup> amongst others. Like other offences involving violence against women and girls, child marriage is under-reported and even when reported to the police or other authorities, the attrition rates are so high<sup>31</sup> that very few cases ever make it to trial.<sup>32</sup> Criminology literature recognises that there are ‘many points of attrition in the life cycle of the case before, during or after the trial.’<sup>33</sup> Four major points of attrition are recognised.<sup>34</sup>

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<sup>26</sup> The National Strategy on Ending Child Marriage (note 2 above) makes no mention of the strategic role of the judiciary in this context.

<sup>27</sup> Contrary to section 79 of the Child Care, Protection and Justice Act (Chapter 26:03 of the Laws of Malawi) and section 15 of the Trafficking in Persons Act (Chapter 7:06 of the Laws of Malawi).

<sup>28</sup> Contrary to section 137 of the Penal Code (Chapter 7:01 of the Laws of Malawi).

<sup>29</sup> Contrary to section 5 of the Gender Equality Act (Chapter 25:06 of the Laws of Malawi).

<sup>30</sup> Contrary to section 81 of the Child Care, Protection and Justice Act (Chapter 26:03 of the Laws of Malawi).

<sup>31</sup> For a general discussion on attrition in sexual violence see J Murphy-Oikonen, L Chambers & K McQueen ‘Sexual Assault Case Attrition: The Voices of Survivors’ (2022) 12 *SAGE Open* <https://doi.org/10.1177/21582440221144612> (accessed 17 October 2023).

<sup>32</sup> In the case of *Republic v Yusuf Willy*, Criminal Review No 06 of 2021, High Court, Zomba District Registry (Unreported) Ntaba J notes in paragraph 2.35 that high levels of attrition in sexual violence cases result in impunity.

<sup>33</sup> A Garg ‘Attrition in Indian Rape Cases that Fail to Reach a Verdict: Going Beyond Conviction’ and ‘Acquittal’ [https://www.law.ox.ac.uk/sites/default/files/migrated/criminal\\_justice\\_hub\\_proposals\\_-\\_garg.pdf](https://www.law.ox.ac.uk/sites/default/files/migrated/criminal_justice_hub_proposals_-_garg.pdf) (accessed 17 October 2023).

<sup>34</sup> See J Gregory & S Lees ‘Attrition of Rape and Sexual Assault Cases’ (1996) 36 *British Journal of Criminology* 1–17. Although these attrition points are identified in rape cases, they apply equally to cases of child marriage.

The first is police discretion: the police must decide, upon receiving a report, whether to record the case as an offence. Second, police investigators must decide whether or not to refer the matter for prosecution. It is also at the discretion of the police investigators to decide whether there is sufficient evidence to refer the matter forward. Third, the prosecution must decide whether to prosecute the defendant or to take no further action. Fourth, the judiciary must decide whether to convict the defendant or not. Whilst it is this fourth point of attrition that is entirely in the realm of the judiciary, the other three also provide an opportunity for the judiciary to exercise an oversight function in the exercise of police discretion which is a crucial function in ECM.

(c) *Resolving challenges resulting from prosecutorial discretion*

Prosecutorial discretion is governed by statute. Section 81 of the Criminal Procedure and Evidence Code<sup>35</sup> vests in any public prosecutor the power to withdraw any criminal proceedings with the consent of the Director of Public Prosecutions in subordinate courts. The power to withdraw a matter in the subordinate courts under this provision, must be made with ‘the consent of the court’. Whilst no guidance is provided in the provision as to what considerations the court might consider in deciding whether or not to consent to the prosecution’s decision to withdraw, enough space is created within this provision for the judiciary to exercise oversight over such decisions. Since the subordinate courts are not courts of record, there is no recorded case law in which such courts have taken the prosecution to task in their decision to withdraw a case, and anecdotal accounts suggest that the subordinate courts merely rubber stamp the decision of the prosecution to withdraw. Research is required on the effects of this provision as it holds an important key in ensuring that the prosecution is held accountable in its decision to withdraw sexual violence cases, and

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<sup>35</sup> Chapter 8:01 of the Laws of Malawi provides that:

‘In any trial before a subordinate court any public prosecutor may, with the consent of the court or on the instruction of the Director of Public Prosecutions, at any time before judgment is pronounced, withdraw from the prosecution of any person; and upon such withdrawal—

- (a) if it is made before the accused is called upon to make his defence, he shall be discharged, but such discharge of an accused shall not operate as a bar to subsequent proceedings against him on account of the same facts;
- (b) if it is made after the accused is called upon to make his defence, he shall be acquitted.’

more specifically child marriages cases if attrition rates are to be reduced. It would also be very important to enhance the capacity of the subordinate courts with specific contextual training on child marriages so that they are able to examine the prosecution on the reasons for withdrawal with a better understanding of how this would affect further prosecution of the case. Training on evidential analysis in complex cases would also assist in capacitating the subordinate courts to reflect critically on whether the prosecution has considered the totality of the evidence in making its decision to withdraw.

Section 77 of the Criminal Procedure and Evidence Code also empowers the Director of Public Prosecutions to enter a discontinuance at any stage in the proceedings. Under this provision, however, the court does not have any power to question the entry of a discontinuance by the Director of Public Prosecutions during the proceedings and therefore any challenge to such a decision can lie only in judicial review. Unlike with section 81 of the Criminal Procedure and Evidence Code, the court would have to be moved in separate proceedings to challenge the discretion. Despite numerous anecdotal accounts that many cases of sexual violence are withdrawn by the prosecution, the discretion of the Director of Public Prosecutions does not seem to have been challenged in judicial review proceedings. Since cases have to be brought before the courts, more civic education and rights education is needed in order for an informed populace to make the prosecution more accountable. Strategic interest litigation for this purpose would also ensure that such cases are brought before the courts.

The judiciary of Malawi has recently initiated open days where it showcases its functions to the general public. The Women Judges Association of Malawi also conducts awareness campaigns aimed at making justice more accessible to the people. The work of the Women Judges Association in Malawi (WOJAM) is an example of judicial officers coming together to complement their adjudicatory role with wider advocacy activities. WOJAM, the Malawi Chapter of the International Association of Women Judges, is a corporate body membership which includes all female judicial officers and has an open-door policy for male judicial officers. The main objective of this Association is to bring the courts to the people and the people to the courts while upholding the rule of law. Its vision is to provide effective and efficient legal and judicial service. Amongst its objectives, WOJAM aims to promote public awareness of all issues relating to fair administration of justice. By virtue of being made up of judicial officers, WOJAM has members in every district in Malawi and uses court centres to conduct sensitisation and public awareness campaigns.

To the extent that WOJAM has attempted to incorporate issues of child marriage in its diverse awareness raising programmes showcasing the various roles of the judiciary and encouraging the public to access justice through the courts, it has been very effective. The levels of effectiveness are yet to be measured; however, bearing in mind that the baseline of access to justice for such matters has previously been very low, the fact that some cases in which pertinent issues have emerged have seen their way up to the High Court is evidence of WOJAM's effectiveness. There is however still room for improvement. No specific awareness programmes on the oversight role of the judiciary with regard to police investigatory and prosecutorial discretion have been held. WOJAM has worked with other justice providers such as the Women Lawyers Association, who have set up legal advice clinics at joint awareness raising functions. Such partnerships ensure that the general public is assured of the functions of the court and receives legal advice and assistance on how to access them and challenge any actions that prevent survivors or complainants in child marriage cases from seeking justice. It is therefore critical in anti-child-marriage strategies that the agency of the judiciary, particularly its constituent bodies, is recognised and supported to the fullest by all duty bearers and stakeholders.

Awareness raising activities by the judiciary must however be carried out with ethical constraints. As judicial officers, any extrajudicial role in access to justice could be construed as eroding the impartiality of the judiciary. WOJAM therefore restricts its activities to simply raising awareness about the laws that are available to respond to any issue, including ECM, and any legal advice on the application or interpretation of the laws is left to partners that provide legal aid and assistance. Enhancing the awareness raising role of the judiciary, either as an institution or through its constituent bodies like WOJAM, makes sense and should be a critical component in ECM.

(d) *Resolving challenges resulting from investigatory discretion*

Ordinarily, very little is known about the standards by which the police exercise their discretion in deciding whether or not to prosecute sexual violence cases, amongst others, and this contributes to reporting attrition rates, as most members of the public are not sure if their complaints will be processed. The power vested in the police to decide whether to investigate or not is also a judicially reviewable power, yet few legal actions have been commenced to challenge it. One notable case does exist, namely the case of *The State v The Inspector General of Police Ex Parte MM*<sup>36</sup> (hereafter

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<sup>36</sup> *The State v The Inspector General of Police Ex Parte MM* Judicial Review Cause No 7 of 2020, High Court, Lilongwe District Registry.

the ‘Nsundwe case’). This case is notable not only because it sought the review of the actions of the Malawi Police Service for its ‘failure to conduct prompt, proper, effective and professional investigations into complaints of sexual assault and rape made by the complainants’,<sup>37</sup> but also because the case was brought to court by the Women Lawyers Association who acted on behalf of the victims. One of the grounds on which judicial review was sought in the Nsundwe case was that the applicants had no alternative remedy, as the Malawi Police Service has the sole authority to investigate and arrest the perpetrators of sexual violence against women and girls, and once the police decided not to investigate and prosecute, the survivors were left with no remedy but recourse to the court.

The High Court ordered the Malawi Police Service to compensate the 18 women allegedly sexually assaulted, to arrest the 17 police officers and to set up an Independent Police Complaints Commission, which was hailed by the United Nations Resident Representative in Malawi as an important milestone towards the protection of survivors of violence in Malawi.<sup>38</sup> The United Nations representative also hailed the Women Lawyers Association for the pivotal role they played in bringing the case to the attention of the courts and thereby reinforcing the constitutional right of survivors of sexual violence to access justice and effective remedies for the harm they have suffered. The jurisprudential value of the Nsundwe case in highlighting the crucial role of the judiciary in police oversight over all investigation of sexual violence offences cannot be overstated. Strengthening this role will therefore also play a significant role in ECM. In view of the low legal literacy in Malawi and the lack of awareness about human rights remedies and procedures for redress, it is important that in strengthening the capacity of the judiciary to perform its oversight functions, human rights defenders such as the Women Lawyers Association should also be capacitated and supported to bring such matters before the courts.

(e) *The court’s duty to adjudicate*

With regard to the final point of attrition, the ability of the judiciary to effectively adjudicate over a child marriage prosecution cannot be overemphasised in order to avoid attrition at this stage. As courts can

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<sup>37</sup> *The State v The Inspector General of Police* (note 36 above).

<sup>38</sup> ‘UN Hails Malawi Justice on Nsundwe Rape Galore: “Important Milestone”’ *Nyasa Times Online News* 17 August 2020 <https://www.nyasatimes.com/un-hails-malawi-justice-on-nsundwe-rape-galore-important-milestone/> (accessed 17 October 2023).

only convict on the availability of evidence that satisfies the beyond reasonable doubt standard, effective adjudication is adjudication that properly conducts and manages the cases in accordance with the law that places primacy on the role of the judge in protecting the survivor during the criminal process (which includes providing oversight for the role of other actors in the criminal justice system), as well as managing the court room during the trial in a manner that ensures that all who interact with the survivor protect and fulfil her rights. The Criminal Procedure Evidence Code<sup>39</sup> provides for various measures for survivor protection in section 71G which can be used for this purpose.

Effective adjudication also requires proper analysis of the evidence before court. An acquittal or conviction must be justified by sound reasoning in accordance with the law of procedure. Increasing the capacity of the judicial officers through knowledge and skills training as well as attitude or mind-set change in child marriage cases is crucial for this role. The analysis of evidence in such cases should also be consistent with human rights principles, with judicial officers not only incorporating a gender perspective into the decision-making process, but also avoiding any gender or sex stereotypes or bias that will prevent justice being done.

Once the judicial officer is satisfied upon the evidence to convict the perpetrator, sentencing should reflect the seriousness of the offence and ancillary orders should also be made aimed at compensating the survivor and linking her to service providers that will rehabilitate her and help her to deal with the trauma caused by the process.<sup>40</sup> The Penal Code<sup>41</sup> gives judicial officers powers of compensation in criminal matters.

Without adequate psychosocial support and other measures, the term of imprisonment alone does nothing to change the victim's mindset towards entering an early union. If she is pregnant, she may even find another man to marry or be forced into marriage or even chased out of her home. Such girls need support and well-informed judicial officers could address these issues at the time of sentencing.

In order to send a strong message that child marriage will not be tolerated, there is a need for the courts to carry out appropriate and consistent sentences. The judiciary has developed sentencing guidelines for a number

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<sup>39</sup> Chapter 8:01 of the Laws of Malawi (note 35 above).

<sup>40</sup> UNODC *Handbook for the Judiciary on Effective Criminal Justice Responses to Gender-based Violence against Women and Girls* (2019) 58 [https://www.unodc.org/pdf/criminal\\_justice/HB\\_for\\_the\\_Judiciary\\_on\\_Effective\\_Criminal\\_Justice\\_Women\\_and\\_Girls\\_E\\_ebook.pdf](https://www.unodc.org/pdf/criminal_justice/HB_for_the_Judiciary_on_Effective_Criminal_Justice_Women_and_Girls_E_ebook.pdf) (accessed 18 October 2023).

<sup>41</sup> See section 32 of the Penal Code (Chapter 7:01 of the Laws of Malawi).

of offences to ensure consistency in the manner in which some offences are handled nation-wide. Child marriage offences could also benefit from sentencing guidelines, either in the form of jurisprudence or a practice direction from the office of the Chief Justice. Sentencing guidelines are enhanced through training which enables the judicial officers to appreciate the facts, the context and the seriousness of the offence.

Training or capacity building is therefore key in ensuring effective adjudication of child marriage cases. In this regard, social context training would be more desirable. Social context judicial training in particular can play a crucial role in assisting judges to effectively address and eliminate child marriage. There are various ways in which such training can be beneficial:

1. Understanding cultural norms and practices: Social context judicial training helps judges understand the cultural norms and practices that contribute to child marriages. This understanding allows judges to approach cases with cultural sensitivity, ensuring that legal decisions are appropriate and respectful of the communities involved.<sup>42</sup>
2. Recognising root causes: Social context training helps judges identify the underlying factors that contribute to child marriages, such as poverty, gender inequality, and lack of access to education. By understanding these root causes, judicial officers can address them more effectively in their decisions and recommendations.<sup>43</sup>
3. Enhancing awareness of child rights: Social context training educates judges about the rights of the child, as enshrined in international human rights instruments. This knowledge enables judges to make informed decisions that prioritise the best interests of the child, ensuring their protection from child marriages.<sup>44</sup>
4. Promoting collaboration: Social context training encourages judges to collaborate with other stakeholders, such as child protection agencies, NGOs, and community leaders. By fostering partnerships, judicial officers can work together with these actors

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<sup>42</sup> See New South Wales Handbook for Judicial Officers [https://www.judcom.nsw.gov.au/publications/benchbks/judicial\\_officers/currency.html](https://www.judcom.nsw.gov.au/publications/benchbks/judicial_officers/currency.html) (accessed 18 October 2023).

<sup>43</sup> See S Goodman & J Louw-Potgieter 'A Best Practice Model for the Design, Implementation and Evaluation of Social Context Training for Judicial Officers' (2012) 5(2) *African Journal of Legal Studies* 181–197 <https://doi.org/10.1163/17087384-12342004> (accessed 18 October 2023).

<sup>44</sup> Goodman & Louw-Potgieter (note 43 above).



to develop comprehensive strategies for preventing and addressing child marriages.<sup>45</sup>

5. Building community trust and engagement: Social context training equips judges with the skills to engage with communities affected by child marriages. By actively involving community members in the judicial process, judges can build trust, gain valuable insights, and promote community ownership of efforts to end child marriages.<sup>46</sup>
6. Creating awareness and advocacy: Social context training empowers judges to raise awareness about child marriages and advocate for legal and social reforms. Judicial officers can use this platform to educate the public, policymakers, and other judicial colleagues about the harmful effects of child marriages and the importance of ending this practice.

In summary, social context judicial training enhances judges' understanding of the cultural, social, and economic factors that contribute to child marriages. By incorporating this knowledge into their decision-making processes, judicial officers can effectively address child marriages and contribute to ending this harmful practice.

*(f) Role of the judiciary in civil cases*

The judicial officer must however be aware that child marriage may not always manifest in criminal actions in which the victim and perpetrator are identified since this phenomenon is practised underground. The judicial officer must therefore be capable of identifying an incidence of child marriage which may be an underlying issue in a matter that comes before him or her.

Victim identification is one of the most critical roles a judicial officer can play in any case involving violence against women or girls.<sup>47</sup> Because victims of child marriage will not be readily self-identifiable and may not even testify, the judicial officer must be able to elucidate the context from the facts so as to identify any potential victim and take appropriate action. Having noted for example that most child marriages will not be formally officiated, such unions will continue in existence as *de facto* unions. Such unions may persist for a number of years and upon dissolution the parties may seek the court's intervention for distribution of property which was

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<sup>45</sup> Goodman & Louw-Potgieter (note 43 above).

<sup>46</sup> Goodman & Louw-Potgieter (note 43 above).

<sup>47</sup> *UNODC Handbook* (note 39 above) 58.

acquired during the subsistence of the union. By the time such parties come to court, the wife may no longer be a child and therefore the issue of child marriage would not naturally arise. By simply calculating the length of time the parties have cohabited, it will be possible to determine whether the de facto union was a child marriage at the time it was entered into. While the perpetrator may not be tried for child marriage in the case for distribution, the judicial officer may, as a consequential order, recommend that the police investigate the husband and prosecute if any offences relating to child marriage are uncovered. This course of action may not protect the child bride who would be an adult at that point but contributes to the legal protection framework if perpetrators are aware that they can still be prosecuted even after the child attains majority as long as the marriage was entered into when she was a child.

Maintenance proceedings are an appropriate platform for the identification or detection of child marriages. The statistics discussed earlier point to the magnitude of the problem of teenage pregnancies in Malawi which is a country equally plagued with high numbers of child marriages. Although no research has been carried out on the subject, anecdotal evidence shows that these marriages do not last very long, and with the initiatives being undertaken with progressive chiefs, such as Chief Kachindamoto,<sup>48</sup> a large number of children are withdrawn from such marriages. For children born in such circumstances, the fathers routinely fail to provide maintenance. A recent report of research findings commissioned by the Child Justice Directorate in the Malawi Judiciary shows that the majority of court users in maintenance proceedings are women and adolescent girls, recognising that the complainant in an action for maintenance is the foundation for providing such complainant with protection and social protection as a survivor of sexual violence. This requires the judicial officer to consider the maintenance application as an opportunity to ensure that the child or children born to child marriages are accorded their right to maintenance in accordance with the law.<sup>49</sup>

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<sup>48</sup> Chief Kachindamoto has annulled 2 049 child marriages. She's developed a network of 'secret mothers and secret fathers' who keep an eye on other parents, making sure no one pulls their girls out of school. See VitalVoices Global Partnership Website, Senior Chief Teresa Kachindamoto Leadership in Public Life 2017 <https://www.vitalvoices.org/honoree/chief-theresa-kachindamoto/> (accessed 18 October 2023).

<sup>49</sup> Particularly the Constitution of Malawi, 1994; the Child Care Protection and Justice Act (Chapter 26:03 of the Laws of Malawi); the Marriage, Divorce and Family Relations Act (Chapter 25:01 of the Laws of Malawi) as well as the Prevention of Domestic Violence Act (Chapter 7:05 of the Laws of Malawi).

Generally, the judiciary has experienced problems with the enforcement of maintenance orders which has reached crisis proportions with high levels of non-compliance by defaulters. Enforcement remains a problem despite the law recognising non-compliance with maintenance orders as an offence.<sup>50</sup>

Responding to maintenance orders in a manner that recognises their status as survivors of child marriage is thus an important role for the court in ECM. It is through recognition that child marriage survivors need measures such as child maintenance for their own survival and that of their children, that judicial officers can begin to engage with the law and the system to find effective means of ensuring that orders they make on maintenance are appropriate and sufficient to prevent pushing the child back into a situation of destitution where child marriage seems to be the only way out. Maintenance applications also present evidential complexities that require the judicial officer to possess sufficient knowledge and skills to properly analyse the evidence and to request further particulars where the evidence is lacking. Since the judgments of the courts provide them with a forum to raise awareness, elucidating the issues in properly reasoned judgments contributes to ECM by sending out the message that survivors of child marriage must not only be assisted with social protection measures, the proceedings in which such measures are sought must be consistent with human rights principles and the best interests of the child. Further, maintenance actions in the lower courts must be procedurally straightforward with relaxed rules of procedure which enable the judicial officer to interact with the litigant in a manner that ensures the best interests of the child. These issues are routinely overlooked and should be prioritised for training.

The role of the judicial officer in maintenance also goes beyond the making of an order and extends to contributing to awareness raising campaigns, over and above clearly elucidating the issues in their judgments by participating in other activities aimed at raising awareness of the law which shall be discussed below.

Applications for the grant of letters of administration and probate under the Deceased Estates (Wills, Inheritance and Protection) Act<sup>51</sup> also provide the courts with a platform to identify child and early marriages by again calculating the age at which the surviving spouse (who statistically will more often be a woman) entered into the marriage. Whilst it is too late to

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<sup>50</sup> Section 22(1) of the Child Care Protection and Justice Act (Chapter 26:03 of the Laws of Malawi).

<sup>51</sup> See Chapter 10:02 of the Laws of Malawi (note 23 above).

offer any social protection measures for such spouses, the scenario presents an opportunity for data collection on the extent of the phenomenon with a view to assessing its prevalence and whether there is a decline, and also which years indicate an increase in such marriages. There are many opportunities for the development of national action plans with social protection measures based on actual data to respond to the specific manifestations of the problem.

Working in the context of a country with a poor record for data collection, the judiciary as the record keeping institution has the capacity to generate data with regard to the numbers of cases that touch on early/child or forced marriages, in whatever form they present themselves, the context within which they occur, and the measures taken. In most cases, judicial measures overlook the needs of the victims and do little to enhance victim protection and convenience. The judiciary is better at imposing sanctions on perpetrators than it is at interrogating social contexts. The number of victims who pass through the system without having their needs addressed is also recordable data which should assist governance structures in developing plans and strategies and in allocating funds to ending early/child and forced marriage. Lastly, conducting research on the incidence of early/child and forced marriage in whatever manifestation and the social factors surrounding it that are recorded as the facts of the case, provides a more complete picture on the social phenomenon which can be used by the governance structures in addressing the issues.

(g) *Role of the judiciary in ensuring that survivors get protection measures and services*

In order to avoid relegating the recent constitutional and legislative interventions prohibiting child marriage to the status of ineffective ‘paper laws’ devoid of correlative practical effect, they must be matched with protection services to women and girls running away or rescued from early/child and forced marriages. What is required, has been described by ‘Background Paper for the Expert Meeting on the Impact of Existing Strategies and Initiatives to address Child, Early and Forced Marriage’ as follows:

*Joint general recommendations No.31 of the Committee on the Elimination of Discrimination against Women/General Comment No.18 of the Committee on the Rights of the Child on Harmful Practices stresses that women who are victims of harmful practices need immediate support services. . . . Given that perpetrators of harmful practices are often the spouse of the victim, a family member or a member of the victim’s community, protective services should seek to relocate victims outside their immediate community if there is reason to believe*

*that they may be unsafe. Psychosocial support must also be available to treat the immediate and long-term psychological trauma of victims, which may include post-traumatic stress disorder, anxiety and depression.*<sup>52</sup>

Without victim protection measures, compensation schemes as well as support in terms of safe accommodation, psychosocial counselling and even economic empowerment and life-skills orientation, the legal framework will have limited impact. The significance of the measures must be understood in the sense that social security is not provided to all needy persons in Malawi.<sup>53</sup> The court's role in providing such protection measures and services goes beyond the duty of the court to make ancillary orders after sentencing the perpetrator. The judiciary should understand the social context within which child marriage is practised.

The ideal situation for survivor protection measures arises where the law actually provides for them. Some countries, like Kenya, have general legislation providing for victim protection<sup>54</sup> for survivors of violence. Malawi does not have a specific law, and survivor protection provisions are spread across various statutes providing protection measures connected with the subject of the legislation. There are therefore no specific protection measures for protecting survivors of child marriage; however, such protection can be provided under the other laws where applicable.

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<sup>52</sup> UN OHCHR *Background Paper for the Expert Meeting on the Impact of Existing Strategies and Initiatives to address Child, Early and Forced Marriage* (2016).

<sup>53</sup> 'The Government of Malawi's Social Cash Transfer Programme (SCTP) scheme is an unconditional transfer targeted to rural ultra-poor and labor-constrained households operated by the Ministry of Gender, Community Development and Social Welfare (MoGCDSW) with policy oversight and guidance provided by the Ministry of Economic Planning and Development (MoEPD) and UNICEF Malawi. The programme began as a pilot in 2006 in Mchinji District and was subsequently expanded to an additional eight districts in 2009 (Balaka, Likoma, Chitipa, Salima, Machinga, Phalombe and Mangochi). As of August 2020, the program reached approximately 283,000 households and 1,195,000 individuals, or 7 percent of the total population. The main objectives of the SCTP are to reduce poverty and hunger, and to improve children's human development. Transfer amounts vary by household size and number of school-aged children, and averaged MK 6400 per household per month (approximately US\$8). The specific benefit structure as of August 2020 was: MK2600, MK 3300, MK 4400 and MK5600 for households of size one, two three and four or more respectively. An additional bonus of MK 800 and MK 1500 was provided to household members of school going age.' See The Transfer Project website Malawi 'Malawi's Social Cash Transfer Programme (SCTP) 2013–2015'.

<sup>54</sup> Victim Protection Act, Act No 17 of 2014.

For example, in the long title to the Prevention of Domestic Violence Act,<sup>55</sup> the protection of persons affected by domestic violence is amongst the objects of the Act. Another purpose of the Act is to provide ‘legal services and other social services to persons affected by domestic violence’.<sup>56</sup> These services are primarily provided through an ‘enforcement officer’<sup>57</sup> who may, where necessary, arrange medical care or alternative residence or a temporary place of shelter for the victim. The enforcement officer may enlist the assistance of any service provider to provide these services. In the absence of express statutory provisions, strategic interest litigation could be the answer. There is a need to test whether child marriage can be considered domestic violence by virtue of the relationship involving a minor so that any such scenario should automatically lead to enforcement officers providing protection measures and social services for survivors.

The Trafficking in Persons Act<sup>58</sup> also creates a protection officer in section 43 with similar duties towards trafficked persons. The Trafficking in Persons Act goes a step further to empower the Minister to designate premises for the care and protection of trafficked persons.<sup>59</sup> The Trafficking in Persons Act also provides measures for witness protection in trafficking cases, leaving it up to the discretion of the court to decide on appropriate measures for trafficking victims on a case by case basis, upon application.<sup>60</sup> The Trafficking in Persons Act also creates a fund<sup>61</sup> which may be used, inter alia, to provide for the protection and compensation of victims of trafficking. Where the child marriage is the exploitation phase of the act of child trafficking, the judiciary should ensure that survivors that require the services under this law are able to access them.

One of the greatest challenges to providing survivors with protection measures and social services is the physical availability of such measures. Once girls are rescued from child marriages, very few are provided with the means to survive such as alternative accommodation, education, vocational

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<sup>55</sup> Chapter 7:05 of the Laws of Malawi.

<sup>56</sup> Section 3 of the Prevention of Domestic Violence Act (Chapter 7:05 of the Laws of Malawi).

<sup>57</sup> Created under section 32 of the Prevention of Domestic Violence Act (Chapter 7:05 of the Laws of Malawi).

<sup>58</sup> Chapter 7:06 of the Laws of Malawi.

<sup>59</sup> Section 45 of the Trafficking in Persons Act (Chapter 7:06 of the Laws of Malawi).

<sup>60</sup> Section 47 of the Trafficking in Persons Act (Chapter 7:06 of the Laws of Malawi).

<sup>61</sup> Section 51 of the Trafficking in Persons Act (Chapter 7:06 of the Laws of Malawi).

skills or social security funds. There are some state programmes underway which involve social cash transfers to such survivors.<sup>62</sup> Whilst there are state and NGO shelters in some localities, the state of repair of some shelters has been bemoaned by some victims who would rather stay with the perpetrators of violence against them than stay in the existing shelters. Decrepit shelters lead to double victimisation which is institutionalised if the courts unknowingly refer victims to such measures. The judiciary also has a role in directing the state to live up to its obligations to provide for such survivors by providing these types of protective measures and facilities. Law reform providing statutory obligation for such structures would be an optimal solution, but progressive jurisprudence along the lines of *Francis Kapu and 7 Others v The State*<sup>63</sup> could produce the same results in the interim. In this case, Chirwa J ordered that detaining a child in a police station was contrary to section 96(1) of the Child Care, Protection and Justice Act as well as contrary to section 23(1) of the Constitution. Chirwa J proceeded to order the release of the children and since there appeared to be no safety homes designated by the Minister under section 157 of the Child Care, Protection and Justice Act, the judge ordered that such homes should be immediately designated and established under that Act as these are the only institutions where children in conflict with the law may be lawfully detained. The learned judge went on to remind the Minister that as a duty bearer, he ought to have designated such safety homes immediately after the Act was passed. The principles elaborated in this judgment could equally be used to order the Minister responsible for shelters for survivors of child marriage to construct shelters and ensure that they are well maintained for the purpose of rehabilitating and providing security for survivors of sexual or other types of violence. Orders by the courts that such shelters be constructed or renovated and made available as is required under the Trafficking in Persons Act will ensure that there is a ready supply of shelters that can be used for child marriage survivors.

### III CONCLUSION

The efforts made by the Government of Malawi in ECM in the areas of law reform, policies and strategies in place are laudable. The levels of attrition of cases of child marriage in the criminal justice system is, however, cause for concern. There are a number of intervention areas that

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<sup>62</sup> See The Transfer Project (note 53 above).

<sup>63</sup> Miscellaneous Criminal Review Case No 5 of 2021 High Court, Principal Registry (unreported).

would assist, but in relation to the judiciary, targeted interventions with the specific role of the judiciary in mind would result in considerable gains in inspiring confidence in the system so that complainants would not readily withdraw cases and would be empowered to challenge the decision of the police to fail to act. Whilst it has been argued that law reform is needed to improve the laws, this has not been the focus of this paper. While there may be room for law reform, there is a lot that can be achieved using the existing legal framework if the roles of all duty bearers are recognised and each duty bearer strengthened to better perform their functions.

Current emphasis on the functions of duty bearers in the Strategy to Eliminate Child Marriage focuses on legal interventions, does not recognise the important role the judiciary can play in ECM and does not focus on strengthening its capacity for this purpose. Child marriage introduces various contextual and human rights considerations that require sufficient knowledge and skills for effective adjudication. The judiciary also has the unique position of ensuring that victims are accorded proper protection and social welfare measures such as counselling, provision of accommodation, survival funds or means to earn a livelihood, maintenance and restitution amongst others. These issues require sufficient knowledge and skill for effective adjudication. A strategy aimed at ECM should prioritise such capacity building.

The judiciary is also underutilised because it provides an oversight function over the discretion of the police to investigate or prosecute child marriage offences which is rarely invoked. Lack of legal literacy and awareness of the laws is a major contributor for the inability of most complainants to challenge decisions of law enforcement officials that negatively affect them. Beyond adjudication, judicial officers can also play roles to end child marriage by raising awareness on the avenues of redress. Collaborating with human rights defenders strengthens this role as the complainants usually lack the legal assistance to enforce their rights through litigation. The importance of strategic interest litigation by human rights defenders in such circumstances cannot be overstated. The survivor friendly jurisprudence that has emerged from the courts as a result of strategic interest litigation, has clarified various issues and these judgments now need to be widely publicised so that they achieve maximum impact. In these progressive judgments as well in collaborative awareness raising activities, judicial officers have a ready-made platform to advocate for change and condemn the practice of child marriage.

If the awareness raising function of the judiciary was strengthened, then programmes that include participation of other stakeholders to provide specific legal advice on child marriage would yield significant results. However, it is essential to maintain a clear distinction between the judicial



role and advocacy activities. The following guidelines should therefore be considered during awareness raising campaigns:

1. **Neutrality and impartiality:** Judges must be impartial and avoid any appearance of bias. Engaging in awareness raising activities should not compromise their ability to remain neutral in their judicial decisions.
2. **Separation of powers:** Judges are part of the judicial branch, which is separate from the executive and legislative branches. Their primary role is to interpret and apply the law. Engaging in awareness raising activities should be done with caution to avoid blurring the boundaries between branches of government.
3. **Public education:** Judges can contribute to public education by participating in educational initiatives focused on legal processes, the justice system, and the rights of individuals. This can help enhance public understanding of the law and promote access to justice.
4. **Collaboration with stakeholders:** Judges can collaborate with relevant stakeholders, such as legal professionals, community organisations, and government agencies, to collectively raise awareness about legal issues and promote legal literacy.
5. **Judicial code of conduct:** Judicial officers should adhere to the Malawi judiciary codes of conduct and ethics that outline ethical standards and guidelines. These codes provide guidance on the extent of judges' involvement in extrajudicial activities, including awareness raising.

Ultimately, judicial officers should exercise discretion and balance their judicial responsibilities with any involvement in awareness raising activities. It is important to respect the principles of judicial independence, impartiality, and the separation of powers while considering opportunities to contribute to public education and legal awareness.

The judiciary also play the role of record-keeping as an institution with the capacity to generate data concerning the numbers of cases that touch on child marriages, in whatever form they present themselves, the context within which they occur, and the measures taken. This data will enable or assist governance structures to develop plans and strategies in allocating funds to end early/child, and forced marriage. Establishing a data management system that links the ministry responsible for children and social welfare and the police would also go a long way toward developing data that shows the trends of child marriage with sufficient particularity for strategic interventions.

Ending child marriage will require innovative measures and strategies that look beyond the traditional and recognise those stakeholders like the judiciary who can contribute to this end. With a new vision for judicial activities with strategies that enhance their skills and knowledge and enhanced collaboration with other stakeholders, some considerable gains towards ECM could be made.

Overall, supporting the judiciary with capacity building, especially with social context training, will assist in effective adjudication aimed at ECM. While the judiciary is often trained, ECM has a number of cultural and economic-specific nuances that require specialist training if matters involving child marriage are to be adjudicated in a survivor friendly manner, according the survivor all her rights as well as developing jurisprudence that is in the best interests of the child and which respects, protects and fulfils all constitutional rights.

# WEAKENING COLLECTIVE BARGAINING AND INDUSTRIAL ACTION IN SOUTH AFRICA: PROBLEMATISING THE RISKS OF REWARDING NON-STRIKERS

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## I INTRODUCTION

The practice of rewarding non-striking employees with bonuses and other incentives has generated an intense debate in South Africa.<sup>1</sup> Whilst employers argue that rewarding non-strikers is necessary for incentivising employees not to withdraw their labour, striking employees and their unions maintain that the practice has a negative effect on the exercise of the right to strike.<sup>2</sup> The argument is that striking employees would be dissuaded from joining strikes based on the lure of reward thereby substantially weakening employees' collective bargaining efforts as well as undermining the objectives of that particular strike.<sup>3</sup> This article presents a discussion on the legality and ramifications of the practice of rewarding non-striking employees with extra payment.<sup>4</sup> It argues that rewarding

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<sup>1</sup> C Marumoagae 'Legality of Paying a Gratuity to Non-striking Employees' (2012) July *De Rebus* 4; J Romeyn 'Striking a Balance: The Need for Further Reform of the Law Relating to Industrial Action' <http://aphnew.aph.gov.au/binaries/library/pubs/rp/2007-08/08rp33.pdf> (accessed 18 September 2020); L Chamberlain 'Assessing Enabling Rights: Striking Similarities in Troubling Implementation of the Rights to Protest and Access to Information in South Africa' (2016) *African Human Rights Law Journal* 373; T Ngcukaitobi 'Strike law, Structural Violence and Inequality in the Platinum Hills of Marikana' (2013) *Industrial Law Journal* 840.

<sup>2</sup> KO Odeku 'An Overview of the Right to Strike Phenomenon in South Africa' (2014) *Mediterranean Journal of Social Sciences* 697; B Hepple et al *Laws Against Strikes: The South African Experience in an International and Comparative Perspective* (2016) 23; C Chinguno 'Marikana Massacre and Strike Violence Post-Apartheid' (2011) *Global Labour Journal* 167.

<sup>3</sup> KJ Selala 'The Right to Strike and the Future of Collective Bargaining in South Africa: An Exploratory Analysis' (2014) III *International Journal of Social Sciences* 115.

<sup>4</sup> K Ewing 'Laws against Strikes Revisited' in C Barnard et al (eds) *The Future of Labour Law* (2004).

non-strikers may be anti-bargaining, anti-democratic and unduly infringe on the constitutionally protected right to strike.<sup>5</sup>

The right to strike is an important right which must not be undermined by rewarding non-striking employees.<sup>6</sup> The right to strike provides a mechanism to resolve labour conflicts which emanate from the inequality of bargaining power which defines the employer and employee's relationship.<sup>7</sup> So long as employers and employees have divergent interests and objectives there will be at least the potential for conflicts.<sup>8</sup> According to Kolb and Putnam<sup>9</sup>, labour related disputes are a persistent fact of organisational life: as employees perform their duties, various degrees of conflict will occur.<sup>10</sup> There are two powerful tools that are employed in such cases as a way to redress the employment disputes: (a) collective bargaining and (b) striking.<sup>11</sup> When the collective bargaining process has broken down due to the lack of a meeting of minds, employees will go on strike.<sup>12</sup> When employees are striking, employers' production will be negatively affected.

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<sup>5</sup> M Brassey 'The Dismissal of Strikers' (1990) *Industrial Law Journal* 233.

<sup>6</sup> Section 23 of the Constitution of the Republic of South Africa, 1996.

<sup>7</sup> H Cheadle 'Constitutionalising the Right to Strike' in B Hepple, R le Roux & S Sciarra (eds) *Laws Against Strikes: The South African Experience in an International and Comparative Perspective* (2015) 68; B Adell 'Regulating Strikes in Essential and Other Services after the New Trilogy' (2011) *Canadian Labour and Employment Law Journal* 413; R le Roux & T Cohen 'Understanding the Limitations to the Right to Strike in Essential and Public Services in the SADC Region' (2016) *Potchefstroom Electronic Law Journal* 6.

<sup>8</sup> BO Omisore & AR Abiodun 'Organizational Conflicts: Causes, Effects and Remedies' (2014) *International Journal of Academic Research in Economics and Management Sciences* 119; E Fergus 'Reflections on the (Dys)functionality of Strikes to Collective Bargaining: Recent Developments' (2016) 37(3) *Industrial Law Journal* 1540; M Tenza 'The Link between Replacement Labour and Eruption of Violence During Industrial Action' (2016) *Obiter* 109; S Van Eck & T Kujinga 'The Role of the Labour Court in Collective Bargaining: Altering the Protected Status of Strikes on Grounds of Violence in *National Union of Food Beverage Wine Spirits and Allied Workers v Universal Product Network (Pty) Ltd* (2016) 37 *ILJ* 476 LC' (2017) *Potchefstroom Electronic Law Journal* 2.

<sup>9</sup> DM Kolb & LL Putnam 'The Multiple Faces of Conflict in Organizations' (1992) *Journal of Organizational Behavior* 311.

<sup>10</sup> At 311.

<sup>11</sup> M Budeli 'Understanding the right to Freedom of Association' (2010) *Comparative and International Law Journal of Southern Africa* 27; Cliffe Dekker Hofmeyr *From Recognition to Strike: An Overview of Collective Labour Law* (2014) 2.

<sup>12</sup> PAK le Roux 'Claims for Compensation Arising from Strikes and Lockouts' (2013) *Contemporary Labour Law* 11; PAK le Roux 'Defining the Right to Strike' (2004) *Contemporary Labour Law* 16.

To avoid such economic consequences, employers usually reward non-strikers for maintaining the company's production during a crippling strike.<sup>13</sup>

Sitting on equal plane in terms of significance, are the keenest objections raised by employees and their union about extra payment to non-strikers. At the core is the likely detrimental effect on future strikes.<sup>14</sup> In fact, striking employees would be dissuaded from joining strikes based on the lure of reward.<sup>15</sup> In other words, this practice of rewarding non-strikers has the effect of weakening the employees' collective bargaining effort, or at most sowing discord and disunity amongst members of a union and the workforce.<sup>16</sup> In this sense, additional payments undermine the right to strike and invariably tilt the scales of power in favour of the employer.<sup>17</sup> Also arising is the acute free-rider problem: if the striking employees' demands are met, the non-striking employees who fall within the bargaining unit, and who had performed the tasks of those on strike in addition to their own, would end up benefiting twice.<sup>18</sup> First, non-strikers would receive the salary increment resulting from the sacrifices made by their colleagues, and secondly, from extra income derived from the strike action.<sup>19</sup> The question is whether offering bonuses to non-striking employees who went beyond the call of duty and performed the duties of the striking employees contravenes section 5 of the Labour Relations Act.<sup>20</sup>

This article is divided into three parts. The first part examines the constitutional and legislative protection of the right to strike with its corollary of collective bargaining, and other mandatory provisions.<sup>21</sup>

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<sup>13</sup> NT Rwodzi & N Lubisi 'Introducing a Serpent into the Garden of Collective Bargaining: A Case Analysis of *Numsa Obo Members v Elements Six Productions (Pty) Ltd* (2017) ZALCJHB 35' (2019) *Potchefstroom Electronic Law Journal* 3; A Myburgh 'The Failure to Obey Interdicts Prohibiting Strikes and Violence: The Implications for Labour Law and the Rule of Law' (2013) *Contemporary Labour Law* 2.

<sup>14</sup> S Estreicher 'Collective Bargaining or "Collective Begging"? Reflections on Anti-strikebreaker Legislation' (1994) *Michigan Law Review* 579.

<sup>15</sup> Marumoagae (note 1 above) 4.

<sup>16</sup> Chinguno (note 2 above) 162.

<sup>17</sup> J Grogan *Collective Labour Law* (2010) 244.

<sup>18</sup> MM Botha & W Germishuys 'The Promotion of Orderly Collective Bargaining and Effective Dispute Resolution, the Dynamic Labour Market and the Powers of the Labour Court' (2018) *Journal of Contemporary Roman-Dutch Law* 532.

<sup>19</sup> *NUMSA v Bader Bop (Pty) Ltd* 2003 (3) SA 513 (CC); (2003) 24 ILJ 305 (CC) paras 26, 65; *Kem-Lin Fashions CC v Brunton* (2001) 22 ILJ 109 (LAC) paras 17–18.

<sup>20</sup> Act 66 of 1995.

<sup>21</sup> DC Subramanien & JL Joseph 'The Right to Strike under the Labour Relations Act 66 of 1995 and Possible Factors for Consideration that Would Promote the Objectives of the LRA' (2019) *Potchefstroom Electronic Law Journal*

The second part discusses challenges of rewarding non-striking workers including weaknesses and inconsistencies in the implementation of these practices in the workplace. This discussion of the legal ramifications of rewarding non-striking employees who voluntarily elect to sustain economic production by performing the duties of the striking employees is presented in the context of section 5 of the Labour Relations Act and other ancillary provisions.<sup>22</sup> Since the foundational cases of *CWIU v BP SA* and *OK Bazaars (1929) Ltd v SACCAWU* (1993),<sup>23</sup> recourse by employers to defeat a protected strike by paying incentives, rewards or bonuses to non-strikers dressed up as ‘innocent’ rewards for ‘hard work’ has been and still is, a veritable ground for litigation.<sup>24</sup> There is no doubt that non-striking employees cannot be forced by their employers to do the task of striking employees.<sup>25</sup> Paying bonuses to non-strikers to perform the tasks of strikers is tantamount to replacing labour and this practice has a tremendous effect on collective bargaining and strikes.<sup>26</sup> The LRA is silent on whether an employer can politely request non-striking employees to voluntarily perform such task.<sup>27</sup> In the final part, the article will discuss the

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1; D Dickinson ‘Contracting out of the Constitution: Labour Brokers, Post Office Casual Workers and the Failure of South Africa’s Industrial Relations Framework’ (2017) *Journal of Southern African Studies* 790; A Rycroft ‘What Can Be Done about Strike-Related Violence?’ (2014) *International Journal of Comparative Labour Law and Industrial Relations* 199, 200; K Calitz ‘Violent, Frequent and Lengthy Strikes in South Africa: Is the Use of Replacement Labour Part of the Problem?’ (2016) *South African Mercantile Law Journal* 437; Ngcukaitobi (note 1 above) 840; K Von Holdt ‘Institutionalisation, Strike Violence and Local Moral Orders Transformation: Critical Perspectives on Southern Africa’ <https://muse.jhu.edu/article/383716/pdf> (accessed 21 September 2020); Selala (note 3 above) 116; B Hepple ‘The Right to Strike in an International Context’ [http://www.law.utoronto.ca/documents/conferences2/StrikeSymposium09\\_Hepple.pdf](http://www.law.utoronto.ca/documents/conferences2/StrikeSymposium09_Hepple.pdf) (accessed 21 September 2020); S Adelman ‘The Marikana Massacre, the Rule of Law and South Africa’s Violent Democracy’ (2015) *Hague Journal on the Rule of Law* 6.

<sup>22</sup> Chamberlain (note 1 above) 371.

<sup>23</sup> *CWIU v BP SA* (1991) 12 ILJ 599 (IC); *OK Bazaars (1929) Ltd v SACCAWU* (1993) 14 ILJ 362 (LAC); B Hepple, R le Roux & S Sciarra (eds) *Laws against Strikes: The South African Experience in an International and Comparative Perspective* (2016) 6.

<sup>24</sup> Hepple et al (note 23 above) 6.

<sup>25</sup> B Waas ‘Strike as a Fundamental Right of the Workers and its Risks of Conflicting with other Fundamental Rights of the Citizens’ <https://isssl.org/wp-content/uploads/2013/01/Strike-Waas.pdf> (accessed on 20 September 2020).

<sup>26</sup> Marumoagae (note 1 above) 4.

<sup>27</sup> KG Dau-Schmidt, SD Harris & O Lobel *Labour and Employment Law* (2009) 96.

circumstances in which employers might be said to undermine the right to strike by paying non-striking employees who elect to continue working during a strike a gratuity over and above their normal remuneration.<sup>28</sup> The objective of this part is to explore the possibilities of reforming the law to include a proviso that prohibits an employer from requesting non-strikers to perform the work of the strikers.<sup>29</sup>

## II THE CONSTITUTIONAL AND LEGISLATIVE PROTECTION OF THE RIGHT TO STRIKE: CHARTING THE LANDSCAPE

When it comes to issues of employment it is important to look at constitutional and statutory context. In this regard it is worth mentioning freedom of association in section 18, the right to engage in collective bargaining and the right to strike in section 23. The Constitution of the Republic of South Africa in section 23 confers on every employee the right to strike.<sup>30</sup> It further provides that every trade union, employers' organisation and employer has the right to engage in collective bargaining, and goes on to provide that national legislation may be enacted to regulate the process.<sup>31</sup> The Labour Relations Act 66 of 1995 was enacted by the Parliament of South Africa to give effect to the fundamental rights conferred by section 23 of the Constitution. The right to strike, it has been said, is a crucial weapon in the armoury of organised labour, and a keystone of modern industrial society.<sup>32</sup>

The right to protest is internationally recognised in various treaties, including the International Covenant on Civil and Political Rights<sup>33</sup> and the European Convention of Human Rights' Article 11 on freedom of peaceful assembly and association which provides that 'Everyone has

<sup>28</sup> G Heald *Why is Collective Bargaining Failing in South Africa?* (2016) 4.

<sup>29</sup> E Webster 'Marikana and Beyond: New Dynamics in Strikes in South Africa' 2017 *Global Labour Journal* 139.

<sup>30</sup> The Constitution of the Republic of South Africa, 1996.

<sup>31</sup> Section 23 of the Constitution. Some of the salient objectives of section 23 include regulation of the organisational rights of trade unions; the promotion and facilitation of collective bargaining at the workplace and at sectoral level; regulation of the right to strike and the recourse to lock-out in conformity with the Constitution; and also the promotion of employee participation in decision-making through the establishment of workplace forums.

<sup>32</sup> Subramanien & Joseph (note 21 above) 3.

<sup>33</sup> See Article 21 of the International Convention of Civil and Political Rights (16 December 1966) and Article 8 of the International Convention on Economic, Social and Cultural Rights (16 December 1966).

the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interest.<sup>34</sup>

The right to strike is a form of dispute settlement mechanism corollary to collective bargaining and is resorted to when parties have reached a deadlock in negotiations.<sup>35</sup> The right has been described as an indispensable component of a democratic society and justified as a countervailing force to the power of capital.<sup>36</sup> It is the ultimate weapon in persuading the other party to bargain. Strikes occur due to a failure in the process of fixing working conditions through voluntary collective bargaining. ILO instruments do not explicitly deal with the right to strike, but its supervisory bodies, in particular the Committee on Freedom of Association and the Committee of Experts on the Application of Conventions and Recommendations, have long recognised the right to strike as an essential means available to workers for the promotion and protection of their economic and social rights.<sup>37</sup> Article 3 of Convention 87<sup>38</sup> states that:

3. (1) *Workers' and employers' organisations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes.*

(2) *The public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof.*

Article 4 of the Right to Organise and Collective Bargaining Convention, No 98, 1951 also recognises that:

*Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements.*

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<sup>34</sup> See Article 11 of the European Convention on Human Rights (3 September 1953).

<sup>35</sup> See *Eskom Holdings (Pty) Ltd v National Union of Mineworkers* (2009) 30 ILJ 894 (LC).

<sup>36</sup> B Nkabinde 'The Right to Strike, an Essential Component of Workplace Democracy: Its Scope and Global Economy' 2009 *Maryland Journal of International Law* 276.

<sup>37</sup> C Hofmann 'The Right to Strike and the International Labour Organization' <http://library.fes.de/pdf-files/iez//10775.pdf> (accessed 27 September 2020).

<sup>38</sup> Freedom of Association and Protection of the Right to Organise Convention, No 87, 1948 (hereinafter Convention 87 of 1948).



These two conventions are stated as two of the eight core ILO conventions in the Declaration on Fundamental Principles and Rights at Work 1998.<sup>39</sup> Convention 87 is regarded as a principal source of international obligations in the world of work.<sup>40</sup> Article 2 of the Convention provides that workers have the right to join and establish organisations of their own choice without authorisation.<sup>41</sup> It is clear from the wording of this Convention that governments must refrain from interfering with trade unions when performing their duties as union members.

South Africa has given effect to its obligation by entrenching the right to collective bargaining as a constitutional right, and by providing extensively for collective bargaining in labour law. These rights are entrenched in Chapter Two of the Bill of Rights.

In this vein, section 23(2)(c) of the South African Constitution guarantees that every worker has the right to strike.<sup>42</sup> The Constitution protects this right by providing the necessary procedures for the exercise of the right. The LRA, on the other hand, in section 64(1) provides that 'every employee has the right to strike, and every employer has the recourse to a lock-out'.<sup>43</sup> A strike is then defined in section 213 of the LRA as:

*the partial or complete concerted refusal to work, or the retardation or obstruction of work, by persons who are or have been employed by the same employer or by different employers, for the purpose of remedying a grievance or resolving a dispute in respect of any matter of mutual interest between employer and employee, and every reference to 'work' in this definition includes overtime work, whether it is voluntary or compulsory<sup>44</sup>*

When one looks at the definition of a strike which contemplates some form of stoppage in work, it becomes clear that strikes, by their nature, are intended to cause the employer economic harm.<sup>45</sup> By withholding their labour, the employees hope to bring production to a halt, causing the employer to lose business and to sustain overhead expenses without the prospect of income, in the expectation that, should the losses be sufficiently substantial, the employer will accede to their demands.<sup>46</sup>

<sup>39</sup> Convention 87 of 1948 (note 38 above).

<sup>40</sup> A van Niekerk, N Smit, M Christianson, M McGregor & BPS Van Eck *Law@work* (2018) 389.

<sup>41</sup> See Article 2 of ILO Convention No 87.

<sup>42</sup> Section 23 of the Constitution.

<sup>43</sup> Section 64 of the LRA.

<sup>44</sup> Section 213 of the LRA.

<sup>45</sup> *Stuttafords Department Stores Ltd v SACTWU* (2001) 22 ILJ 414 (LAC).

<sup>46</sup> H Cheadle 'Strikes' in M Brassey et al (eds) *The New Labour Law* (1987) 244.

The LRA gives effect to the right to strike by providing a clear and detailed framework on how the right should be exercised. The current legislative framework allows for a voluntary system of collective bargaining backed by the freedom of parties to resort to coercive power.

In *Gobile*,<sup>47</sup> three employees refused to work overtime and on public holidays because they alleged, contrary to their employer's view, that they were contractually not obliged to do so. Their refusal to work was not accompanied by any express demand. The Labour Appeal Court inquired into the purpose of their action in order to decide whether their refusal to work constituted a strike.<sup>48</sup> The court held that the employees' aim was to make their employer accede to their perception of what their contractual obligations should be. Therefore, their actions constituted a strike.<sup>49</sup>

According to Cliffe Dekker Hofmeyr a strike typically occurs for two reasons. An economic strike occurs over issues regarding wages, hours and workers losing their jobs. It should be noted that when this type of strike occurs, a worker puts their job at risk,<sup>50</sup> whereas a labour practices strike is initiated to protest unfair labour practices by an employer. In this type of strike, employees can retain their status as well as their right to be reinstated when the strike is over.<sup>51</sup> In other words, when a strike occurs it is either through concerted action or withdrawal of labour.<sup>52</sup> Dickinson<sup>53</sup> advances the view that 'strikes constitute the withdrawal of labour'. In a protected strike, one which takes place within the LRA's framework, workers forfeit their wages for the duration of the strike – 'no work, no pay' – but their jobs are protected and, once the strike is over, they can return to work. It is during this period that the employer experiences loss of production because there tends to be a lot of protesting which is aligned with persuading other workers to join the strike. If some workers choose not to join the strike, this can weaken the collective bargaining between the employer and the employees.

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<sup>47</sup> *Gobile v BP Southern Africa (Pty) Ltd* (1999) 20 ILJ 2027 (LAC).

<sup>48</sup> TJA Cohen et al *Trade Unions and the Law in South Africa* (2009) 48.

<sup>49</sup> *Gobile* (note 47 above ) para 9.

<sup>50</sup> Cliffe Dekker Hofmeyr *Strike Guideline*, <https://www.cliffedekkerhofmeyr.com/export/sites/cdh/en/practice-areas/downloads/Employment-Strike-Guideline.pdf> (accessed 22 September 2020). See also T Metcalf 'Tactics Used by Labor Unions: Striking & Collective Bargaining' <https://smallbusiness.chron.com/tactics-used-labor-unions-striking-collective-bargaining-61541.html>.

<sup>51</sup> Hofmeyr (note 50 above).

<sup>52</sup> Hofmeyr (note 50 above).

<sup>53</sup> Dickinson (note 21 above) 8.

Some jurisdictions do not have the protection provided by our LRA. For instance, in Zimbabwe the Labour Act provides for fines for strikes and pickets that disrupt the normal operation of services.<sup>54</sup> Furthermore, any violation of the right to work of non-strikers, and in respect of minimum services, is a disciplinary offence and renders striking workers liable to civil and penal sanctions. The right to strike<sup>55</sup> is strengthened by the right to freedom of association,<sup>56</sup> and the right to engage in collective bargaining.<sup>57</sup> Another point of note is that the LRA guarantees the fundamental right to freedom of association. This encompasses the right of every employee and employer to choose whether to associate with a group of employees, a trade union or a group of employers or an employers' organisation, respectively. South Africa has entrenched the right to collective bargaining as a constitutional right, and by providing extensively for collective bargaining in labour law.<sup>58</sup>

At the core of the Labour Relations Act's guarantee of the fundamental right of freedom of association is the right of every employee to take part in the formation of a trade union and become a member of a trade union.<sup>59</sup> A corollary of trade union membership is the right to participate in lawful activities.<sup>60</sup> This brings to the fore the pivotal provisions of section 5(1) and 5(3) which read as follows:

- (1) *No person may discriminate against an employee for exercising any right conferred by this Act . . .*
- (3) *No person may advantage, or promise to advantage, an employee or a person seeking employment in exchange for that person not exercising any right conferred by this Act or not participating in any proceedings in terms of this Act. However, nothing in this section precludes the parties to a dispute from concluding an agreement to settle that dispute.*

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<sup>54</sup> Section 104 of Labour Act 17 of 2002 [Chapter: 28:01] (as amended 1 February 2006).

<sup>55</sup> Section 23(2)(c) of the Constitution.

<sup>56</sup> Section 18 of the Constitution provides: 'Everyone has the right to freedom of association'.

<sup>57</sup> Section 23(5) of the Constitution provides:

'Every trade union, employers' organisation and employer has the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36(1).'

<sup>58</sup> Chinguno (note 2 above) 162.

<sup>59</sup> *IMATU v Rustenburg Transitional Council* (2000) 21 ILJ 377 (LC) 383A–D. See also *Keshwar v SANCA* (1991) 12 ILJ 816 (IC).

<sup>60</sup> *Kroukam v SA Airlink (Pty) Ltd* (2005) 26 ILJ 2153 (LAC).

Freedom of association is further strengthened by section 187 of the LRA, which concerns automatically unfair dismissals. Section 187(1)(a) of the LRA provides that:

*A dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to section 5 or, if the reason for the dismissal is— (a) that the employee participated in or supported, or indicated an intention to participate in or support, a strike or protest action that complies with the provisions of Chapter IV.<sup>61</sup>*

The endorsement of trade union rights within the Constitution,<sup>62</sup> as well as the LRA,<sup>63</sup> essentially provided for stronger protection of the rights of employees.<sup>64</sup> A trade union can be described as the in-between body that bridges the gap between an employer and an employee.<sup>65</sup> Essentially the role of a trade union is to safeguard the existing rights of its members and also to improve and enhance these rights.<sup>66</sup> All employees are entitled to join and participate in trade union activities.<sup>67</sup> Therefore, trade unions are essential to furthering the concepts of equality and democracy in the workplace, as they promote the interests of employees by ensuring that employees are placed in an equal position to their employers.<sup>68</sup>

In terms of section 187(1)(a), to dismiss an employee for joining or participating in the affairs of a union is therefore automatically unfair. An interesting question which may follow, is whether a managerial employee who holds office and is a trade union member, may exercise these rights.<sup>69</sup> When managerial employees join a trade union, they commit themselves to a body whose primary object is to maximise the

<sup>61</sup> Section 187(1)(a) of the LRA.

<sup>62</sup> Section 23(2) of the Constitution.

<sup>63</sup> Section 65 of the LRA.

<sup>64</sup> A Botes 'The History of Labour Hire in Namibia: A Lesson for South Africa' (2013) *Potchefstroom Electronic Law Journal* 525.

<sup>65</sup> SKR Sundar 'Trade Unions and Civil Society: Issues and Strategies' (2007) *Indian Journal of Industrial Relations* 713. See also R. Grawitzky 'Collective Bargaining in Times of Crisis: A Case Study of South Africa' (2011) ILO 1.

<sup>66</sup> SKR Sundar 'Emerging Trends in Employment Relations in India' 2007 *Indian Journal of Industrial Relations* 714.

<sup>67</sup> J Grogan *Collective Labour Law* (2007) 34.

<sup>68</sup> M Finnemore & R van Rensburg *Contemporary Labour Relations* (2002) 139.

<sup>69</sup> *IMATU v Rustenburg Transitional Council* (note 59 above) 378H–379C where the following functions of managerial employees were identified: (i) to give advice; (ii) to make recommendations to councillors who formulate policy and (iii) to direct, motivate and discipline other staff under their control. It is clear from these functions why managerial employees must enjoy the trust and confidence of their employer to perform functionally in terms of their employment contracts.

benefits their members derive from the employer. Therefore, by joining a trade union an employee commits himself to a body that stands in direct opposition to his employer; hence there can be a breach of the duty of fidelity owed by an employee to his employer.

Section 1 of the Act states that the purpose of the LRA is to advance economic development, social justice, labour peace, and the democratisation of the workplace by fulfilling the primary objectives of the Act. These include the promotion of orderly collective bargaining, collective bargaining at sectoral level, employee participation in decision-making in the workplace, and the effective resolution of labour disputes.<sup>70</sup>

The court's enforcement of the LRA's dispute resolution framework is further illustrated in *Mackay*,<sup>71</sup> where the court stated that:

*[A]ll disputes arising from the employer-employee relationship must be effectively resolved. Such disputes are resolved through conciliation, arbitration and adjudication, and those of a collective nature through collective bargaining. In the light of the foregoing it is clear that it could never have been intended that some disputes arising out of the employer-employee relationship are incapable of resolution in terms of the Act.*<sup>72</sup>

The court envisioned that the labour dispute resolution framework is deemed effective in protecting the rights of employees.<sup>73</sup> Furthermore, the protection of employees' rights is enforced through the process of collective bargaining within the dispute resolution system.<sup>74</sup> In *National Police Services Union*,<sup>75</sup> the court pointed out that the LRA does not place any duty on either the employer or the employee to engage in the bargaining process. The courts are not given authority to determine or influence the result of the bargaining process. The outcome of such negotiations is entirely dependent on the parties themselves.<sup>76</sup> This ruling essentially portrays that

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<sup>70</sup> These goals were reiterated in the case of *NUMSA v Bader Bop* (note 19 above) para 26, where the court held that the Act sought to provide a framework whereby both employees and employers and their organisation could participate in collective bargaining with an emphasis on bargaining at sectoral level, employee participation in decisions in the workplace and the effective resolution of labour disputes.

<sup>71</sup> *Mackay v ABSA Group* (2000) 21 ILJ 2054 (LC).

<sup>72</sup> *Mackay* (note 71 above) para 15.

<sup>73</sup> *Mackay* (note 71 above) para 15.

<sup>74</sup> FJ Steadman, J Brand & C Lotter et al *Labour Dispute Resolution* (2009) 30.

<sup>75</sup> *National Police Services Union v National Negotiating Forum* (1999) 20 ILJ 1081 (LC) (hereinafter referred to as *National Negotiating Forum*).

<sup>76</sup> *National Negotiating Forum* (note 75 above) para 52.

both parties to the bargaining process must be given equal power which instils democracy within labour relations.<sup>77</sup>

It is undisputed that the balance of power in employment relationships favours employers over employees, so strikes are used as tools by employees to bring some sort of balance.<sup>78</sup> Botha argues that refusal to work grants employees a significant voice regarding what goes on in the workplace.<sup>79</sup> Similarly, Estreicher opines that ‘without the right to strike, collective bargaining becomes collective begging.’<sup>80</sup> Chicktay, on the other hand, advances the view that a strike action enables employees to retain their dignity by showing the employer that they are ‘not just cogs in a machine’.<sup>81</sup> In addition, the Constitution entrenches the right of workers to go on strike.<sup>82</sup> The right to strike is not only recognised in the domestic or national laws of countries, but also by international law, as fundamental to the protection of workers’ rights.<sup>83</sup> The endorsement of trade union rights within the Constitution, as well as section 65 of the LRA, essentially provides for stronger protection of the rights of employees.<sup>84</sup> The LRA protects strikers against dismissal as long as they comply with the requirements of the Act. A trade union can be described as the in-between body that bridges the gap between an employer and an employee.<sup>85</sup> All employees are entitled to join and participate in trade union activities.<sup>86</sup>

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<sup>77</sup> D Du Toit ‘Industrial Democracy in South Africa’s Transition’ (1997) *Law, Democracy and Development* 42.

<sup>78</sup> E Manamela & M Budeli ‘Employees’ right to strike and violence in South Africa’ (2013) *Comparative and International Law Journal of Southern Africa* 323; Myburgh (note 13 above) 1.

<sup>79</sup> MM Botha ‘Responsible Unionism During Collective Bargaining and Industrial Action: Are We Ready Yet?’ 2015 *De Jure* 332.

<sup>80</sup> Estreicher (note 14 above) 578.

<sup>81</sup> MA Chicktay ‘Placing the Right to Strike Within a Human Rights Framework’ (2006) *Obiter* 348.

<sup>82</sup> Section 23(2) of the Constitution.

<sup>83</sup> SB Gericke ‘Revisiting the Liability of Trade Unions and/or Their Members During Strikes: Lessons to be Learnt from Case Law’ (2012) *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 567. See also the International Convention on Economic, Social and Cultural Rights of 1996, the European Social Charter of 1961, and the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights of 1988.

<sup>84</sup> S Hayter & J Visser (eds) *Collective Agreements: Extending Labour Protection* (2018) 142.

<sup>85</sup> Hayter & Visser (note 84 above).

<sup>86</sup> P Hirschsohn ‘The ‘Hollowing-out’ of Trade Union Democracy in COSATU? Members, Shop Stewards and the South African Communist Party’ (2011) *Law, Democracy and Development* 284.

Therefore, trade unions are essential to the furtherance of concepts of equality and democracy in the workplace as they promote the interests of employees by ensuring that employees are placed in an equal position to their employers.<sup>87</sup>

### III THE CONUNDRUM OF REWARDING NON-STRIKING WORKERS

The Constitution entrenches the right of workers to go on strike.<sup>88</sup> Although this is a constitutionally entrenched right, employees are not obliged to participate: they may choose not to exercise their right and rather continue with their normal work. In addition, the employers may decide to hire replacement workers. Section 76(1)(b) of the Labour Relations Act 66 of 1995, as amended, provides:

*An employer may not take into employment any person— . . . (b) for the purpose of performing the work of any employee who is locked out unless the lock-out is in response to a strike.*<sup>89</sup>

Section 76(1)(b) of the LRA, which permits replacement of labour in response to a strike, seems to fuel violence in industrial actions. COSATU has even proposed that a limitation should be put on hiring replacement workers.<sup>90</sup> Section 76(1)(b) permits replacement of labour subject to exceptions. The interpretation of the exceptions was discussed in the recent case of *National Union of Metalworkers of South Africa v Trenstar (Pty) Ltd*,<sup>91</sup> where the Constitutional Court held,

*In interpreting the exception contained in s 76(1)(b), it is important to bear in mind the usual position governing the use of replacement labour during strikes and lock-outs. Subject to the one exception contained in s 76(1)(a), an employer may use replacement labour during a strike. But subject to the one exception contained in s 76(1)(b), an employer may not use replacement labour during a lock-out.*<sup>92</sup>

<sup>87</sup> R Gomez & J Gomez 'Workplace Democracy for the 21st Century' [https://d3n8a8pro7vhm.cloudfront.net/broadbent/pages/7736/attachments/original/1592501160/Workplace\\_Democracy.pdf?1592501160](https://d3n8a8pro7vhm.cloudfront.net/broadbent/pages/7736/attachments/original/1592501160/Workplace_Democracy.pdf?1592501160) (accessed 23 September 2021).

<sup>88</sup> Section 23(2) of the Constitution. See also section 64 of the LRA.

<sup>89</sup> Section 23(2) of the Constitution.

<sup>90</sup> K Calitz 'Violent, Frequent, and Lengthy Strikes in South Africa: Is the Use of Replacement Labour Part of the Problem?' (2016) 28(3) *South African Mercantile Law Journal* 440.

<sup>91</sup> *National Union of Metalworkers of South Africa v Trenstar (Pty) Ltd* 2023 (4) SA 449 (CC); (2023) 44 ILJ 1189 (CC).

<sup>92</sup> *Trenstar* (note 91 above) para 39.

Employees see this provision as a severe limitation standing in their way towards the betterment of wages and living conditions.<sup>93</sup> Not only replacement labourers but also employees who do not participate in the strike action and keep working are victims of violence by strikers.<sup>94</sup> Tenza posits that ‘once the employer has appointed replacement labour, it is believed that the desire to reach an agreement is removed, as the employer will be able to continue to operate as usual while the regular workforce is out on strike.’<sup>95</sup>

If employees go on strike, without non-strikers agreeing to work, the employers will experience a decline in production, which results in losing market share as well suffering reputational damage.<sup>96</sup> Therefore, to avoid economic harm, employers will simply reward volunteering employees for maintaining the viability of the enterprise during a crippling strike.<sup>97</sup> The questions that arises: Does offering bonuses to non-striking employees who went beyond the call of duty and performed the duties of the striking employees contravene section 5 of the LRA?<sup>98</sup> How compelling is the contention that the employer is simply rewarding volunteers for their efforts in ensuring that it fulfils clients’ demands during a crippling strike? More accurately, what is significant here is that without non-strikers going the extra mile, the employer would have lost market share as well as suffering reputational damage. From a different perspective, can it be argued that the interests of the employer in safeguarding the viability of the enterprise override concerns about disproportionate treatment of striking employees?

There are both advantages and disadvantages in rewarding non-strikers. This is clear from the wording of sections 5 and 64 of the LRA.

The right to strike is conferred in the LRA by section 64(1), which states: ‘Every employee has the right to strike’. The Committee on Freedom of Association only considers the replacement of strikers to be justified: (a) in the event of a strike in an essential service in which strikes are

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<sup>93</sup> Calitz (note 90 above) 459.

<sup>94</sup> Calitz (note 90 above) 441. Also see cases of *FAWU obo Kapesi v Premier Foods Ltd t/a Blue Ribbon Salt River* (2010) 31 ILJ 1654 (LC); *Ntimane v Agrinet t/a Vetsak (Pty) Ltd* [1998] ZALC 98.

<sup>95</sup> M Tenza ‘Is the Employer Compelled to Provide Safe Working Conditions to Employees During a Violent Strike? (2021) *Law, Democracy, and Development* 257, 259.

<sup>96</sup> Le Roux ‘Claims for Compensation’ (note 12 above) 11; Le Roux ‘Defining the right to strike’ (note 12 above) 16.

<sup>97</sup> Rwodzi & Lubisi (note 13 above) 16; Myburgh (note 13 above) 2.

<sup>98</sup> Act 66 of 1995.



forbidden by law, and (b) when a situation of acute national crisis arises.<sup>99</sup> The Committee of Experts has considered that:

*A special problem arises when legislation or practice allows enterprises to recruit workers to replace their own employees on legal strike. The difficulty is even more serious if, under legislative provisions or case-law, strikers do not, as of right, find their job waiting for them at the end of the dispute. The Committee considers that this type of provision or practice seriously impairs the right to strike and affects the free exercise of trade union rights.*<sup>100</sup>

The courts under the 1956 LRA ‘found nothing exceptionable about rewarding non-strikers for “going the extra mile”, or for denying strikers privileges during and after strike action’.<sup>101</sup> As such, under the 1956 LRA, employers were allowed to reward non-striking employees for work they did during the strike, including the work of striking employees. This was because under the 1956 Act, strikes in South Africa were not recognised. For example, in *Chemical Workers Industrial Union v BP South Africa*,<sup>102</sup> some employees went on a legal strike relating to demands concerning wages and ancillary matters. After the strike had begun, the employer took a decision to pay bonuses to non-striking employees, who were requested to work longer hours than usual, as well as to those who were requested to perform tasks falling outside their job description. This was to reward such employees for continuing production during the strike.<sup>103</sup> The union was of the view that such conduct constituted an unfair labour practice in terms of the 1956 LRA. It was held that, in deciding to pay the bonuses, the employer’s objective was to ensure that its business operations continued during the strike.<sup>104</sup> The court was convinced that the payment of the bonuses was a suitable and necessary measure for the employer to implement to combat the strike and, as such, it was a fair, reasonable and legitimate response to the strike. It also rejected the union’s contention that the employer’s payment of bonuses constituted victimisation of its striking members. The court held that the employer’s

<sup>99</sup> ILO *Compilation of decisions of the Committee on Freedom of Association* 6 ed (2018) 172.

<sup>100</sup> ILO, 1994. *Freedom of Association and Collective Bargaining International Labour Conference*, Geneva. See also B Gernigon, A Odero & H Guido *ILO Principles Concerning the Right to Strike* (2000).

<sup>101</sup> Grogan (note 17 above) 244.

<sup>102</sup> *Chemical Workers Industrial Union v BP South Africa* (1991) 12 ILJ 599 (IC).

<sup>103</sup> *Chemical Workers Industrial Union* (note 102 above) para 601.

<sup>104</sup> *Chemical Workers Industrial Union* (note 102 above) para 600.

payment of bonuses to certain of its employees not engaged in the legal strike at its business premises did not constitute an unfair labour practice.<sup>105</sup>

The LRA does not mention whether an employer can request non-striking employees to voluntarily perform tasks falling outside their job description. Furthermore, bribing non-strikers with some bonuses to perform the tasks of strikers is tantamount to replacing labour. Such an undertaking undermines the rights of employees to freely associate and take part in the lawful activities of their unions and amounts to discrimination. If employers are allowed to reward non-strikers it is clearly against the spirit of the LRA.

Section 5(1) of the LRA provides: 'No person may discriminate against an employee for exercising any right conferred by this Act.' As such, it has been correctly argued that 'where an employer pays gratuities to employees for not participating in a strike, such conduct will amount to an infringement of section 5(1)' of the LRA. By paying such a gratuity, an employer will send a message that, in future, for an employee to be awarded greater benefits when his colleagues down tools, he should continue working.<sup>106</sup>

Section 5(3) of the LRA provides that no one may advantage, or promise to advantage, an employee or a person seeking employment in exchange for that person not exercising any right conferred by this Act or not participating in any proceedings in terms of this Act.<sup>107</sup>

By rewarding non-striking employees, employers are advantaging those employees in exchange for them not exercising a right conferred by the LRA, namely the right to strike. Such a reward would amount to an infringement of section 5(3) of the LRA. On the other hand, rewarding non-strikers can also be viewed as a promise to advantage employees who are on strike if they end their strike action, thereby creating an impression that if they do not take part in strike action, they will also be eligible for the rewards awarded to non-striking employees. Such initiative by the employer would affect an employee's decision in future as to whether or not to embark on a strike.<sup>108</sup> As such, the employer will be dictating whether or not employees should exercise their right to strike. I am of the view that such conduct by the employer cannot be justified under the current LRA.

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<sup>105</sup> *Chemical Workers Industrial Union* (note 102 above) para 600.

<sup>106</sup> A Basson, PAK le Roux & EML Strydom *Essential Labour Law* (2009) 253.

<sup>107</sup> Act 66 of 1995.

<sup>108</sup> Rwodzi & Lubisi (note 13 above) 16.

In *NUMSA obo Members v Element Six Production (Pty) Ltd*,<sup>109</sup> members of NUMSA, UASA and SAEWA had embarked upon a protected strike in pursuit of their wage demands. As to be expected, not all employees joined the protected strike. During the strike some of the non-striking employees performed extra duties, thereby enabling the employer to sustain production at a level sufficient to meet clients' demands. In appreciation of the non-striking employees' efforts in going the extra mile, the employer decided to pay them an additional amount termed 'a token of appreciation'.<sup>110</sup> In the aftermath of the strike, naturally, striking employees were aggrieved by selective payment bonuses. It is this dispute over payment of bonuses to non-strikers that found its way to the Labour Court.

The core issue before the Labour Court was whether the payment of bonuses to non-strikers amounted to unfair discrimination against striking employees. The applicants contended that rewarding non-strikers discriminated against striking employees for exercising a right as contemplated by section 5(1) of the LRA 1995 or constituted a prohibited advantage or promise of advantage for a person not exercising any right conferred by the Act or for not participating in any proceedings in terms of the Act as contemplated by section 5(3). On the other hand, the respondent retorted that it did not breach the provisions of section 5 and its payments were not discriminatory on any specified or unspecified ground.<sup>111</sup> The employer's second line of defence was that the criteria it had applied in making payments were objective and rational and did not contain any corrosive effect on future strikes.<sup>112</sup>

The court ruled that the payment of a 'token' to non-striking employees constituted differentiation, which amounted to discrimination within the confines of section 5 of the LRA<sup>113</sup> and that the discrimination was unfair in that the striking employees were prejudiced for their participation in the lawful activities of their trade union, and the exercise of their right to strike. A declaratory order was made prohibiting the employer from engaging in such an activity.

In *FAWU v Pets Products (Pty) Ltd*<sup>114</sup> the employer had paid vouchers to non-striking employees as a reward for the work that they performed

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<sup>109</sup> *NUMSA obo Members v Element Six Production (Pty) Ltd* [2017] ZALCJHB 35 (hereinafter referred to as *NUMSA obo Members*).

<sup>110</sup> *NUMSA obo Members* (note 109 above) para 3.3.

<sup>111</sup> *NUMSA obo Members* (note 109 above) para 4.

<sup>112</sup> *NUMSA obo Members* (note 109 above) para 10.9.

<sup>113</sup> *NUMSA obo Members* (note 109 above) para 23.12.

<sup>114</sup> *FAWU v Pets Products (Pty) Ltd* (2000) 21 ILJ 1100 (LC).

during a strike.<sup>115</sup> The union argued that such payment contravened section 5(1) and (3) of the LRA in that it discriminated against strikers for exercising their right to strike and that the employer advantaged the non-strikers in exchange for not exercising their right to strike.<sup>116</sup> The union also argued that the effect of paying such vouchers was that those who did not strike were rewarded for doing so and those who did strike were penalised for doing so. It was further argued that this had the effect that the strikers and non-strikers were deterred from striking in future.<sup>117</sup> The employer argued that the payment of the vouchers was not a payment to those who did not strike, but to those who had worked during the strike and those who had 'gone the extra mile'. Further, that the payment was for the 'extra hard work' done by the non-strikers and that the employer had no ulterior motive in making the payment to the non-strikers.<sup>118</sup>

The court was of the view that the *sine qua non* for the payment was not so much the hard work performed by the non-strikers, but that the non-strikers did not go on strike and maintained production.<sup>119</sup> It was found that non-strikers were remunerated for overtime work and for work they did on weekends. The court held that the non-strikers did nothing extraordinary to warrant additional or extra payment other than what was provided for in their service contracts. In arriving at its decision, the court opined, 'the rights found in our Constitution and in the Act are hard-earned and well-deserved'.<sup>120</sup> The right to organise, the right to engage in collective bargaining, and the right to strike are priceless. After employing the well-known *Harksen* test in *Harksen v Lane*<sup>121</sup> the court held that where a person discriminates against employees for exercising their right to strike, which is conferred by this Act, then the unfairness of that discrimination is presumed although the contrary may still be established.<sup>122</sup> The court held that the employer had discriminated against the strikers for exercising their right to strike, and, by doing so, the employer infringed section 5(1) of the LRA.<sup>123</sup> Importantly, the court held that the employer had infringed section 5(3) of the LRA by providing vouchers to the non-strikers. The right to strike cannot be waived unless there is an agreement between

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<sup>115</sup> *FAWU* (note 114 above) para 6.

<sup>116</sup> *FAWU* (note 114 above) para 6.

<sup>117</sup> *FAWU* (note 114 above) para 7.

<sup>118</sup> *FAWU* (note 114 above) para 7.

<sup>119</sup> *FAWU* (note 114 above) para 12.

<sup>120</sup> *FAWU* (note 114 above) para 15.

<sup>121</sup> *Harksen v Lane* NO 1998 (1) SA 300 (CC).

<sup>122</sup> *FAWU* (note 114 above) para 20.

<sup>123</sup> *FAWU* (note 114 above) para 21.

a trade union and the employer that regulates the issue. It was further held that there can be no justification for giving rewards to non-strikers because they refrained from exercising their statutory right to strike.<sup>124</sup>

Notably, the court found that the non-strikers were paid a benefit or a reward 'in exchange' for them not having exercised their right to strike conferred by the LRA.<sup>125</sup> Additionally, in *NUM v Namakwa Sands*,<sup>126</sup> the Labour Court found that the act of paying non-striking employees redeployment allowances, the provision of free meals and the excessive overtime worked contravened section 5 of the LRA.<sup>127</sup> However, the court also found that NUM had failed to show a causal link between the payment of the exceptional performance bonus and the participation in the strike. There was also no evidence to substantiate the allegation that the exceptional performance bonus was actually the annual performance bonus in disguise. In arriving at its conclusion, the court deviated from the reasoning set out in the above cases.<sup>128</sup> The court reasoned that just because some employees were participating in a strike, it did not mean that if an employee decided not to exercise this right of his own accord, then the employee should be denied contractual benefits. The inconsistency of the decisions of the court means that there is a need to adopt an express legislative provision which explicitly prohibits employers from rewarding non-striking employees due to the impact it has on the striking employees' rights and the integrity of the industrial action.<sup>129</sup>

#### IV CONCLUSION AND OPTIONS FOR LAW REFORM

This article has argued that the right to strike is a fundamental right which is strengthened by the right to freedom of association and the right to engage in collective bargaining.<sup>130</sup> It has argued that the practice of awarding bonuses to non-striking employees has the effect of weakening the employees' collective bargaining effort, or at most causing discord and disunity amongst members of a union, thus undermining the right to strike and invariably tilting the scales of the power play in favour

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<sup>124</sup> *FAWU* (note 114 above) para 24.

<sup>125</sup> *FAWU* (note 114 above) para 24.

<sup>126</sup> *NUM v Namakwa Sands – A Division of Anglo Operations Ltd* (2008) 29 ILJ 698 (LC) para 1.

<sup>127</sup> *NUM v Namakwa Sands* (note 126 above) para 44.

<sup>128</sup> *NUM v Namakwa Sands* (note 126 above) para 45.

<sup>129</sup> Marumoagae (note 1 above) 4.

<sup>130</sup> Du Toit (note 77 above) 327.

of the employer.<sup>131</sup> When non-striking employees perform the tasks of striking employees, it means employers can continue with business as usual. Employers can use such practices as a strategy to negate and dilute the intended effects of the protected strike action embarked upon by employees.<sup>132</sup> This undoubtedly degrades the status of collective bargaining as a constitutional tool to resolve disputes and defeats the purpose of the LRA by undermining the rights of employees to freely associate and take part in the lawful activities of their unions.<sup>133</sup>

Considering the above, it can be submitted that section 5 of the LRA must be amended and an express proviso that prohibits an employer from requesting a non-striker to perform the work of the strikers must be inserted in the section. The new provision should provide that:

*No employer shall discriminate against striking employees by awarding, rewarding, or paying gratuitous tokens including bonuses, and other allowances to non-striking employees.*

The above proviso will protect employees so that there are not dissuaded from joining strikes based on the lure of reward.

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<sup>131</sup> NUMSA *obo Members* (note 109 above) para 18.4.

<sup>132</sup> NUMSA *obo Members* (note 109 above) para 18.6.

<sup>133</sup> NUMSA *obo Members* (note 109 above) para 18.7.

# *SLEEPWALKING WITH A STOCHASTIC PARROT – ENSURING ACCURACY WHEN USING GENERATIVE ARTIFICIAL INTELLIGENCE IN LEGAL RESEARCH*

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## I INTRODUCTION

A judicial officer of the First Circuit (Labor) Court of Cartagena, Colombia, recently prompted the natural language processing tool ChatGPT<sup>1</sup> for information while preparing a judgment in a children’s medical rights case. This judicial officer defended his actions by arguing that Colombian law allowed ‘technologies that made legal work more efficient’.<sup>2</sup> Many other legal professionals are also optimistic that artificial intelligence (AI) will substantially benefit legal practice. However, others have been more cautious in their approach, referring to AI as a ‘legal black box’ due to the opaqueness of the software.<sup>3</sup> Nonetheless, it is generally accepted that AI will radically change the legal profession.<sup>4</sup>

Various AI algorithms for application in legal practice have been developed, including programmes that conduct due diligence and substantive

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<sup>1</sup> For more information on ChatGPT, see OpenAI ‘Introducing ChatGPT’ <https://openai.com/blog/chatgpt> (accessed 18 November 2023); A Sharma ‘The Escalation of ChatGPT: How ChatGPT Will Exert Influence on the Legal Profession?’ (2023) 3 *Jus Corpus Law Journal* 108–110.

<sup>2</sup> PM Parikh, DM Shah, KP Parikh, Judge JM Padilla Garcia ‘ChatGPT, and a Controversial Medicolegal Milestone’ (2023) 75(1) *Indian Journal of Medical Sciences* 3–8; L Taylor ‘Colombian Judge Says He Used ChatGPT in Ruling’ (3 February 2023) <https://www.theguardian.com/technology/2023/feb/03/colombia-judge-chatgpt-ruling#:~:text=Prof%20Juan%20David%20Gutierrez%20of,make%20their%20work%20more%20efficient> (accessed 25 July 2023).

<sup>3</sup> J Soukupova ‘AI-Based Legal Technology: A Critical Assessment of the Current Use of Artificial Intelligence in Legal Practice’ (2021) 15 *Masaryk University Journal of Law and Technology* 285; E Ross & A Milligan ‘What Can ChatGPT Do, and Should We Let It?’ (2023) 34(6) *South Carolina Lawyer* 34–39.

<sup>4</sup> M McKamey ‘Legal Technology: Artificial Intelligence and the Future of Law Practice’ (2017) 22 *APPEAL: Review of Current Law and Law Reform* 49–50.

contract review (Kira Systems, Leverton, eBrevia), timing analysis and billing software (Brightflag, Smokeball), electronic discovery programmes (Everlaw, Exterro), legal analytics and prediction (CARA, Loom Analytics, Ravel Law, Intaspexion), document automation (PerfectNDA), intellectual property (TrademarkNow, SmartShell) and assistance with legal strategy (Lex Machina, Premonition).<sup>5</sup> Generative artificial intelligence (GAI) research platforms that focus on improved efficiency in legal research, such as Lexis Advance and Ross Intelligence, have also entered the market. These programmes typically require a paid subscription and are highly effective in accessing and retrieving structured legal-specific information from a verified database. However, some legal research is also possible by using non-legal specific GAI algorithms like Chat Generative Pre-trained Transformer (ChatGPT),<sup>6</sup> Bing Chat<sup>7</sup> and Google Bard.<sup>8</sup> These chatbots can generate misleading, biased, incorrect, or non-existent information.<sup>9</sup> As a result, the use of non-legal-specific GAI programmes in legal research poses significant challenges to the fundamental function of legal representatives as it potentially distorts the connection between legal authority and the moral demand for accountability.

The use of ChatGPT in legal research has already produced blatantly unethical and eventually harmful outcomes during litigation for a legal practitioner in a foreign jurisdiction. The nature of the transgression and the consequences thereof were reported in the Southern District Court of New York in the case of *Mata v Avianca, Inc.*<sup>10</sup> This note will consider the risks associated with the use of AI when conducting legal research, and more specifically, GAI algorithms, such as ChatGPT, by legal practitioners

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<sup>5</sup> D Faggella 'AI in Law and Legal Practice – A Comprehensive View of 35 Current Applications' (7 September 2021) <https://emerj.com/ai-sector-overviews/ai-in-law-legal-practice-current-applications/> (accessed 25 July 2023).

<sup>6</sup> See <https://chat.openai.com/> (accessed 18 November 2023).

<sup>7</sup> See <https://www.bing.com/new> (accessed 18 November 2023).

<sup>8</sup> See <https://bard.google.com/> (accessed 18 November 2023).

<sup>9</sup> The Bing website states: 'Bing aims to base all its responses on reliable sources – but AI can make mistakes, and third-party content on the internet may not always be accurate or reliable. Bing will sometimes misrepresent the information it finds, and you may see responses that sound convincing but are incomplete, inaccurate, or inappropriate. Use your own judgment and double check the facts before making decisions or taking action based on Bing's responses.' The Bard website states that 'Bard is an experiment and may give inaccurate or inappropriate responses'; see also OpenAI 'Is ChatGPT Biased?' <https://help.openai.com/en/articles/8313359-is-chatgpt-biased> (accessed 18 November 2023).

<sup>10</sup> *Mata v Avianca, Inc.*, 1:22-cv-01461, (S.D.N.Y.).



without verifying the accuracy of the results. There have been some discussions on the potential implications of AI for legal practice in South Africa. A search of the Legal Practice Council (LPC) website<sup>11</sup> for the terms ‘artificial intelligence’ and ‘ChatGPT’ reveals no results. However, some relevant contributions have been published in the South African attorneys’ law journal, *De Rebus*.<sup>12</sup> It is hoped that this article will contribute to the ongoing discussion and that legal professionals will use this article to anticipate and reflect on their potential responses to the ethical dilemmas inherent in AI-generated legal research.

## II *MATA V AVIANCA, INC*, 1:22-cv-01461, (S.D.N.Y.)

The United States District Court, Southern District of New York, was recently called on to adjudicate a matter in which the plaintiff, Roberto Mata (Mata), instituted a civil claim against Avianca Inc (Avianca) for the recovery of damages for personal injuries sustained when a metal serving cart crashed into Mata’s knee on board of an Avianca flight.<sup>13</sup> Peter LoDuca of the law firm Levidow, Levidow and Oberman PC (Levidow) filed a notice of appearance on behalf of Mata.<sup>14</sup> However, Steven Schwartz (Schwartz), also of the Levidow firm, performed all the substantive legal work.<sup>15</sup> The eventual outcome on the merits of this matter is not essential to this discussion. It is sufficient to state that Avianca applied for the dismissal of the complaint as Avianca was in bankruptcy proceedings and subject to the automatic bankruptcy stay.<sup>16</sup> Mata’s claim was, as a result,

<sup>11</sup> <https://lpc.org.za/> (accessed 18 November 2023).

<sup>12</sup> See for instance: M van Eck ‘Pitfalls and Traps for Legal Practitioners when Using ChatGPT’ (1 September 2023) *De Rebus* 11 <https://www.derebus.org.za/pitfalls-and-traps-for-legal-practitioners-when-using-chatgpt/> (accessed 18 November 2023); M van Eck ‘Chatting with ChatGPT: Will Attorneys Be Able to Use AI to Draft Contracts?’ (1 April 2023) *De Rebus* 12 <https://www.derebus.org.za/chatting-with-chatgpt-will-attorneys-be-able-to-use-ai-to-draft-contracts/> (accessed 18 November 2023); M van der Merwe ‘Do Legal Practitioners Truly Understand the Danger of ChatGPT?’ (1 September 2023) *De Rebus* 14 <https://www.derebus.org.za/do-legal-practitioners-truly-understand-the-danger-of-chatgpt/> (accessed 18 November 2023); D Mabasa ‘ChatGPT: Exploring the Risks of Unregulated AI in South Africa’ (1 May 2023) *De Rebus* 17 <https://www.derebus.org.za/chatgpt-exploring-the-risks-of-unregulated-ai-in-south-africa/> (accessed 18 November 2023).

<sup>13</sup> ECF 1; Compl’t para 12; US District Judge Kevin Castel.

<sup>14</sup> ECF 8.

<sup>15</sup> LoDuca May 25 Affidavit paras 3–4 (ECF 32); Schwartz May 25 Affidavit para 4 (ECF 32–1).

<sup>16</sup> 11 U.S.C. § 362(a); LoDuca Affidavit paras 7–8.

time-barred under the Convention for the Unification of Certain Rules Relating to International Carriage by Air (Montreal Convention), and a motion to dismiss was granted.<sup>17</sup>

During the litigation, Schwartz used ChatGPT to supplement and cite case law as authority for the arguments on behalf of the plaintiff. Schwartz also included quotes from the *Varghese* judgment. The case law generated by ChatGPT is *Varghese v China Southern Airlines Co Ltd*, 925 F.3d 1339 (11th Cir. 2019); *Shaboon v Egyptair*, 2013 IL App (1st) 111279-U (Ill. App. Ct. 2013); *Petersen v Iran Air*, 905 F. Supp 2d 121 (DDC 2012); *Martinez v Delta Airlines, Inc*, 2019 WL 4639462 (Tex. App. Sept. 25, 2019); *Estate of Durden v KLM Royal Dutch Airlines*, 2017 WL 2418825 (Ga. Ct. App. June 5, 2017) and *Miller v United Airlines, Inc*, 174 F.3d 366 (2d Cir. 1999). These cases, on initial scrutiny, follow the typical citation format used in the United States. As a result, it is impossible to determine their validity based only on the citations alone. Nonetheless, Schwartz did not independently confirm the existence of the judgments and included them in the plaintiff's 'Affirmation in Opposition to Motion' to dismiss.

Avianca could not locate any of the judgments cited by Schwartz.<sup>18</sup> Avianca, in its 'Reply Memorandum of Law in Support of Motion', in relation to *Varghese v China Southern Airlines*, stated that the judgment could not be located by caption or citation, nor were there any cases bearing any resemblance to *Varghese* in the Federal Reporter using a Westlaw search or PACER. Avianca located a judgment similar to *Varghese* in *Zicherman v Korean Air Lines*, but the court cited by Schwartz did not decide that matter. As a result, the court issued an order requiring Mata's legal representative to file an affidavit with copies of the cases cited. Schwartz again prompted ChatGPT and asked, 'Is [V]arghese a real case?'; 'What is your source?' and 'Are the other cases you provided fake?'. ChatGPT confirmed that the cases existed and could 'be found in reputable legal databases such as LexisNexis and Westlaw'. Schwartz filed a document with scanned copies of screenshots of the second set of results generated by ChatGPT. Nonetheless, the court found that the cases were indeed non-existent and issued an order requiring Schwartz, LoDuca and the Levidow firm to show cause why a sanction should not be imposed against them for citing non-existent cases to the court and submitting to the court copies of non-existent judicial opinions.<sup>19</sup>

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<sup>17</sup> ECF 16; Opinion and Order, p 6.

<sup>18</sup> *Mata v Avianca* (note 10 above), Order to Show Cause (May 4, 2023), ECF No. 31.

<sup>19</sup> Order of 11 April 2023, ECF 29.

The sanctions hearing was held on 8 June 2023, and Castel, USDJ delivered the Opinion and Order on Sanctions on 22 June 2023. The court accepted that legal practitioners may use ‘a reliable artificial intelligence tool for assistance’. Nonetheless, there is an affirmative duty on legal practitioners to ‘conduct a reasonable inquiry’ to ensure the accuracy of their research. Legal practitioners who file arguments ‘without taking the necessary care in their preparation’ ‘abuse ... the judicial system’.<sup>20</sup> The court thus found that the respondents ‘abandoned their responsibilities’ by including non-existent case law in the legal arguments. The deception harmed Mata as the arguments were not based on authentic judicial precedents. It created wasted costs, unnecessarily prolonged the matter and potentially caused reputational harm to judicial officers and the legal system.

The court stated that it has a ‘wide discretion’ to impose an appropriate sanction aimed at specific and general deterrence for this transgression or comparable conduct.<sup>21</sup> No order was made regarding mandatory education for the legal practitioners as Levidow agreed to conduct a mandatory continuing legal education program on technological competence, artificial intelligence, and notarisation practices.<sup>22</sup> The legal practitioners, jointly and severally, were ordered to pay a penalty of \$5 000 to the Registry of the Court.<sup>23</sup> Avianca did not seek a punitive cost order.<sup>24</sup> The legal practitioners were also ordered to notify their client and the judicial officers, whose names were wrongfully cited in the case law provided to the court, of the sanctions imposed in the sanctions hearing.

### III DISCUSSION

Schwartz could have used many AI systems on the market to obtain legal-specific reliable research outcomes, such as Westlaw Precision, Westlaw Edge or Westlaw Classic. Reuters states that its AI products provide ‘a more efficient way to conduct research with tools that deliver more precise researching, expanded KeyCite functionality, and optimised workflow

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<sup>20</sup> The court referred to *Cooter & Gell v Hartmax Corp*, 496 U.S. 384, 398 (1990); *AJ Energy LLC v Woori Bank*, 829 Fed. App’x 533, 535 (2d Cir. 2020) (summary order) (quoting *Gutierrez v Fox*, 141 F.3d 425, 427 (2d Cir. 1998)).

<sup>21</sup> *Mata v Avianca* (note 10 above) paras 28–29.

<sup>22</sup> Corvino declaration paras 14 and 15; declaration of Thomas R Corvino Esq, sole equity partner of Levidow, Levidow and Oberman PC, 6 June 2023, para 15.

<sup>23</sup> *Mata v Avianca* (note 10 above) para 33.

<sup>24</sup> *Mata v Avianca* (note 10 above) (PKC) Opinion and Order on Sanctions, para 31.

capabilities' with 'the most up-to-date and organised collections of case law, statutes, and regulations regularly vetted by a team of expert attorney-editors'.<sup>25</sup> Even more specialised AI legal research-focused algorithms exist, such as ROSS Intelligence, which uses an 'artificially intelligent attorney' called Watson. ROSS is marketed as 'AI-driven products to augment lawyers' cognitive abilities' and '[L]egal research software made for fast and in-depth research'.<sup>26</sup> ROSS is an advanced platform that incorporates the ability to generate search results from natural language queries, and it is further capable of independently generating legal research memoranda based on the search results it generates.<sup>27</sup> LexisNexis also developed a product called Lexis+, described as an 'AI-powered, beginning-to-end legal research solution' that uses 'industry's leading citator, *Shepard's Citation Service*'. This AI system also incorporates 'Brief Analysis' that 'mines archives of legal precedents to find supporting documentation that bolsters your legal argument'.<sup>28</sup>

Schwartz did not use these legal-specific cognitive AI algorithms, as Levidow had only a limited subscription to Fastcase. Schwartz was thus able to search for state court precedents only.<sup>29</sup> He, therefore, used ChatGPT. Numerous articles have provided information on GAI technology's features and operation, with many devoted to ChatGPT.<sup>30</sup> It is sufficient for this article to say that ChatGPT is a conversational GAI language model capable of open-ended discussions and generating human-like text based on inputs from the user.<sup>31</sup> ChatGPT can answer a wide array of general queries on various topics, translate text from one language to another, generate creative writing, draft emails, compose essays, suggest

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<sup>25</sup> See <https://legal.thomsonreuters.com/en/products/westlaw-edge> (accessed 25 July 2023); see in general PE Kohn 'How Artificial Intelligence Is Revolutionizing the Legal Practice' (2016) 43 *LITIG* 12.

<sup>26</sup> See <https://www.rossintelligence.com/about-us> (accessed 18 November 2023).

<sup>27</sup> A Arruda 'CEO of Ross Intelligence, Discusses AI in the Legal Profession' *Northwestern Pritzker School of Law: News* (10 November 2017) <http://www.law.northwestern.edu/about/news/newsdisplay.cfm?ID=892> (accessed 25 July 2023).

<sup>28</sup> See <https://www.lexisnexis.com/community/insights/legal/b/thought-leadership/posts/the-power-of-artificial-intelligence-in-legal-research> (accessed 25 July 2023).

<sup>29</sup> Declaration of Thomas R Corvino Esq, sole equity partner of Levidow, Levidow and Oberman PC, 6 June 2023, para 8.

<sup>30</sup> Ross & Milligan (note 3 above) 34–39; Soukupova (note 3 above) 282–283; AA Reddy 'Legal Implications in Artificial Intelligence' (2022) 5 *International Journal of Law Management and Humanities* 1766.

<sup>31</sup> N Roy & M Maity "'An Infinite Deal of Nothing": Critical Ruminations on ChatGPT and the Politics of Language' *Decision* (March 2023) 50(1) 11 at 12.

improvements to existing texts, and provide explanations and examples to help users understand concepts or learn new topics.<sup>32</sup> ChatGPT does not possess real-time knowledge or the ability to browse the internet, so its responses are based on the information it learned before its knowledge cutoff (at present, September 2021). ChatGPT is trained on large datasets of conversations, allowing it to produce ostensibly intelligent responses through natural language processing. The dataset used to train the system may not accurately reflect reality or contain enough examples for the chatbot to learn from appropriately to generate accurate responses when prompted about unfamiliar topics. These chatbots also rely on statistical methods such as machine learning algorithms, which can introduce bias into their predictions. The inherent limitations of ChatGPT will sometimes produce ‘hallucinations’ that manifest as nonsensical results that do not correspond to reality.<sup>33</sup> Some authors reject the term ‘hallucinations’ as it anthropomorphises machines and potentially obscures the fact that the algorithm fabricates the information. The use of the term ‘fabrications’ is thus preferred. OpenAI is attempting to reduce the prevalence of these fabrications through ‘process supervision’ whereby ChatGPT is rewarded for each correct step of reasoning instead of rewarding only a correct conclusion. Nonetheless, many experts doubt whether this intervention would significantly mitigate this challenge.<sup>34</sup>

ChatGPT will admit that it does ‘not have personal feelings, beliefs, or moral obligations’. It will further acknowledge when prompted that it could ‘generate incorrect or misleading responses’. The ChatGPT interface specifically incorporates a footer stating, ‘ChatGPT may produce inaccurate information about people, places, or facts’.<sup>35</sup> ChatGPT (Free Plan – based on the GPT-3.5 architecture with knowledge cutoff in

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<sup>32</sup> See in general I Dergaa, K Chamari, P Zmijewski & H Ben Saad ‘From Human Writing to Artificial Intelligence Generated Text: Examining the Prospects and Potential Threats of ChatGPT in Academic Writing’ (2023) 40(2) *Biol Sport* 615–622; K Wach, CD Duong, J Ejdy et al (2023) 11(2) ‘The Dark Side of Generative Artificial Intelligence: A Critical Analysis of Controversies and Risks of ChatGPT’ *Entrepreneurial Business and Economics Review* 7–30 <https://doi.org/10.15678/EBER.2023.110201> (accessed 25 July 2023).

<sup>33</sup> Wach et al (note 32 above) 11–13.

<sup>34</sup> H Field ‘OpenAI is Pursuing a New Way to Fight A.I. “Hallucinations”’ (May 2023) <https://www.cncb.com/2023/05/31/openai-is-pursuing-a-new-way-to-fight-ai-hallucinations.html#:~:text=AI%20hallucinations%20occur%20when%20models%20like%20OpenAI%27s%20ChatGPT%20or%20Google,the%20James%20Webb%20Space%20Telescope> (accessed 25 July 2023).

<sup>35</sup> See <https://chat.openai.com/> (accessed 18 November 2023).

September 2021), when prompted whether a legal practitioner should use it for legal research, generated a response confirming that:

*ChatGPT can provide general information and assist in generating text, it is not specifically trained or specialised for legal research. As an attorney, it is recommended to rely on authoritative legal databases, professional resources, and legal experts for accurate and reliable legal research. ChatGPT can complement your research process by providing general background information, clarifying concepts, or assisting with simple queries, but it should not be the sole source for legal advice or complex legal research.*

The writer, on 12 July 2023, reproduced the prompt to ChatGPT by Schwartz and requested the chatbot to '[W]rite a complete summary of the *Varghese v. China Southern Airlines Co., Ltd.*, 925 F.3d 1339 (11th Cir. 2019) case'. ChatGPT generated the following response:

*Varghese v. China Southern Airlines Co., Ltd.*, 925 F.3d 1339 (11<sup>th</sup> Cir. 2019) is a significant legal case decided by the United States Court of Appeals for the Eleventh Circuit. The case involves issues of personal jurisdiction and the applicability of the Montreal Convention in an international air travel dispute. The plaintiff, Varghese, purchased a ticket from China Southern Airlines for a flight from the United States to India with a layover in China. However, during the layover, Varghese fell and sustained injuries while attempting to retrieve his checked baggage. Varghese subsequently filed a lawsuit in a federal district court in Florida, alleging negligence and seeking damages from China Southern Airlines. The central question in this case was whether the federal Court had personal jurisdiction over China Southern Airlines, a Chinese airline, in a lawsuit filed in Florida. The district court dismissed the case, ruling that it lacked personal jurisdiction over the airline because the incident occurred in China, and China Southern Airlines did not have sufficient contacts with Florida. On appeal, the Eleventh Circuit affirmed the district court's decision, but on different grounds. The appellate Court focused on the applicability of the Montreal Convention, an international treaty governing liability in air travel accidents. The Court held that the Montreal Convention's exclusive jurisdiction provision precluded the exercise of personal jurisdiction by the US court. According to the Montreal Convention, a passenger injured during international air travel can only bring a lawsuit in one of the following jurisdictions: the defendant's principal place of business, the defendant's domicile, the ticketed destination, or the passenger's principal and permanent residence. Since Varghese was an Indian resident, the Eleventh Circuit determined that the appropriate forum for his lawsuit would be India, not the United States. The Court rejected Varghese's argument that China Southern Airlines waived its jurisdictional defense by participating in US litigation and conducting business in the United States. The Court held that the defendant's contacts within the United States were irrelevant to the issue of personal jurisdiction under the Montreal Convention. Therefore, the Eleventh Circuit affirmed the district court's dismissal of Varghese's lawsuit, concluding that the US court lacked personal jurisdiction over China Southern

*Airlines due to the Montreal Convention's exclusive jurisdiction provision. This case clarifies the application of the Montreal Convention and highlights the limitations on personal jurisdiction in international air travel disputes.*

After that, ChatGPT was prompted with a statement that '[T]his judgment does not seem to be reliable, and I could not find it. Confirm that the judgment exists'. ChatGPT responded by stating that:

*I apologise for the confusion. Upon reviewing my response, I made an error in referencing the case 'Varghese v. China Southern Airlines Co., Ltd., 925 F.3d 1339 (11th Cir. 2019)'. I apologise for any inconvenience caused. However, I must clarify that as an AI language model, I don't have direct access to real-time data or the ability to browse the internet. I can only provide information based on my training, which was completed in September 2021. It's possible that the case you mentioned may not be accurately represented or does not exist. To obtain accurate and up-to-date information on legal cases, I recommend consulting official legal databases, court records, or legal professionals who can provide reliable information on specific cases.*

Again, ChatGPT was asked, '[W]hy did you initially state that the judgment existed?' ChatGPT generated the following response:

*I mistakenly assumed the existence of a case with the information you provided. As an AI language model, I generate responses based on patterns and information in my training data. However, I don't have real-time access to external sources, such as legal databases or court records. Therefore, I must rely on the information I have been trained on, which is accurate up until September 2021. [. . .] It's always best to verify the existence and details of a specific legal case through reliable legal sources or consult with legal professionals who have access to current and accurate information.*

#### IV IMPLICATIONS OF THE JUDGMENT

Understandably, legal professionals may develop trust in AI when the existing literature assures them that '[A]ccuracy and precision, the tool which is found only in an adroit lawyer, can be found in abundance in an Artificial Intelligence'. These publications further suggest that the 'accuracy and precision of AI enables lawyers to be more confident while providing their clients with advice on a particular case' and that the 'work done by an Artificial Intelligence is unerringly precise'.<sup>36</sup>

Legal practitioners must, however, be cautious despite these assurances. The South African Code of Conduct for Legal Practitioners

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<sup>36</sup> D Bhora & K Shravan 'Demystifying the Role of Artificial Intelligence in Legal Practice' (2019) 8 *Nirma University Law Journal* 1 4.



(‘the LPCC’)<sup>37</sup> states that legal professionals may ‘not abuse or permit abuse of the process of court or tribunal and shall act in a manner that shall promote and advance the efficiency of legal process’.<sup>38</sup> Legal practitioners must accordingly uphold the highest standards of honesty and integrity<sup>39</sup> and employ their utmost efforts to perform their work competently and promptly, staying reasonably informed about legal advancements, relevant laws and regulations, legal theory, common law, and legal practices.<sup>40</sup> These obligations are also found in foreign jurisdictions. For example, the American Bar Association Model Rules of Professional Conduct state that legal practitioners must ‘keep abreast of changes in the law and its practice, including a reasonable understanding of the benefits and risks associated with technology the lawyer uses to provide services to clients’. These Rules also prescribe ‘continuing study and education’ and compliance ‘with all continuing legal education requirements to which the lawyer is subject to remain apprised of any developments in technology that impact the practice of law, failing which may constitute a violation of the ethical rules’.<sup>41</sup>

The reasonable legal practitioner must further ensure that any tool used for legal research is appropriate for the purpose. Legal practitioners must also guard against unintentionally submitting sensitive or confidential data when prompting an AI system. These duties on legal practitioners incorporate an obligation to diligently ‘supervise’ those to whom legal practitioners delegate work to ensure that the conduct of everyone contributing to the legal service rendered is compatible with the relevant professional obligations of the legal practitioner. The failure to supervise those who interact with AI algorithms in legal practice may, as a result, also produce unethical results that may be attributed to the legal practitioner personally.

Legal practitioners are expected to protect and advance their clients’ proper and lawful legal interests while supporting judicial officers and facilitating efficient, effective, expeditious and fair hearings.<sup>42</sup> As an

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<sup>37</sup> GN 168 GG 42364 of 28 March 2019; GN R198 GG 42364 of 23 March 2019, published under the Legal Practitioners Act 28 of 2014 (LPCC).

<sup>38</sup> LPCC, Rule 60.1; 3.14 and 3.15.

<sup>39</sup> LPCC, Rule 3.1.

<sup>40</sup> LPCC, Rule 3.13.

<sup>41</sup> American Bar Association Model Rules for Professional Conduct, [https://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/) (accessed 25 July 2023); see also Comment 6 to Rule 1.1, RPC, Rule 407, SCACR.

<sup>42</sup> The South African Norms and Standards for the Performance of Judicial Functions GN R147 GG 37390 of 28 February 2014, para 5.1(ii) and the South



extension of their professional obligations, legal practitioners are expected to assist the court by making it aware of any material facts and decided cases, even where this disclosure may be detrimental to their client's case. This duty logically implies that this information must be reliable, allowing a judicial officer to accept the validity of the submissions provided by a legal practitioner.<sup>43</sup> The legal profession may never deceive the court and must be honest and truthful in their dealings with each other.<sup>44</sup> Van Blerk JA in *Ex Parte Swain* specifically commented that:

..., it is of vital importance that when the Court seeks an assurance from an advocate that a certain set of facts exists the Court will be able to rely implicitly on any assurance that may be given. The same standard is required in relations between advocates and between advocates and attorneys. The proper administration of justice could not easily survive if the professions were not scrupulous of the truth in their dealings with each other and with the Court. The applicant has demonstrated that he is unable to measure up to the required standard in this matter.<sup>45</sup>

The use of unverified GAI-generated results during litigation may adversely affect the ability of judicial officers to 'deliver quality justice' by 'applying the appropriate law in a fair hearing'.<sup>46</sup> This duty requires that judicial officers locate and follow legal precedent to determine the best information about the outcome of a particular case.<sup>47</sup> The court thus basically uses pre-existing rules to resolve new disputes.<sup>48</sup> However, filing non-existent case law, whether generated by GAI or not, can contaminate the legal precedent system and undermine the integrity of

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African Judicial Code of Conduct ('the JCC') article 10(1)(c), issued in 2012, pursuant to the Judicial Service Commission Act 9 of 1994, section 12, GN R865 GG 35802 of 18 October 2012; see also *Chetty v Perumaul* (AR313/2020) [2021] ZAKZPHC 66 (21 September 2021) para 53.

<sup>43</sup> *Ex Parte Swain* 1973 (2) SA 427 (N) 434H.

<sup>44</sup> *S v Hollenbach* 1971 (4) SA 636 (NC) 638E–G; *Society of Advocates of Natal v Merret* 1997 (4) SA 374 (N) 383F–G.

<sup>45</sup> *Swain* (note 43 above) 434H.

<sup>46</sup> South African Norms and Standards for the Performance of Judicial Functions (note 42 above); see A van Coller 'These Are Not the Decisions You Are Looking for – the Courts' Duty to Follow Binding Precedent' (2023) 38(1) *Southern African Public Law*.

<sup>47</sup> BJ Nestor 'Revisiting Smith: Stare Decisis and Free Exercise Doctrine' (2021) 44 *Harvard Journal of Law & Public Policy* 408.

<sup>48</sup> M Sinclair 'Precedent, Super-Precedent' (2007) 14 *George Mason Law Review* 370; D Lyons 'Formal Justice and Judicial Precedent' (1985) 38 *Vanderbilt Law Review* 495.

judicial adjudication. The potential for legal practitioners to introduce non-existent case law with the negligent use of GAI may thus result in an exponential increase in the workload of judicial officers as they will be compelled to verify the authenticity of any case law cited during litigation. This consequence will further complicate the relationship between judicial officers and legal practitioners. It may thus be prudent to impose a duty on legal practitioners to inform the court when AI is used in any matter submitted for adjudication. Some courts in foreign jurisdictions have already moved to formalise this reporting requirement. Judge Brantley Starr of the Northern District of Texas issued a standing ‘Mandatory Certification Regarding Generative Artificial Intelligence’ order that requires all legal practitioners to file a certificate setting out any use of GAI in court filings. This order requires that:

*All attorneys and pro se litigants appearing before the Court must, together with their notice of appearance, file on the docket a certificate attesting either that no portion of any filing will be drafted by generative artificial intelligence (such as ChatGPT, Harvey.AI, or Google Bard) or that any language drafted by generative artificial intelligence will be checked for accuracy, using print reporters or traditional legal databases, by a human being.*<sup>49</sup>

This intervention was deemed necessary as GAI demonstrates a propensity to fabricate information, quotes and citations and may incorporate unknown or unanticipated biases. The order by Judge Starr has already been followed in a standing order by the US District Court for the Northern District that requires ‘any party using any generative AI tool in the preparation of drafting documents for filing with the Court must disclose in the filing that AI was used’.<sup>50</sup>

## V CONCLUSION

As a research resource, AI aims to improve legal practice by automating, accelerating, and enhancing research. However, the use of GAI by the legal profession raises significant ethical concerns, primarily where it relies on the responses generated without verifying the accuracy of the output. There are significant risks of flawed and misleading results for legal practitioners who

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<sup>49</sup> In re: Mandatory Certification Regarding Generative Artificial Intelligence, Misc. Order No. 2 (N.D. Tex. 2023).

<sup>50</sup> Standing Order for Civil Cases Before Magistrate Judge Fuentes at 2 (N.D. Ill. May 31, 2023) (Requiring disclosure of the use of generative AI, including the tool and the manner in which it was used, and warning that reliance on an AI tool may not constitute reasonable inquiry under Federal Rule of Civil Procedure 11).

use GAI as a research or analytical tool without a proper understanding and validation of the information generated. The consequences of GAI use without verification can compromise the integrity of legal practice, as shown in *Mata v Avianca, Inc.* Legal practitioners must thus be aware of the benefits and limitations of AI tools, as any ethical imperatives with the use of AI remain the responsibility of the legal practitioner. AI will, therefore, enhance legal research and efficiency only if used responsibly and ethically.

Legal practitioners must understand and adhere to legal ethics and demonstrate the required moral inclination that generates content-specific ethical outcomes. However, the formal rules of professional conduct alone will no longer provide all the necessary resources to ensure ethical practice. Legal practitioners must now also be familiar with technological developments affecting legal practice. These obligations are specifically relevant during litigation, where the efforts of legal practitioners, as court officers, are vital in the proper administration of justice. A legal practitioner who automatically accepts the results generated by an AI program may be guilty of unethical conduct that brings the legal profession into disrepute.<sup>51</sup> Legal practitioners must thus develop and maintain an appropriate understanding of the AI they use and must be competent to review the output generated to ensure competent legal representation to clients. The impact of AI on legal practice thus necessitates ongoing reflection, adaptation, and the integration of ethical considerations into the professional conduct of all legal practitioners.

The potential for adverse outcomes emanating from the use of AI by legal professionals will soon require Practice Directives by the courts and proactive amendments or additions to the LPPC to regulate the use of AI by the legal profession. These regulations may result in the filing of mandatory certifications disclosing any use of AI in court documents and disclosures to clients in legal services. The ongoing improvements in AI will also require continuing education to ensure that legal professionals adequately adhere to their professional obligations.

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<sup>51</sup> LPPC, Rule 3.15.

# LAW CLERKS' ORIGINS AND THEIR DUTIES

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## I INTRODUCTION

In the first exposition on law clerks and their role in South Africa, the learned contributing authors of a work that surveys the South African judiciary,<sup>1</sup> Corder and Brickhill, contend that unlike in the United States of America whence the modern institution of law clerks originated, the 'role of law clerks has received very little, *if any*, attention in South Africa.'<sup>2</sup>

This article argues, to the contrary that the role of law clerks in South Africa has actually received plentiful attention both relatively recently<sup>3</sup> and in the past, but to be fair, these accounts are typically found in anecdotal, biographical and reminiscent works.<sup>4</sup> Nevertheless, it is to Corder and Brickhill's beckoning that this article responds. Like in America, quite a number of current<sup>5</sup> and former prominent South African judges had

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<sup>1</sup> C Hoexter & M Olivier (contributing editors) *The Judiciary in South Africa* (2014). Cf earlier works on the judiciary in South Africa most notably: H Corder *Judges at Work: The role and Attitudes of the South African Appellate Judiciary 1910–50* (1984); CF Forsyth *In Danger for Their Talents: A Study of the Appellate Division of the Supreme Court of South Africa from 1950–80* (1985); and AE van Blerk *Judge and Be Judged* (1988).

<sup>2</sup> H Corder & J Brickhill 'Constitutional Court' in Hoexter & Olivier (note 1 above) 369–374. (My emphasis.)

<sup>3</sup> B Wunsch 'Treating Judges Properly' (2000) 13(1) *Advocate* 33. See also generally, A Price & M Bishop (eds) and G Bradfield (general editor) 'A transformative Justice: Essays in Honour of Pius Langa' 2015 *Acta Juridica*, the most recent South African *festschrift* in honour of the country's late nineteenth Chief Justice with contributions predominantly by his former clerks, admittedly published after Corder & Brickhill (note 2 above).

<sup>4</sup> See the Hon CP Bresler *Tilt the Sack* (1965), ch 9 entitled 'Apprenticeship with the Judges'; I Goodman *Judges I Have Known* (1969), ch 17 entitled 'Clerk to Chief Justice', and M Diemont *Brushes with the Law* (1995).

<sup>5</sup> For instance, Judge Fayeza Kathree-Setiloane, who clerked for Justice Yvonne Mokgoro in the inaugural Constitutional Court in 1995, Judge Violet Phatshoane who was a judge's researcher at the Supreme Court of Appeal in 1996, Judge Mokgere Masipa, who clerked in the Labour Court and Labour Appeal Court from 1998 to 2000 and Judge Susannah Cowen, who clerked for Chaskalson P (later CJ) in the Constitutional Court from 1999 to 2000.

clerkship backgrounds,<sup>6</sup> revealing as it does the early existence of the institution in the South African superior courts<sup>7</sup> under the interchanged appellations – judge’s clerk, judge’s secretary or registrar – over the years. That, however, was well before the *formalisation* of the institution by the 1995 Constitutional Court’s adoption of the institution of law clerks – which largely resembles the United States Supreme Court model.<sup>8</sup> The Constitutional Court’s employment of law clerks for a single year also has its origins in the US Supreme Court’s model derived from that court’s year-round court term which, by law, begins on the first Monday in October and lasts until the first Monday in October of the next year, during which approximately 5 000 to 7 000 new cases are filed at the court.<sup>9</sup>

This article begins with an attempt at defining the term ‘law clerk’ followed by a discussion of the origins of the institution of law clerks in the United States of America. This is followed by a brief discussion of the form the institution took in its formative years in the South African superior courts having had a similar evolution to the development of the institution in the United States of America. The article then looks at the process of selecting and appointing law clerks (law researchers) to the Supreme Court of Appeal, and their duties and responsibilities. Lastly, the article deals with what is expected of law clerks in South Africa and the qualities that they must possess and cultivate to be successful.

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<sup>6</sup> See Corder (note 1 above) 25–33; table 1 below setting out a biographical summary of former judges of appeals’ careers before their appointments as judges. See also Forsyth (note 1 above), figure 1 at 8–11; AA Roberts *A South African Legal Bibliography* (Pretoria 1942), and the works cited in note 4 above in respect of Justices Bresler, Tindall and Diemont.

<sup>7</sup> The term ‘superior court’ is adopted from the Superior Courts Act 10 of 2013 (which came into effect on 23 August 2013).

<sup>8</sup> Corder & Brickhill (note 2 above) 370 note that ‘under the guidance of Arthur Chaskalson, it was agreed that judges of the Constitutional Court would, like many of their counterparts around the world, have the use of clerks. It is the only court in the country to have law clerks for all judges.’ (My emphasis.) In fact, according to the website of the Constitutional Court, each Constitutional Court judge has two South African law clerks and may have one foreign law clerk, which model of having up to three clerks per judge most closely resembles that of the US Supreme Court. See the Constitutional Court website at <http://www.constitutionalcourt.org.za> (accessed 27 February 2015).

<sup>9</sup> See US Supreme Court website at <https://www.supremecourt.gov/about/courtatwork.aspx> (accessed 20 October 2023).

## II WHAT IS A LAW CLERK?

Genevieve Coonan notes that, '[p]ersons familiar with American law will instantly recognise the term [law clerk] as connoting those shadowy *individuals who are trained in the law to assist judges in researching legal opinions.*'<sup>10</sup> This description captures two universal features for the role of modern law clerks, namely (a) individuals trained in law, and (b) who assist judges with research.

In most expositions and commentaries on law clerks, including when judicially considered, the tendency has been to describe them in relation to their role within the judicial process.

Law clerks may be defined as the learned or professional assistants of judges, who provide judges with independent research on discrete points of law for cases before the courts. In the United States of America, studies have shown law clerks to be influential in the formation of court decisions.<sup>11</sup> Law clerks also assist the judges in the judgment-writing process.

So, unlike the clerk of court, 'staff clerk' or 'courtroom deputy' in other jurisdictions, who are permanent administrative court staff with statutorily defined duties,<sup>12</sup> law clerks assist judges in their preparation for hearings and in the decision-making process. Law clerks thus assist their judges in core judicial functions. Law clerks are usually recent law graduates who performed at or near the top of their class or are recently admitted lawyers with some legal practice experience. They fill this coveted, prestigious and unique apprenticeship<sup>13</sup> before pursuing further successful legal careers.

In the first judicial consideration on the role of clerks in America, the Fifth Circuit Court of Appeals in *Fredonia Broadcasting Corp*<sup>14</sup> held as follows in the context of the obvious impropriety of the involvement of

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<sup>10</sup> G Coonan 'The Role of Judicial Research Assistants in Supporting the Decision-making Role of the Irish Judiciary' (2006) 6 *Judicial Studies Institute Journal* 171 at 173 (my emphasis).

<sup>11</sup> See *Parker v Connors Steel Co*, 855 F.2d 1510, (11th Cir.1988) 1525. See also L Baum *The Supreme Court* 6 ed (1998) 20, where the learned author notes that 'of all members of the support staff [of the US Supreme Court], law clerks have the most direct impact on the Court's decisions.'

<sup>12</sup> See section 11 of the Superior Courts Act 10 of 2013 and section 13 of the Magistrates' Courts Act 32 of 1944. See 5 *Lawsa* 3 ed (2013) paras 17 and 180; and 3(2) *Lawsa* 2 ed (2006) para 479. For more on these officers in America see S Flanders & J Goldman 'Screening Practices and the Use of Para-judicial Personnel in the U.S. Courts of Appeals: A Study in the Fourth Circuit' in M Tonry & RA Katzmann (eds) *Managing Appeals in Federal Courts* (1988) 641–656.

<sup>13</sup> Corder & Brickhill (note 2 above) 370.

<sup>14</sup> *Fredonia Broadcasting Corp v RCA Corp*, 569 F.2d 251 (5th Cir. 1978).

a former clerk in litigation which he had come upon during his clerkship stint for the trial judge (at 255):

*In order fully to appreciate the role of a law clerk and to evaluate the taint of impropriety that occurred in this case, we consider it appropriate to note briefly the role of law clerks in our judicial system. . . . The law clerk has no statutorily defined duties but rather performs a broad range of functions to assist his judge. A judicial clerkship provides the fledgling lawyer insight into the law, the judicial process, and the legal practice. The association with law clerks is also valuable to the judge; in addition to relieving him of many clerical and administrative chores, law clerks may serve as sounding boards for ideas, often affording a different perspective, may perform research, and may aid in drafting memoranda, orders and opinions. (Footnote omitted.)*

The learned judge went on to say the following at 256:

*This general knowledge and experience is an invaluable asset to the law clerk and his subsequent utilization of the knowledge is to be encouraged. See generally K. Llewellyn, *The Common Law Tradition: Deciding Appeals*, 321–23 (1960). A law clerk, by virtue of his position, is obviously privy to his judge's thoughts in a way that the parties cannot be. We are not holding that a former law clerk may never practice before the judge for whom he clerked. Such a holding would clearly be unwarranted and would cast an undue burden on the law clerk. Moreover, it would hinder the courts in securing the best qualified people to serve as law clerks. What is offensive here is that the district judge seemed to countenance the notion that the law clerk could improperly use the specific knowledge gained from working with him on this particular case. The impartiality of a trial judge is seriously open to question when the judge refuses to recuse himself after being made aware that his former law clerk is actively involved as counsel for a party in a case in which the law clerk participated during his clerkship.*

Post-*Fredonia*, the circuit courts described law clerks in *Hall v Small Business Administration* as 'sounding boards for tentative opinions' of the judges they serve and confirmed that clerks are 'privy to the judge's thoughts in a way that neither parties to the lawsuit nor his most intimate family members may be.'<sup>15</sup> In *Oliva v Heller*<sup>16</sup> it was stated that '[l]aw clerks are simply extensions of the judges at whose pleasure they serve.' In *In re Allied-Signal Inc.*,<sup>17</sup> it was found that 'the relationship of clerk to judge itself is close enough that one might find an appearance of undue influence' where

<sup>15</sup> *Hall v Small Business Administration*, 695 F.2d 175 (5th Cir. 1983) 179.

<sup>16</sup> *Oliva v Heller*, 839 F.2d 37 (2d Cir. 1988) 40.

<sup>17</sup> *In re Allied-Signal Inc, et al, Petitioners*, 891 F.2d 967 (1st Cir. 1989).

there existed 'a fairly close relation between clerk and party'. Supporting this notion that an apprehension of bias extends to clerks due to their proximity to the decision-making process of the courts, in *Parker v Connors Steel Co*,<sup>18</sup> the court unequivocally held: 'We recognise the importance that some law clerks play in the decisional process and it is for this reason that a clerk is forbidden to do all that is prohibited to the Judge.'

### III HISTORICAL BACKGROUND

By all notable accounts,<sup>19</sup> the modern institution of judicial clerkship was conceived and introduced by Justice Horace Gray when, as Chief Justice of the Massachusetts Supreme Judicial Court, he began – using his own funds<sup>20</sup> and of his own accord – from 1875,<sup>21</sup> the practice of annually employing a graduate from his *alma mater* Harvard Law School, to assist him with his chamber work. Gray's uncharacteristic yet original appellation for his chamber assistant was 'secretary'.<sup>22</sup>

<sup>18</sup> *Parker v Connors Steel Co* (note 11 above) 1525.

<sup>19</sup> See *Fredonia Broadcasting Corp* (note 14 above). See also PR Baier 'The Law Clerks: Profile of an Institution' (1973) 26 *Vanderbilt Law Review* 1125–1177; FM Coffin *On Appeal: Courts, Lawyering, and Judging* (1994) 71; JG Kester 'The Law Clerk Explosion' (1995) 3 *The Long Term View: A Journal of Informed Opinion* 20; CE Stewart 'From the President' in *The Bench* (the magazine of the American Inns of Court) September/October (2014) 2; MC Miller 'Law Clerks and their Influence at the U.S. Supreme Court: Comments on Recent Works by Peppers and Ward' (2014) 39 *Law & Social Inquiry* (journal of the American Bar Foundation) 741–757. Also see the Federal Judicial Center website on the history of the Federal Judiciary, court officers, staff and law clerks at [http://www.fjc.gov/history/home.nsf/page/admin\\_03\\_11.html](http://www.fjc.gov/history/home.nsf/page/admin_03_11.html) (accessed 19 June 2015). Cf JB Oakley & RS Thompson *Law Clerks and the Judicial Process: Perceptions of Qualities and Functions of Law Clerks in American Courts* (1980) 11 fn 2.12, where it is suggested that it might have actually been Professor John Chipman Gray who first conceived the idea.

<sup>20</sup> Coffin (note 19 above) 71.

<sup>21</sup> Although Justice Gray assumed office at the helm of the Massachusetts Supreme Court as Chief Justice in 1873, it was only two years later, in 1875, overwhelmed by both the judicial and administrative duties of his office, that with the help of his half-brother he obtained a law clerk to assist him in his chamber and judicial administrative workload and responsibilities. See (b) *Invention of innovation, opportunity and circumstance* below.

<sup>22</sup> Baier (note 19 above) 1130, where the learned author notes that 'clerkship owes its earliest appellation, "secretary," to the terminology of Justice Gray.'



(a) *The father of modern judicial clerkship*<sup>23</sup>

Horace Gray Jr was born in Boston on 24 March 1828 to an affluent family of shipping merchants.<sup>24</sup> He graduated from Harvard College in 1845 at the age of seventeen after which he travelled extensively in Europe where he is said to have been ‘reviewing scenes already familiar to his mind from his wide reading and exhaustive study of history and general literature’.<sup>25</sup> He then returned home to enter Harvard Law School in 1848. According to Hampton Carson,<sup>26</sup> after Gray graduated from the Harvard University Law School in 1849, ‘[h]e subsequently read law under the direction of Judge Lowell,<sup>[27]</sup> and obtained admission to the Bar in 1851.’<sup>28</sup> He was appointed an Associate Justice of the Supreme Judicial Court of Massachusetts. He was promoted in 1873, to be Chief Justice of that same court, succeeding Chief Justice Reuben Chapman when the latter retired.<sup>29</sup>

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<sup>23</sup> Snyder prefers to make Justice Gray an ancestor of the institution by calling him ‘the grandfather of the modern clerkship’ implying that either Justice Brandeis or perhaps Professor Frankfurter was the father of the institution. See B Snyder ‘The Judicial Genealogy (and Mythology) of John Roberts: Clerkships from Gray to Brandeis to Friendly to Roberts’ (2010) 71 *Ohio State Law Journal* 1149–1243 at 1155.

<sup>24</sup> R Bloom ‘The Origin of the Supreme Judicial Court Law Clerk System’ on the Law Clerk’s Society of the Supreme Judicial Court website at <http://sjclawclerks.sociallaw.com/about-us/law-clerk-history/> (accessed 19 June 2015).

<sup>25</sup> *Horace Gray, Jr.* 182 Mass. 613 (1903).

<sup>26</sup> HL Carson *The Supreme Court of the United States: Its History and its Centennial Celebration* (1892) 524–527.

<sup>27</sup> John Lowell (1824–1897) was a ninth generation Lowell and second generation American federal judge from that prominent American family. He graduated from Harvard College in 1843 with a Bachelor of Arts degree (AB) and obtained his postgraduate law degree from Harvard Law School in 1845. He was admitted to the Bar in 1846 and commenced to practise law from 1846 to 1865, during which time he was also editor of the *Monthly Law Reporter* from 1856 to 1860. On 11 March 1865, he was nominated by President Abraham Lincoln to a seat on the US District Court for the District of Massachusetts, and he left that court for another judicial appointment to the US Circuit Courts for the First Circuit in December 1878. He resigned from the latter court in May 1884 after he had served on the bench for a combined period of 20 years when he returned to private practice in Boston where he practised law until his death in May 1897. See DR Lowell *The Historic Genealogy of the Lowells of America from 1639 to 1899* (1899) 218–219.

<sup>28</sup> Carson (note 26 above) 525. It is important to note that Justice Gray served his legal apprenticeship reading in a sitting judge’s chambers, as his experience there must have played a role in inspiring his conception of the institution when he became chief justice.

<sup>29</sup> Carson (note 26 above) 525.

Justice Gray had an exceptional judicial career and reputation, both as a Massachusetts State judge, during which period he scribed opinions which can be found in 43 volumes of the *Massachusetts Reports*,<sup>30</sup> and when he became an Associate Supreme Court Justice from January 1882 and for the succeeding twenty years.<sup>31</sup> His opinions while in that court are contained in 81 volumes of the *U.S. Supreme Court Reports*.<sup>32</sup>

However, it was during Gray's chief justiceship that he hired young Louis D Brandeis,<sup>33</sup> who later became a successful Boston attorney<sup>34</sup> and thereafter was appointed as an Associate Justice of the US Supreme Court from 1916 to 1939.<sup>35</sup> Brandeis had made it abundantly clear even then that 'a prototype of the modern law clerk [had] existed in Gray's chambers.'<sup>36</sup> In letters to his friends and family in his first week of working for Gray, Brandeis wrote:

*My position with the Ch.J is pleasanter than my fondest hopes had pictured. None of the unpleasant peculiarities for which Judge Gray is noted have appeared in my intercourse with him. His arrogance and impatience are apparently the judicial wig & gown, for off the bench, there is no sign of them. On the contrary, he is the most affable of men, patiently listening to suggestions and objections & even contradiction. I have worked with him daily since Tuesday and have enjoyed most of the mornings keenly. Our mode of working is this. He takes out the record & briefs in any case, we read them over, talk about the points raised, examine the authorities' arguments – then he makes up his mind if he can, marks out the line of argument for his opinion, writes it, & then dictates it to me.*

<sup>30</sup> Carson (note 26 above) 525–526.

<sup>31</sup> Bloom (note 24 above).

<sup>32</sup> Carson (note 26 above) 525–526.

<sup>33</sup> Brandeis had written about his acceptance of this position to his Harvard classmate Walter Bond Douglas, saying: 'I have accepted a position with Ch. Justice Gray as his Secty & Assistant which gives me a salary about \$500 – does not take very much of my time, will be very instructive and is deemed by Bradley Thayer & Langdell very valuable as a stepping stone. Most of the work for the C.J. falls in summer so that it will not interfere with the practice.' As noted by Snyder, Brandeis said this as he in fact clerked and practised simultaneously. See Snyder (note 23 above) 1159.

<sup>34</sup> TC Peppers *Courtiers of the Marble Palace: The Rise and Influence of the Supreme Court Law Clerk* (2006) 44–45. See also WH Rehnquist *The Supreme Court* (2004) 110.

<sup>35</sup> MI Urofsky *Louis D. Brandeis: A Life* (2009) 39–48.

<sup>36</sup> A Ward & DL Weiden *Sorcerers' Apprentices: 100 Years of Law Clerks at the United States Supreme Court* (New York, 2006) 33–34.

*But I am treated in every respect as a person of co-ordinate position. He asks me what I think of his line of argument and I answer candidly. If I think other reasons better, I give them; if I think his language is obscure, I tell him so; if I have any doubts I express them and he is very fair in acknowledging a correct suggestion or disabusing one of an erroneous idea.*

*In these discussions & investigations I shall learn very much. Many beautiful points are raised and must be decided. The Ch. Justice has a marvellous knowledge of Mass. decision[s] & Statutes and I expect much advantage in this respect.<sup>37</sup> (My emphasis.)*

Brandeis clerked for nearly two terms until Gray was elevated to the US Supreme Court. Gray himself having benefited from the ‘dualistic legal training’ of a formal law school education and an apprenticeship of ‘exacting study with Judge Lowell’<sup>38</sup> which ‘[t]horoughly trained and equipped’<sup>39</sup> him through reading law<sup>40</sup> in a sitting judge’s chambers, it was therefore natural for him to *refine* this early apprenticeship into the modern law clerk institution.<sup>41</sup> Gray therefore did not completely invent the institution. He after all apprenticed with Judge Lowell and there are some suggestions that the formation of the institution is attributable to the Bar traditions of devilling and employing a junior, but it is on the *modern* institution of law clerks that this contribution focuses.

‘Before Gray, judges hired non-lawyers for stenographic and administrative duties.’<sup>42</sup> But, it was Justice Gray – ‘always a more methodical worker than a quick one’<sup>43</sup> – who first requested his clerks to draft opinions for cases, ‘although the drafts were only used to stimulate Gary’s own writing.’<sup>44</sup> He had been a ‘scholar of note, able to hold his own

<sup>37</sup> Snyder (note 23 above) 1159.

<sup>38</sup> *Horace Gray, Jr.* (note 25 above).

<sup>39</sup> *Horace Gray, Jr.* (note 25 above).

<sup>40</sup> ‘Reading the law’ seems to have been a common apprenticeship for most young aspirant lawyers of Gray’s time, preceding entry to the Bar. See Ward & Weiden (note 36 above) 26–28.

<sup>41</sup> Ward & Weiden (note 36 above) 29. These learned authors acknowledge despite their thesis on the origins of the institution of law clerks that ‘[i]t is interesting to note that the originator of the law clerk was also the first justice to graduate from law school and read the law as an apprentice. Gray graduated from Harvard Law School in 1849 and then read the law with Judge John Lowell and at the firm of Sohier and Welch. It may be that Gray’s dualistic legal training – formal law school education coupled with experience as an apprentice – influenced and coloured his use of the law clerk.’

<sup>42</sup> Snyder (note 23 above) 1157.

<sup>43</sup> Oakley & Thompson (note 19 above) 11.

<sup>44</sup> This came from Williston’s recollections of his clerkship with Gray noted by Ward & Weiden (note 36 above) 33–34, where it is further noted that,

intellectually with his clerks, and so to sift through their ideas and to adopt what he felt to be useful without the development of dependence.<sup>45</sup> Gray's model of clerkship broke new ground and it was innovative. It earned him due credit for modernising the institution through its present mainstay hallmarks as he:<sup>46</sup>

- (a) hired recent law graduates for a one-year term rather than on a permanent basis;<sup>47</sup>
- (b) relied on the recommendations of a law professor to select his clerks, thereby opening another avenue for symbiotic relations between the bench and academia; and
- (c) not only relied on his clerks for secretarial work such as taking dictation but also for substantive input on his opinions.

But what exactly caused Justice Gray to retain bright and promising law graduates from his *alma mater* out of his own pocket? Was the institution a coping mechanism devised by Justice Gray in 'response to the increasing workload' to make his judicial work manageable? Or was it the Justice's urge to mentor young talent, given Carson's<sup>48</sup> narrative that Gray was 'ambitious to preserve the precious stores of knowledge' and keen to inspire 'others to emulate his example'? The answer seems to lie somewhere in a combination of all these influences. Ward and Weiden argue that the law clerk institution was not a response to the growing workload of the court, but that it instead 'reflected the legal apprenticeship/mentor model of legal education that had been imported from England'.<sup>49</sup> It is not clear why the

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'Gray also debated [with] his clerks regarding the cases before the Court, and [he] expected the clerks to defend their views.' This usage of clerks as correctly noted by Ward and Weiden 'foreshadowed the way in which law clerks later developed.'

<sup>45</sup> Oakley & Thompson (note 19 above) 13.

<sup>46</sup> Oakley & Thompson (note 19 above) 13.

<sup>47</sup> This preference also followed by Holmes and Brandeis of appointing recent graduates as noted by Dean Acheson was due to the belief 'that these young men, fresh from the intellectual stimulation of the law school, brought them [ie the judges] constant refreshment and challenge . . . more useful in their work than the usual office aides.' See Ward & Weiden (note 36 above) 34. The employment of a law clerk for a period of one year specifically, is suspected to be due to the single, common, and annual court term of the US courts. According to the US Supreme Court website 'The Term of the Court begins, by law, on the first Monday in October and lasts until the first Monday in October of the next year.' See the US Supreme Court website at <http://www.supremecourt.gov/about/briefoverview.aspx> (accessed 28 August 2015).

<sup>48</sup> Carson (note 26 above) 525–526.

<sup>49</sup> Ward & Weiden (note 36 above) 26. The learned authors further note at the same place that: 'The traditional English model of legal training involved,

learned authors perceive these influences as mutually exclusive as opposed to being congruent. It nevertheless begs a closer look into the specific conditions under which Justice Gray worked.

(b) *Invention of innovation, opportunity and circumstance*

It is not surprising that the institution of law clerks was specifically conceived by Gray in 1875 within an appellate court setting of the Massachusetts Supreme Judicial Court,<sup>50</sup> in the same year in which the Massachusetts legislature had deemed it necessary to increase the number of the Supreme Judicial Court justices to seven. This was in response to the rising appellate courts' caseload, which had been described as a 'tidal wave of cases' which had 'hit' the entire United States at the time,<sup>51</sup> as result of the American 'industrial revolution, the spread of railroads, rapid developments in corporate and tort law, and population growth.'<sup>52</sup>

Bloom notes that the reason Gray resorted to obtaining chamber assistance in the form of a law clerk was that he had assumed an overwhelming caseload and that:

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first, obtaining a general education followed by a lengthy period of time "reading the law" at one of the Inns of Court. Then, a period of further apprenticeship in the office of a barrister ensued. . . . [E]arly American legal training followed the English model, although there was no American equivalent to the Inns of Court. In America, the apprentice model typically required an undergraduate education, although this was not uniformly practiced or required, followed by a substantial period reading the standard legal treatises and commentaries as an apprentice to a practicing attorney.'

<sup>50</sup> According to the court's website, the Massachusetts Supreme Judicial Court, which was originally called the Superior Court of Judicature, was established in 1692 laying claim to being the oldest appellate court in continuous existence in the western hemisphere. It is said to be the Commonwealth's highest appellate court and it consists of a chief justice and six associate justices appointed by the governor with the consent of the executive council. Importantly, the court sits *en banc*, hearing appeals on a broad range of criminal and civil cases from September through May. Single justice sessions are held each week throughout the year for certain motions pertaining to cases on trial or on appeal, bail reviews, Bar discipline proceedings, petitions for admission to the Bar, and a variety of other statutory proceedings. The associate justices sit as single justices each month on a rotation schedule, at <http://www.mass.gov/courts/court-info/sjc/about/> (accessed 23 June 2015).

<sup>51</sup> Bloom (note 24 above).

<sup>52</sup> Bloom (note 24 above).

*Not only was he writing almost twenty-five percent of the court's opinions, but also he was presiding over trials (torts, divorce, contract, and capital crimes) that were still part of the Supreme Judicial Court's jurisdiction. The new chief justice needed help. In 1875, he turned to his half brother, John Chipman Gray, a professor at Harvard, to recommend a recently graduated and highly ranked Harvard Law School student to fill a new one-year position that Grey called "secretary" . . . [it] was none other than Louis D. Brandeis.<sup>53</sup> . . . Gray paid his law clerk out of his own pocket.<sup>54</sup>*

When he resigned his seat as Chief Justice of the State of Massachusetts to take his seat as an Associate US Supreme Court Justice in 1882, he continued the custom of appointing law clerks for a year's term relying on his half-brother, Professor John Chipman Gray<sup>55</sup> to select the clerk for the year,<sup>56</sup>

*Gray brought his innovative clerkship to the U.S. Supreme Court from 1891 to 1902 and remained ahead of his time. Upon Gray's death in 1903, only his successor on both courts, Oliver Wendell Holmes Jr., had adopted his clerkship model. This next clerkship innovator was one of Gray's former clerks, Louis Brandeis.<sup>57</sup>*

Ward and Weiden<sup>58</sup> explain that it was the Supreme Court's increasing workload that crystallised the creation of the institution of law clerks and the concomitant pressures associated with such increased workload that led to the increase in the number of clerks over time.

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<sup>53</sup> Brandeis finished his legal studies at Harvard in record time with an average grade of 97 per cent, a record said not to have been broken in his lifetime. One of his classmates, William E Cushing said of Brandeis: 'My friend Brandeis is a character in his way – one of the most brilliant legal minds they have ever had here. . . . The professors listen to his opinion with the greatest deference. And it is generally correct.' Urofsky (note 35 above) 30–31.

<sup>54</sup> Urofsky (note 35 above) 30–31.

<sup>55</sup> Professor Chipman Gray was an outstanding scholar and passionate law teacher who managed to practise while also teaching through what he described as his 'very peculiar and very fortunate' relations with his partners in practice, yet in no small part due to 'his fortunate and peculiar mental gifts and methods of work'. Due to his passion for teaching law he had 'once thought of giving up practice for the same reasons which led him to decline the highest judicial office.' See ER Thayer, S Williston & JH Beale 'John Chipman Gray' (1915) 28 *Harvard Law Review* 539–549 at 543.

<sup>56</sup> Coffin (note 19 above) 71.

<sup>57</sup> Snyder (note 23 above) 1158.

<sup>58</sup> Ward & Weiden (note 36 above) 21–53.

(c) *Formal adoption of law clerkship and development of the institution*

Justice Felix Frankfurter,<sup>59</sup> while a professor at Harvard Law School (1914–1920), undertook to select bright young final-year students to serve as clerks to various Supreme Court Justices in Washington DC.<sup>60</sup> According to Kester, the institution of judicial law clerks was eventually formalised in 1886, when on the recommendation of the then US Attorney-General, Mr AH Garland, Congress authorised to each justice a ‘stenographic clerk’, described by Garland as ‘a secretary or law clerk, to be a stenographer’<sup>61</sup> and to ‘assist in such clerical work as may be assigned to him.’<sup>62</sup> At an annual salary of \$1 600,<sup>63</sup> clerks were then the entire support staff-complement of Supreme Court justices<sup>64</sup> through the enactment of the Sundry Civil Act of 4 August 1886.<sup>65</sup>

Following this statute, Supreme Court Justices Blatchford, Harlan and Matthew joined Gray by promptly hiring their first clerks, followed the next year by Justices Lamar and then by Bradley, Miller and Chief Justice Fuller who appointed clerks for the 1888 term.<sup>66</sup> But even then, Gray used his clerks more innovatively than his colleagues, in a manner he had envisaged for inter alia ‘reviewing newly filed cases, discussing opinions by other justices, engaging in vigorous colloquy on opinions, and drafting memoranda.’<sup>67</sup>

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<sup>59</sup> See American Legal Manuscripts from the Harvard Law School Library: *The Felix Frankfurter Papers* (1986).

<sup>60</sup> Coffin (note 19 above) 71.

<sup>61</sup> Coonan (note 10 above) 173. Coonan, citing the *Annual Report of the Attorney General of the United States of the Year 1885* at 43, notes the recommendation thus motivated by the Attorney-General: ‘It would greatly facilitate the business of the Supreme Court if each justice was provided by law with a secretary or law clerk, to be a stenographer, to be paid an annual salary sufficient to obtain the requisite qualifications, whose duties shall be to assist in such clerical work as might be assigned to him.’

<sup>62</sup> Kester (note 19 above) 20.

<sup>63</sup> Coonan (note 10 above) 174.

<sup>64</sup> Kester (note 19 above) 20.

<sup>65</sup> Ward & Weiden (note 36 above) 24.

<sup>66</sup> Ward & Weiden (note 36 above) 24.

<sup>67</sup> Bloom (note 24 above). Ward and Weiden quote generously with approval from Samuel Williston’s ‘Horace Gray’ in WD Lewis (ed) *Great American Lawyers* (1971) 137, that Gray’s ‘colleagues generally appointed as their clerks stenographers and typewriters, but Gray continued his practice of securing each year a member of the graduating class from the Law School . . . Before Saturday morning, therefore, Judge Gray would take up the week’s budget of cases with his secretary, whose

Despite its legislative adoption by Congress, in its early years, the institution still fell short of taking its current form.<sup>68</sup> Kester notes that clerks had mainly messenger duties 'because in those days the Supreme Court met in the Capitol, and the Justices' chambers were in their homes scattered around Washington.'<sup>69</sup> One clerk was apparently even recommended for his skills as a barber.<sup>70</sup> It was Justice Oliver Wendell Holmes, Jr who stayed the course in the development of the institution, keeping alive his predecessor Gray's vision of appointing law clerks from top-ranking graduates for single terms.<sup>71</sup> At the time of Holmes' retirement

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duty it was to have given them a study requisite for a mastery of the essential facts and of the authorities cited in the briefs. In doing this he would generally make his secretary state the points of the case as best he could before he himself would say much, but before the discussion closed the conclusions of the tyros were severely tested. . . . Often he would ask his secretary to write opinions in these cases, and though the ultimate destiny of such opinions was the waste-paper basket, the chance that some suggestion in them might be approved by the master and adopted by him, was sufficient to incite the secretary to his best endeavour.' See Ward & Weiden (note 36 above) 29.

<sup>68</sup> Kester (note 19 above) 20.

<sup>69</sup> Kester (note 19 above) 20.

<sup>70</sup> Kester (note 19 above) 20.

<sup>71</sup> Bloom (note 24 above). Bloom notes that when Wendell Holmes, Jr, joined the Supreme Judicial Court in 1882, the judges there were overwhelmed with work and when he joined the US Supreme Court, he continued Gray's practice of employing a new honour graduate from Harvard each year, like Gray, relying on the recommendations of Professor John Chipman Gray, and later he relied on the advice of Felix Frankfurter for his clerk of the year. Oakley & Thompson also note that:

'Fortunately for the survival of Justice Gray's clerkship motif, Justice Gray's successor on the Supreme Court was another Chief Justice of the Massachusetts Supreme Judicial Court, Oliver Wendell Holmes, Jr. While it not appear that Holmes had employed law clerks during his twenty years as a Massachusetts justice, he was an old friend of John Chipman Gray. Within three years of taking his seat in Washington, Holmes was taking annual honour graduates of the Harvard Law School as his law clerks, selected by Professor Gray. When Gray died in 1915, young Professor Felix Frankfurter of the Harvard Law School was asked by Holmes to take Professor Gray's place as procurer of clerks, and Louis Brandeis made the same request when he joined the Court in 1916.' (Footnotes omitted.)

Oakley & Thompson (note 19 above) 16.



at the advanced age of 90 in 1932,<sup>72</sup> the institution of law clerks had become entrenched in the federal judicial system.<sup>73</sup>

In their exposition of the development of the institution of law clerks over the years, Ward and Weiden<sup>74</sup> identify distinct 'regimes' within which the role of law clerks significantly changed from its rudimentary origins.

They note that originally the duties of law clerks were primarily secretarial in nature. This was during the period 1882–1918, which they appositely call the 'secretary regime'.

This period, they say, gave way to the 'research assistant regime' (1919–1941) signified by the conferment of greater responsibility to clerks which entailed opinion editing and research duties for their respective justices.

Later on, as the learned authors note, the increasing caseloads of the Supreme Court Justices further transformed the role of law clerks into the so-called 'junior associate regime' (1942–1969). It was during this period that law clerks were given the added responsibility of being 'active decision maker(s)'. In addition to rendering editorial and research assistance, clerks in this period scrutinised the increasing numbers of *certiorari* petitions, wrote bench memos which analysed cases and made recommendations, and they contributed more substantially to the judgment or opinion-writing process of the court.<sup>75</sup>

Finally, in the contemporary regime (1980–present) mystically named the 'sorcerers' apprentices regime', law clerks are said to be even more influential in the gate-keeping process by which petitions are accepted or rejected for review by the court. Of particular significance is the increased

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<sup>72</sup> *Oliver Wendell Holmes, Jr.* 298 Mass. 575 (1937).

<sup>73</sup> *Oliver Wendell Holmes, Jr.* (note 72 above). Wichern notes that Congress passed the Appropriation Act in 1922 to authorise each Supreme Court Justice to employ one clerk each at an annual salary of \$3 600, but it was not until 1924 that the law clerk position became permanent in the Supreme Court. State courts also adopted that institution and due to the increased caseload of the Supreme Court the number of clerks was increased. See NJ Wichern 'A court of clerks, not of men: Serving justices in the media age' (1999) 49 *DePaul Law Review* at 624. Oakley and Thompson note that the period 'from 1919 to 1939 also saw law clerks blossom at less exalted courts. Congress supplied a law clerk to each federal circuit judge in 1930 and to selected district judges in 1936. By 1933, law clerks were employed by the courts of last resort of California, Illinois, Massachusetts, New Jersey, New York, Oklahoma, and Pennsylvania; and by 1942, almost half the States provided law clerks for their courts of last resort.' Oakley & Thompson (note 19 above) 18.

<sup>74</sup> Ward & Weiden (note 36 above) 21–53.

<sup>75</sup> Ward & Weiden (note 36 above) 23.

use of the *certiorari* pool, in respect of which process each participating justice's chambers is given a share of the *certiorari* petitions and is responsible for writing a memo on each of them to be shared with the other chambers. According to Ward and Weiden, although this practice enhances efficiency by reducing duplication across the chambers, it has the concomitant effect of reducing the likelihood of independent review by more than one clerk (and more than one justice's chambers). The 'sorcerers' apprentices regime' is also marked by increased reliance by the US Supreme Court Justices on clerks for opinion-writing functions. Although, as Ward and Weiden acknowledge, there is considerable variation across chambers as to exactly how the justices use their clerks, on average, law clerks are more likely to write first (and sometimes final) drafts of opinions and do so with less and less supervision by their justices.<sup>76</sup>

Coffin corroborates Ward and Weiden's observation in noting that a century ago the duties of law clerks may very well have been confined to 'checking citations, correcting galley proofs, preparing research memoranda on specific questions of law, and running errands', but today the duties of a law clerk have become more involved. Coffin adds that, 'Justice Gray, the creator and first sponsor, probably used his clerks in a more spacious and challenging manner.'<sup>77</sup> Celebrated scholar, Samuel Williston wrote the following of his tenure as law clerk to Justice Gray in 1888 –

*I would also frequently be asked to write an opinion on the cases that had been assigned to the Judge. I do not wish, however, to give the impression that my work served for more than a stimulus for the judge's own mind. He was a careful man and examined cases for himself, and wrote his own opinions; my work served only as a suggestion.*<sup>78</sup>

Coffin's own suspicion is that if young Williston served up an admirable piece of work, Gray would not consider it degrading to borrow generously from it, neither is it a deplorable notion considering the mutually beneficial relationship between the clerk and judge.

<sup>76</sup> See Ward & Weiden (note 36 above) ch 6 at 237–250.

<sup>77</sup> Coffin (note 19 above) 72.

<sup>78</sup> S Williston *Life and Law* (1940) 92. According to Williston, Gray employed clerks exclusively as sources of inspiration and criticism (at 92–93). It is further noted that, quite unusually for the elders of the land in those times, Gray had a genuine interest in and respect for his clerks' views, which he expected them to bring to bear on the court's problems with the latest theories brewing at the Harvard Law School (at 93).

*(d) Contemporary law clerk institution in the USA*

More than a century after Gray's time, the US judiciary, through the Federal Judicial Center,<sup>79</sup> has compiled a *Judicial Writing Manual*, the first edition of which was published in 1991, proposing the following limited functions for clerks:

- *limiting* clerks to research, bench memos, editing, cite-checking, and commenting on the judge's drafts;
- assigning clerks to write first drafts in routine cases *only*;
- assigning clerks the task of *rewriting* the judge's first draft in even the most complex cases.<sup>80</sup>

In a subsequent edition of the manual, judges are no longer restricted in their usage of clerks.<sup>81</sup> Now, '[t]he process the judge uses depends on his or her own work habits and style and on the capabilities of the law clerk.'<sup>82</sup> With the *caveat*: 'No matter how capable the clerk, the opinion must always be the judge's work.'<sup>83</sup> This strong admonition undoubtedly responds to the view that clerks are excessively influential in the judicial process.<sup>84</sup>

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<sup>79</sup> The Federal Judicial Center is the research and education agency of the US federal judicial system. It was established by Congress in 1967 (28 U.S.C. §§ 620–629), on the recommendation of the Judicial Conference of the United States. By statute, the Chief Justice of the United States chairs the Center's Board, which also includes the director of the Administrative Office of the US Courts and seven judges elected by the Judicial Conference. For more information on the Center see its website at <http://www.fjc.gov/> (accessed 1 July 2015).

<sup>80</sup> Federal Judicial Center *Judicial Writing Manual* (1991) 10–11.

<sup>81</sup> See Federal Judicial Center *Judicial Writing Manual: A Pocket Guide for Judges* 2 ed (2013) 10–11 <http://www2.fjc.gov/sites/default/files/2014/Judicial-Writing-Manual-2D-FJC-2013.pdf> (accessed 23 June 2015). In *In re Allied-Signal Inc, et al, Petitioners* (note 17 above), the court had also held that 'individual judges must enjoy considerable independence in deciding precisely how to use their law clerks, for "bureaucratizing" the law clerk system with too many rules and regulations or too much appellate court supervision would threaten the flexibility that permits that system to speed the resolution of cases.'

<sup>82</sup> *Judicial Writing Manual* (note 81 above).

<sup>83</sup> *Judicial Writing Manual* (note 81 above).

<sup>84</sup> Justice William O Douglas is said to have been one of the most vocal critics of the institution of law clerks (Ward & Weiden (note 36 above) 245). He recalled that: 'Under Earl Warren the demand for more law clerks continued. There were to be four, instead of three, for the Chief, and three, instead of two, for the Justices. One day when the matter was discussed at Conference I made a counter-motion to abolish all law clerks. 'For one year,' I pleaded, "why don't we experiment with doing our own work? You all might like it for a change.'" My proposal was met by

Coffin, a former US Court of Appeal judge of over 41 years' standing,<sup>85</sup> for part of which he was Chief Justice of the First Circuit, asserted that 'the demands on a judge's time make it critically important to use law clerk assistance with maximum effectiveness.'<sup>86</sup>

In yet another useful work compiled by the Federal Judicial Center, the *Law Clerk Handbook*, currently published in its second edition, outlines the duties of clerks as follows:

*Law clerks have no statutorily defined duties; they carry out their judges' instructions. Because each judge decides cases in an individual manner and has developed work habits over the course of a professional career, no two judges use their clerks in precisely the same manner. You must become familiar with your judge's style and work cooperatively with the other members of the chambers staff so that, as a team, you effectively assist the judge in fulfilling his or her judicial responsibilities.*<sup>87</sup>

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a few smiles but mostly stony silence.' WO Douglas *The Court Years, 1939–1975: The Autobiography of William O. Douglas* (1980) 172.

<sup>85</sup> See P Pitegoff 'The legacy of Judge Frank M. Coffin' (2011) 63(2) *Maine Law Review* 385–390 at 386. Mr Justice Coffin was born 11 July 1919 and died 7 December 2009. Pitegoff notes that Frank Coffin was educated in Lewiston and went on to earn degrees from Bates College, Harvard Business School, and Harvard Law School. He clerked for Judge John D Clifford, Jr, in the Maine US District Court, served as corporation counsel in Lewiston, and engaged for several years in private practice. His commitment to public service spanned a wide-ranging career, including naval service in the Pacific during World War II, a role as Democratic state party chairman and a leader (with Senator Edmund S Muskie) in reinvigorating Maine's Democratic Party in the 1950s, and an unsuccessful candidacy for Governor of Maine in 1960. He held positions as a member of Congress (1957–1961), Managing Director of the Development Loan Fund and Deputy Administrator of the Agency for International Development (1961–1964), and US Representative to the Development Assistance Committee of the Organization for Economic Cooperation and Development in Paris (1964–1965). He was appointed to the United States Court of Appeals by President Lyndon B Johnson in 1965, and served as Chief Judge from 1972 to 1983. Judge Coffin assumed Senior status in 1989 and retired from the bench in 2006.

<sup>86</sup> Coffin (note 19 above) 73.

<sup>87</sup> SA Sobel (ed) *Law Clerk Handbook: A Handbook for Law Clerks to Federal Judges* 2 ed (2007) 1 <https://public.resource.org/scribd/8763855.pdf> (accessed 27 February 2015). Wichern notes that clerks are bound not only by the Rules of Professional Conduct (1995), but also by the Code of Judicial Conduct (1990) and the more stringent Code of Conduct for Law Clerks (1989). See Wichern (note 73 above) 628.

This accords with the judicially considered role of law clerks in the earlier quoted<sup>88</sup> *Fredonia* case.<sup>89</sup> Ward and Weiden note that lately, Supreme Court clerks receive a formal orientation and ‘a “*Supreme Court Law Clerk Manual*” covering court-wide administrative matters, and [they] are held to their own code of conduct drafted by the justices’.<sup>90</sup>

These expositions underscore the role and position of law clerks in America. Karl Llewellyn,<sup>91</sup> whose learned work was cited with approval in *Fredonia*,<sup>92</sup> wrote:

*I should be inclined to rate it as Frankfurter's greatest contribution to our law that his vision, energy, and persuasiveness turned this two-judge idiosyncrasy into what shows high possibility of becoming a pervasive American legal institution.*<sup>93</sup>

So pervasive has the institution become, that in the US alone there are over two thousand law clerks serving federal judges and over six hundred other clerks serving bankruptcy judges and magistrates.<sup>94</sup> The institution of law clerks has since been adopted throughout the world. Alan Paterson, giving an exposition of the institution in England where the designation for the institution is ‘judicial assistants’, observes that this institution has been adopted in the ‘common law jurisdictions and beyond’.<sup>95</sup>

The importance of law clerks to the judicial function and process cannot be overemphasised. Sir Phillips has described the unsatisfactory conditions under which some judicial officers work, which he encountered during the course of his career spanning over 60 years. He attributes delays in the delivery of judgments, as notably due to the lack of law clerks or research assistants as aides to judges among other things.<sup>96</sup> These same sentiments were expressed some ten years before Sir Phillips by a former South African Judge of the High Court, Mr Justice Basil Wunsch in an article

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<sup>88</sup> See the quoted dictum from *Fredonia* under ‘II WHAT IS A LAW CLERK?’ above.

<sup>89</sup> 569 F.2d 251 (5th Cir. 1978) 255–256.

<sup>90</sup> Ward & Weiden (note 36 above) 21–22.

<sup>91</sup> See AL Corbin ‘A tribute to Karl Llewellyn’ (1962) 71(5) *Yale Law Journal* 805–812.

<sup>92</sup> *Fredonia Broadcasting Corp* (note 14 above) 256.

<sup>93</sup> Coffin (note 19 above) 71, in which is cited Karl Llewellyn *The Common Law Tradition* (1980) 321.

<sup>94</sup> Coffin (note 19 above) 72.

<sup>95</sup> A Paterson *Final Judgment: The Last Law Lords and the Supreme Court* (2013) 247.

<sup>96</sup> Sir Fred Phillips, CVO, QC *The Modern Judiciary: Challenges, Stresses and Strains* (2010) 12.

tellingly titled 'Treating judges properly'. In it Judge Wunsch identifies remuneration, support staff, notably including law clerks, and libraries as indispensable resources for the proper functioning of the judiciary. He asserted that '[t]o function efficiently and productively judges must be equipped with adequate resources. The lack of them can undermine the quality of judicial work or, at least, impose undue strain on those who have to perform it.'<sup>97</sup>

#### IV LAW CLERKS IN SOUTH AFRICA

From the preceding analyses it is not inconceivable that for judges, particularly in the superior courts and at appellate level, to discharge their important function, they require support staff whatever their designation, duties and however the judge prefers to make use of such para-judicial staff complement or whatever the qualifications or competencies of such staff. What is clear is that the judicial function and the judicial process make it necessary for judges to have chamber assistants. Like their American counterparts, South African judges of the mid-nineteenth to early twentieth century also enjoyed the use of assistants – the rudiments of the law clerk institution – even during the modest formative years of the superior courts of South Africa. Mindful of the 'troublesome' appellation of early clerks,<sup>98</sup> much of the literature surveyed in this regard is biographical and reminiscent, yet helpful for tracing the genesis of law clerks in South Africa.<sup>99</sup>

It is indeed so that the bulk of judicial work in South Africa is carried out by district and regional magistrates, which includes difficult conceptual work in family law, criminal law, and commercial matters. However, magistrates – whose workload, and expansive duties are hardly acknowledged and yet are at the coalface of the administration of justice – are regrettably not given law clerk or research assistance. Hopefully, research assistance will, with time also be extended to the magistrates' courts.

<sup>97</sup> Wunsch (note 3 above) 33.

<sup>98</sup> Coonan (note 10 above) 172. Ward & Weiden (note 36 above) 30–31.

<sup>99</sup> It should be noted that these are in fact the prime sources of information on the institution as it was noted by the authors of the first elaborate work on the use of law clerks in America: 'Finally, it should be noted that what we know of Gray and his law clerks is derived almost exclusively from the same sort of source as is most of our knowledge about the clerkship practices of subsequent Supreme Court Justices: the rose-tinted reminiscences of a former law clerk.' Oakley & Thompson (note 19 above) 13. See also L Blackwell QC MC *Are Judges Human?* (1962) 17.

(a) *Reminiscent historical background*

The following tabular outline of past prominent South African judges with ‘clerkship’ backgrounds is revealing of the rudimentary early existence of the institution of law clerks in South Africa:<sup>100</sup>

**TABLE 1**

*The Architects of the South African Mixed System  
Past South African Judges with clerkship backgrounds*

| <i>Judge</i>                                | <i>Clerkship</i>                          | <i>Post-Clerkship</i> | <i>Judgeship</i>  | <i>Marked attributes</i>  |
|---|---|-----------------------|---|---|
| <i>John Stephen Curlewis</i><br>(1863–1940) | Registrar<br>Office<br>Kimberly<br>(1887) | Transvaal Bar         | <i>Transvaal Supreme Court</i><br>(1903–1924)<br><i>Judge President, Transvaal</i><br>(1924–1927)<br><i>Judge of Appeal</i><br>(1927–1936)<br><i>Chief Justice</i><br>(1936–1938) | He was ‘unbelievably meticulous’ in his attention to detail, and he had a ‘plaintive and querulous nature’. |



<sup>100</sup> SD Girvin ‘The Architects of the Mixed Legal System’ in R Zimmerman & D Visser (contributing editors) *Southern Cross: Civil Law and Common Law in South Africa* (1996) 95–139. See also notes 4 and 6 above. See also many other judges with clerkship backgrounds who sat perennially as Judges of Appeal in Forsyth (note 1 above) 8–11. Compare these with the backgrounds of US Supreme Court Justices in a similar table in Baum (note 11 above) 64–65, reflecting the Supreme Court Justices of 1997. Four of the ten justices were former clerks, for example, Justices William H Rehnquist (Supreme Court clerk, 1952–1953), John Paul Stevens (Supreme Court clerk, 1947–1948), Ruth Bader Ginsburg (Federal district court law clerk, 1959–1961), and Stephen G Breyer (Supreme Court clerk, 1964–1965). See biographies of the current Justices of the Supreme Court on the court website <http://www.supremecourt.gov> (accessed 31 August 2015).

| <i>Judge</i>                                      | <i>Clerkship</i>   | <i>Post-Clerkship</i>   | <i>Judgeship</i>   | <i>Marked attributes</i>  |
|---|--|---|--|---|
| <i>Tielman<br/>Johannes Roos</i><br>(1879–1935)   | Judge's Clerk<br>to<br>Curlewis J<br>(1902)                            | Attorney<br>Transvaal Bar<br>MP<br>(1915)<br><br>Justice<br>Minister<br>(1924)            | <i>Judge of Appeal</i><br>(1929–1932)<br><br><i>Returned to politics</i>   | He had been brilliant at the Bar but focused his energies on politics and became a better politician than lawyer. He is one of only two judges who have been appointed to the AD directly from the Bar. He is said to have been using the AD as a safe refuge to plan his return to politics and his 'cavalier treatment' of the court was not well received. |
| <i>Benjamin<br/>Arthur Tindall</i><br>(1879–1963) | Private<br>Secretary<br>Sir Rose-<br>Innes CJ<br>(Transvaal)<br>(1902) | Cape Bar<br>Transvaal Bar<br>Reporter for<br>Transvaal<br>Supreme<br>Court<br>Silk (1919) | <i>Transvaal Provincial<br/>Division</i><br>(1922–1937)<br><i>Judge President,<br/>TPD</i><br>(1937–1938)<br><i>Judge of Appeal</i><br>(1938–1949) | He was said to be a 'quick, conscientious and indefatigable worker' who would 'bring a thorough knowledge of Roman-Dutch law and highly developed legal mind to bear on the many difficult and intricate legal problems which call for decision by the Transvaal judiciary'.  |





| <i>Judge</i>                                   | <i>Clerkship</i>   | <i>Post-Clerkship</i>   | <i>Judgeship</i>  | <i>Marked attributes</i>   |
|--|--|---|---|--|
| <i>FP (Toon) van den Heever</i><br>(1894–1956) | Clerk to<br>Gregorowski<br>J and then<br>Gutsche J<br>(SWA)<br>(1919–1921) | Windhoek Bar<br>Law Advisor<br>to Union<br>Government<br>(1921–1926)<br>State Attorney<br>(1931–1933) | <i>South West Africa</i><br>(1933)<br><i>Judge of Appeal</i><br>(1948–1956) | Centlivres CJ expressed in his memoir that – ‘Toon will always be remembered in legal history as an ardent exponent of the principles of Roman-Dutch law. He had an uncanny knowledge of those principles and the sources from which they sprang. Being an accomplished linguist, he was able to refer with ease to all the great writers on Roman-Dutch and Roman law.’ |
| <i>Oscar Hendrik Hoexter</i><br>(1893–1970)    | Clerk to<br>J de Villiers<br>JP (TPD)<br>(1916)                            | Bloemfontein<br>Bar Silk<br>(1929)  | <i>South West Africa</i><br>(1938)<br><i>Judge of Appeal</i><br>(1949–1963) | He is remembered for his judgment in <i>Radebe</i> <sup>101</sup> often cited as proof of the judiciary’s ‘colour-blindness’. He refused the Chief Justiceship twice, in each case because Schreiner JA was senior to him.   |



<sup>101</sup> *Radebe v Hough* 1949 (1) SA 380 (A).

| <i>Judge</i>                                      | <i>Clerkship</i>                                 | <i>Post-Clerkship</i>           | <i>Judgeship</i>  | <i>Marked attributes</i>  |
|---|--|---------------------------------|---|---|
| <i>Newton Ogilvie Thompson</i><br>(1904–1992)     | Registrar to Sir Malcolm Searle, JP (CPD) (1925) | Cape Bar Silk (1944)            | <i>Cape Provincial Division</i> (1949–1958)<br><i>Judge of Appeal</i> (1958–1971)<br><i>Chief Justice</i> (1972–1974)   | During his practice at the Bar, he earned a reputation as ‘one of its hardest-working and most conscientious members.’ As puisne judge he was known for being conscientious. During his term as Chief Justice, ‘he proved a fine administrator’.                                |
| <i>Frans Lourens Herman Rumpff</i><br>(1919–1992) | Clerk to Maritz J (TPD) (1935–1938)              | Pretoria Bar (1938) Silk (1951) | <i>Transvaal Provincial Division</i> (1953–1961)<br><i>Judge President, TPD</i> (1959–1961)<br><i>Judge of Appeal</i> (1961–1974)<br><i>Chief Justice</i> (1974–1982) | In <i>Administrateur, Natal v Trust Bank van Afrika Bpk</i> <sup>102</sup> he extended the Aquilian principle to claims for pure economic loss, and equally in <i>Minister van Polisie v Ewels</i> <sup>103</sup> he extended delictual liability for omissions. <sup>104</sup> |

<sup>102</sup> *Administrateur, Natal v Trust Bank van Afrika Bpk* 1979 (3) SA 824 (A).

<sup>103</sup> *Minister van Polisie v Ewels* 1975 (3) SA 590 (A).

<sup>104</sup> Corbett CJ further remarked in Mr Justice Rumpff’s memory that – ‘He had a great love for, and clear insight into our original sources of law the Roman and Roman-Dutch law without being dogmatic or fanatical about them. He endeavoured to apply the true principles of our common law and to sift and remove foreign inclinations in our administration of justice incompatible with our legal system. He nevertheless appreciated the value of a comparative approach to legal problems and to that extent, has time and again, made the effort to seek solutions in the jurisprudence of England and Western Europe.’ (My translation.)

M Corbett ‘Chief Justice Frans Lourens Herman Rumpff’ (1992) 109 *South African Law Journal* 684.

Leslie Blackwell QC MC gives the following explanation of the role of law clerks in the South African setting, necessitating generous citation:<sup>105</sup>

*To every judge there is appointed a registrar. . . . He is a combination of private secretary, A.D.C. [aide-de-camp], and court registrar. As the latter he spends much of his time in court relieving the official registrar, and in doing so carries out the usual functions of a registrar – swearing-in of witnesses, receiving and registering exhibits as they are handed in, attending to witnesses and their fees, and making out punishment warrants for the Judge’s signature. . . .*

*As secretary he types out the judge’s judgments, attends to his not very heavy correspondence, and interviews occasional callers. If the judge needs to refer to law books he fetches them from the library. On circuit he travels with the judge in his coach, acts throughout as registrar, and arranges the social functions. Very often he drives the judge’s car, possibly does little errands for his wife, and makes himself generally useful.*

*Most registrars are advocates, already qualified, or still in course of study. Those who are already qualified come to gain experience and court atmosphere before commencing practice. They sit in court day after day, seeing how cases are conducted, learning the art of cross-examination, seeing how a judge . . . should be handled. They get to know the judges personally, and many of the advocates and attorneys, so that when they start they are not entire strangers to the profession.*

*A registrar is not a civil servant, and his pay by modern standards is meagre. . . . My registrars would come and go, staying with me from six to twelve months, sometimes longer. Most of them would leave to go to the Bar, and many of them today are in good practice. Some of our best-known judges started their legal life as a judge’s registrar. . . . I would never take as a registrar a young man who was not a budding advocate. Service as registrar should be to an advocate what an internship is to a medical student, a short trial run on the practical side of the profession before commencing to practise.*

*. . . I did not often keep them for more than twelve months for at times there is not much to do, and the life of a judge’s registrar, if too prolonged can become a demoralising one. I have often wished that in my early days I had been able to do a twelve months’ service with one of the old-time judges, instead of starting at the Bar without any training or experience. The appointment of the registrars lies with the judge himself, and there is usually a fair amount of competition for the job. They fill a very useful function . . . I have followed the careers of my registrars with interest, I think of their service with me with pleasure; nice boys all of them.*

The judges of the pre-Union colonies and thereafter those of the Union of South Africa were trained in the best traditions of the early English Bar. ‘Names like Menzies and Cloete, Watermeyer and [Lord] de Villiers

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<sup>105</sup> Blackwell (note 99 above) 77–79.

come to mind, to mention only a few of the giants of old'<sup>106</sup> and 'great departed'.<sup>107</sup> Epitomising these architects who administered justice and developed South African law in the earliest days is none other than Lord Henry de Villiers (1842–1914),<sup>108</sup> Chief Justice of the Cape Supreme Court-turned-first Chief Justice of the Union of South Africa upon its establishment in 1910. As a judge of first instance in the Cape, Lord de Villiers was known for his application of equity above the predetermined letter of Roman-Dutch law.<sup>109</sup> To his credit, it has been said that South Africa in 1873 needed puisne judges 'to lay down the law on each case as it arose, justly, systematically, rapidly' just as he did.<sup>110</sup> True to his Victorian training, his learned biographer, Professor Walker notes that:<sup>111</sup>

*Even late in life he held that a judge might well be swamped in an inky sea of jurisprudence. 'You and Judge —,' he once said to a colleague whose library he had been inspecting, 'read too many books. What you want is to get hold of a good conception of justice and apply it.'*

With such views and judicial idiosyncrasies, it is obvious that the law clerk institution as we understand it had no place under Lord de Villiers' administration of justice at the helm the Cape colony, later the Union judiciary. Whilst registrars or judges' secretaries have always been part of the superior courts of the colonies and Union of South Africa,<sup>112</sup> the *role* of officials in those positions in South Africa, evolutionarily speaking, must have taken a similar progression to that which was taken in the United State of America.<sup>113</sup> For instance proofreading being one of

<sup>106</sup> BA Tindall (editor and contributor of introduction) *James Rose Innes: Chief Justice of South Africa, 1914–27* (1949) 336.

<sup>107</sup> Tindall (note 106 above).

<sup>108</sup> E Kahn 'Lord de Villiers' (1978) 95 *South African Law Journal* 430.

<sup>109</sup> EA Walker *Lord de Villiers and His Times: South Africa 1842–1914* (1925) 82.

<sup>110</sup> Walker (note 109 above) 82. Professor Walker notes that Lord de Villiers' 'outstanding characteristics as judge were his extraordinary intuitive perception of the side on which equity lay and his determination to find a way out, if the letter of the law seemed likely to do injustice. . . . With him substantial justice and equity came first, the letter of the law second.' Walker (note 109 above) 83.

<sup>111</sup> Walker (note 109 above) 83.

<sup>112</sup> For example Sir Rose-Innes notes regarding the establishment of the AD: 'We [ie himself and Sir William Solomon] had . . . shared the services of a secretary – Captain Euan Christian – our relations with him may be gathered from the fact that he was wont (so we heard) to refer to us as his twins. We surrendered him to Lord de Villiers, partly because it meant promotion, and partly because it seemed right that the Chief Justice should have a first-class secretary.' Tindall (note 106 above) 244.

<sup>113</sup> See '(c) *Formal adoption of law clerkship and development of the institution*' above.

the main duties of law clerks today, and Sir John Wessels' judgments having been self-admittedly 'peppered with mistakes in quotations and citations',<sup>114</sup> that notwithstanding, AA Roberts KC was Sir Wessels' clerk who edited Sir Wessels' book on contract.<sup>115</sup> This and the fact that the autobiography of Sir John Kotzé is replete with anecdotes about his 'registrar' Rider Haggard's adventures on circuit court and that Mr Haggard (later Sir Haggard) was commended for all things recreational but nothing of legal substance,<sup>116</sup> resonates with the initial usage of clerks in America under Ward and Weiden's 'secretary regime'.

Former judge of appeal, Justice Marius Diemont in his autobiography, *Brushes with the Law*, himself having been a judge's clerk primarily to Mr Justice EF Watermeyer,<sup>117</sup> gives the following insight into the role of judges' clerks in South Africa during the 1920s:

*After I graduated from the university I became registrar to Mr Justice E.F. Watermeyer. That meant I was his full-time clerk or secretary. I sat in court with him, typed his judgments, stopped troublesome attorneys and disappointed litigants from wasting his time – I was the watchdog. I also went on circuit with him and looked after his welfare in the coach. I was fortunate. Judge Watermeyer was an outstanding judge; he later became Chief Justice. . . .*

*Judge Watermeyer, or 'Billy' as he was known to the Bar, was a considerate man. When I went to work for him I did not even know what a warrant was, or a petition for that matter. I could type with only two fingers and even then not accurately. The first civil judgment I typed for my judge set out the arguments*

<sup>114</sup> E Kahn *Law, Life & Laughter Encore: Legal Anecdotes & Portraits from Southern Africa* (1999) 286, where the anecdote is appositely entitled 'No proofreader'.

<sup>115</sup> Kahn (note 114 above) 285.

<sup>116</sup> Sir John Kotzé *Biographical Memoirs and Reminiscences* (1934) 458–488 at 465, where Sir Kotzé notes: 'Haggard often bagged some fine blue-breasted korhaan' and 'this genial, high-spirited and romantic young man, bred and educated as befits a gentleman's son, proved himself to be an excellent cook!' Sir Kotzé (at 487–488) dismissed Sir Haggard's description of an execution as 'dramatic', 'wholly imaginary', 'unfounded reflect', 'pure romance, and not in keeping with fact' with a further disparaging explanatory footnote at 488.

<sup>117</sup> Mr Justice Ernest Frederick ('Billy') Watermeyer was appointed to the Cape Provincial Division on 16 June 1922 to 1937. He was then appointed to the Appellate Division as a Judge of Appeal on 15 October 1937 and became the ninth Chief Justice of South Africa from 1943 until his retirement in 1950. He was the last South African Privy Councillor, 'a champion of Roman-Dutch law with a keen analytical mind' and was renowned as a most brilliant 'all-rounder' in our judicial history. See 'Mr Justice Watermeyer' (1923) *South African Law Journal* 99, with portrait; 'The new Chief Justice' (1943) 60 *South African Law Journal* 429; 'The Rt. Honourable EF Watermeyer' (1950) 67 *South African Law Journal* 332.

*why the plaintiff should fail, but in the final paragraph I left out a critical 'not'. Happily the fault was spotted before the judgment in favour of the wrong party was read in court. This lapse from grace was not as serious as one committed by a brother registrar who went on circuit to Beaufort West with Judge Van Zyl. The judge found Piet Klaase, the accused, guilty and sentenced him to six months' imprisonment for theft, the sentence to be suspended for 12 months on good behaviour. The following day Judge Van Zyl carried out a routine prison inspection. 'I have seen you before,' he said, stopping in front of Piet Klaase. 'Ja, Baas gave me six months yesterday for theft, but said I need not go to prison.' The warrant was sent for when it was established that the judge's clerk had been inattentive or asleep and had not heard that the sentence was to be suspended. Piet Klaase was freed and went on his way rejoicing.<sup>118</sup>*

Mr Justice Diemont describes the valuable experience he gained during his clerkship as follows:

*I learned more in the ten months that I sat in court as a judge's clerk than I had in the previous ten years of my life. I saw life from every angle; I heard cases of importance and cases of no importance at all; I listened to strange cases, to dramatic cases, to dull cases. Each and every one of them enthralled me, which was good. However unimportant the case may seem to the world, to the parties concerned it could be the most vital moment of their lives. I watched witnesses trying to tell the truth and witnesses trying to lie, all facing with less or more success cross-examination that was skilled or seemingly stupid. I saw keen intellects challenge opponents of equal intellect. I saw drama in every form. I watched it all with absorbed interest and to this day, after almost 20 years at the Bar and almost 30 years on the Bench, I confess that it is an interest I have never lost.*

*I knew when I left Judge Watermeyer that I had chosen the right profession.<sup>119</sup>*

The eclectic usage of clerks and the versatility they had to embrace as well as the role's warm and human side and the often lasting relationships which develop between clerks and judges is evident from Mr Justice Diemont's account. He reveals that he once had to act as an Afrikaans interpreter for the benefit of the unilingual Mr Justice Sutton in a civil suit:

*Surprisingly few of my colleagues were bilingual. I learned this years before when I went on circuit as a judge's clerk. Judge George Sutton<sup>[120]</sup> was doing the*

<sup>118</sup> Diemont (note 4 above) 25–26.

<sup>119</sup> Diemont (note 4 above) 26.

<sup>120</sup> Mr Justice George Gerhard Sutton (1880–1950) was appointed to the Cape Provincial Division Bench on 15 February 1929. In 1946 he became Judge President of that Division until 1948. WP Schreiner was his uncle (making him cousins with Mr Justice Oliver D Schreiner) and he married Mr Justice EF Watermeyer's sister, Agnes Gertrude Watermeyer. See 'Mr Justice

*southwestern circuit and the novelty of travelling in the judge's coach appealed to me greatly. The judge was an eccentric man, talkative, nervy and given to repeating himself and sometimes making tactless remarks in court, but I grew to like him. He was a good lawyer and a kind man. After he retired we became friends, and I was always given a warm welcome at his home, particularly if I had a little legal gossip to tell him.'*<sup>121</sup>

Mr Justice Bresler notes in his book that '[i]n those days [1920–1924] an applicant who wished to apply for the position of Registrar . . . had to be in possession of at least one degree, and it was more than an implied term of his engagement that he would proceed to his LLB in order to practise at the Bar, for which this experience in court was regarded as a useful form of preparation'.<sup>122</sup>

(b) *The modern South African clerkship*

Close to a century since Mr Justice Diemont's clerkship, Judge Basil Wunsch of the High Court underscored the importance of adequate staff resources for judges when he said:<sup>123</sup>

*I speak of my own court. Each judge has a registrar or clerk. The annual salary of mine is R37 427. Her other benefits could increase this to about R52 000. The annual package of a competent dictation (not the most senior) typist employed by attorneys in Sandton is over R90 000. Often, registrars are law students. They are, generally speaking, not able to type dictated judgments and even manuscript judgments that are not very simple. Whatever I want typed, such as letters and brief memoranda, I write out in longhand and usually have to correct at least once. Between 32 judges who are on duty at any time (that is, excluding those on circuit duty) we have no pool typist for dictated or manuscript judgments. However, her work is not confined to judgments. It embraces also, subject to the typing of judgments enjoying priority, other documents arising*

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Sutton' (1929) 46 *South African Law Journal* 383–286, with portrait; Kahn (note 114 above) 266–267.

<sup>121</sup> Diemont (note 4 above) 68–69.

<sup>122</sup> Bresler (note 4 above) 73. The learned judge went on to note: 'Continued typing of judgments, and of observing procedure, enabled one to acquire some knowledge, not perhaps of over much positive law, but of pitfalls which were to be avoided. . . . Apart from the advantage of the description I have referred to, almost daily association with a judge would do much to enlarge and enrich one's mind. There was another type of advantage, namely that of being able to observe the leaders of the Bar, although much of their eminence tended at times to baffle rather than instruct, but the impress of these great personalities of Bench and Bar has never been completely dimmed.'

<sup>123</sup> Wunsch (note 3 above) 33–36.

*from judges' official duties, typing work for judges' clerks relating to their duties and for the office of the registrar. She compiles and types the list of judges and their secretaries with their office telephone numbers and the list of judges' vehicles with registration numbers for the security personnel. She also types the registrar's personnel list and telephone numbers of the different officers. So that generally there is a long wait after you submit a judgment for typing. . . .*

Judge Wunsch noted by contrast to the position in the High Court that –

*. . . Each justice of our Constitutional Court has two research clerks. They are law graduates who serve terms of a year. Their responsibilities include: preparing the judge's papers in each case doing detailed research on particular topics preparing pre-hearing memoranda (identifying the key issues in matters to be heard) preparing draft text for judgments assisting the judge in Court assisting the judge with court-related work (writing speeches, committee work) assisting the judge with other work (organisational work, committees, international human rights work) and administrative work. They also review judgments written by their principals. This latter task involves not only proofreading but also cite-checking. This includes: reading a case cited to ensure that the reference or quotation is proper authority for the proposition for which it is cited ensuring that an authority cited is still good law – that is has not been overruled or modified ensuring that cited material has not been taken out of context and that paraphrases accurately reflect the cited authority. An overseas donor has provided funds for the engagement of six research clerks to be shared by the members of the Supreme Court of Appeal and they are already functioning. The Land Claims Court has two research clerks and each judge of the Labour Appeal Court has an associate whose functions are similar to those of a research clerk. I hope that this programme will be extended to other courts. The benefits to judges with heavy case loads and to the public to ensure the accuracy of the contents of judgments are obvious. The Witwatersrand Local Division has, for example, a heavy appeal workload. There are appeals to a full bench (the practice of directing appeals to a full bench rather than the SCA is gaining momentum all the time) against judgments of a single judge and weekly an average of about 25 appeals from judgments in the magistrates' court in criminal and civil cases. Appeals in criminal cases are likely to decrease since the introduction of section 309B into the Criminal Procedure Act, but then there are likely to be large numbers of petitions for leave to appeal where magistrates have refused leave. In many cases the appellants in criminal cases are not represented and no heads of arguments are filed. There are about 25 reviews of judgments in criminal cases in the magistrates' court every week. Often the record in appeals are very bulky. The assistance of graduate clerks, not only to undertake research and to assist with and review judgments, but also to sift appeal records to identify the material documents and issues would be of great value.*



The inaugural Constitutional Court of South Africa under the leadership of its first President (later Chief Justice) Arthur Chaskalson<sup>124</sup> was the first and only South African court to have law clerks assigned to all its individual judges – ‘like its counterparts around the world’ as pointed out by Corder and Brickhill.<sup>125</sup>

Subsequent to the Chaskalson court’s adoption of the employment of clerks, law clerks have since been appointed to the Supreme Court of Appeal and all the respective divisions of the High Court of South Africa. However, the Constitutional Court is the only court in which each judge is assigned two clerks, while the Chief Justice and Deputy Chief Justice are entitled to three clerks each.<sup>126</sup>

(c) *Constitutional Court*

The Constitutional Court ‘occupies a special place’<sup>127</sup> at the apex of the judicial authority of South Africa. It consists of the Chief Justice of South Africa, the Deputy Chief Justice and nine other judges.<sup>128</sup> Unlike the Supreme Court of Appeal, it sits *en banc* in all cases it hears<sup>129</sup> and a matter

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<sup>124</sup> The late Mr Chief Justice A Chaskalson (24 November 1931–1 December 2012) was the first President of the Constitutional Court of South Africa from 1994 to 2001 and Chief Justice of South Africa from 2001 to 2005. See K O’Regan ‘In Memoriam: Arthur Chaskalson’ (2014) 132 *South African Law Journal* 461–473; and G Budlender ‘Tribute to Arthur Chaskalson’ (2013) 29 *South African Journal on Human Rights* 1–5.

<sup>125</sup> Corder & Brickhill (note 2 above) 370.

<sup>126</sup> Corder & Brickhill (note 2 above) 369–371.

<sup>127</sup> Chaskalson P used these and the following words in *Pharmaceutical Manufacturers Association of SA: In re ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) para 55 to describe the court:

‘It was established as part of that order as a new Court with no links to the past, to be the highest Court in respect of all constitutional matters and, as such, the guardian of our Constitution. It consists of eleven members and, unlike other courts, sits *en banc*, which ensures that the views of all its members are taken into account when decisions are made. The Constitution contains special provisions dealing with the manner in which the Judges of this Court are to be appointed and their tenure which are different to the provisions dealing with other judicial officers. It has exclusive jurisdiction in respect of certain constitutional matters and makes the final decision on those constitutional matters that are also within the jurisdiction of other courts.’ (Footnotes omitted.)

<sup>128</sup> Section 167(1) of the Constitution.

<sup>129</sup> Corder & Brickhill (note 2 above) 376. K O’Regan ‘The Constitutional Court: A Judge’s Perspective’ in Hoexter & Olivier (note 1 above) 409. See also

before it 'must be heard by at least eight judges.'<sup>130</sup> It is the highest court of the Republic,<sup>131</sup> with a 'plenary jurisdiction as the final court of appeal in all matters.'<sup>132</sup> It has great testing powers including whether Parliament or the President has discharged constitutional obligations.<sup>133</sup>

Corder and Brickhill note that, '[a]pproximately 24 clerks out of several hundred applicants – typically young graduates or recently qualified practising lawyers – are selected annually for a one-year clerkship in the chambers of one of the eleven judges of the court.'<sup>134</sup> Clerks in the Constitutional Court receive competitive salaries which are 'comparable to the salary paid to first-year candidate attorneys in South Africa's largest law firms.'<sup>135</sup> Law clerks at the Constitutional Court sign confidentiality agreements.

Brickhill, a practising member of the Bar, served as retired Constitutional Court Justice Kate O'Regan's clerk in 2004. Corder, on the other hand is a prominent public law Professor. He said that he would have seized the opportunity to be a law clerk had it been available to him in his time.<sup>136</sup> The learned authors highlight the following duties of law clerks in the Constitutional Court of South Africa:

*To the extent that clerks review the work product of the judges, make edits regarding grammar, word choice and sentence structure, their potential influence relates to stylistic matters. But the clerks also have the opportunity to influence the judges substantively on questions of constitutional doctrine and the manner in which a particular judge exercises her vote.*

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C Lewis 'Reaching the Pinnacle: Principles, Policies and People for a Single Apex Court in South Africa' (2005) 21 *South African Journal on Human Rights* 509 at 521–522.

<sup>130</sup> Section 167(2) of the Constitution.

<sup>131</sup> Section 167(3)(a) of the Constitution.

<sup>132</sup> Corder & Brickhill (note 2 above) 362 and 376–377. Following the Constitution Seventeenth Amendment Act, 2012 which came into effect on 22 August 2013, section 167(3) para (a) of the Constitution was amended to widen the jurisdiction of the Constitutional Court from being 'the highest court in all constitutional matters' to simply being 'the highest court of the Republic'; para (b) imposes three requirements for the court's plenary jurisdiction.

<sup>133</sup> Corder & Brickhill (note 2 above).

<sup>134</sup> Corder & Brickhill (note 2 above) 370.

<sup>135</sup> Corder & Brickhill (note 2 above).

<sup>136</sup> See Professor Hugh Corder's transcribed record of his interview in the Wits University Constitutional Oral History Project done on 4 January 2012 at [http://www.historicalpapers.wits.ac.za/inventories/inv\\_pdfo/AG3368/AG3368-C16-001-jpeg.pdf](http://www.historicalpapers.wits.ac.za/inventories/inv_pdfo/AG3368/AG3368-C16-001-jpeg.pdf) (accessed 22 August 2015).

*Generally speaking, the duties of the court clerks consist of chamber duties, duties not related to court, and public and community relations. Chamber duties include the administration of court papers and case management, the drafting of memoranda on all new applications lodged with the court, producing pre- and post-hearing memoranda, drafting media summaries, preparing, editing, researching and cite-checking judgments, and generally assisting the judge in court. . . .*<sup>137</sup>

Corder and Brickhill hasten to further note that –

*. . . the above duties are, of course, subject to the demands made by an individual judge. Each chamber has its own quirks, personalities, rules, practices and traditions. In any event, a ‘cert pool’ of sorts operates at the court to deal with new applications. For each week of the court term, one of the 11 judges is the appointed duty judge [who together with her chambers are] . . . responsible for monitoring all documents lodged with the court and communicating with the other members of the court where a request is made.*<sup>138</sup>

An elaborate process is followed in the Constitutional Court for editing draft judgments ‘in accordance with the court’s house style,’ whereby clerks are allocated individual paragraphs of the judgment to check.<sup>139</sup> In this regard and also taking into consideration preferences of individual judges, Justice O’Regan explained the following about the role of law clerks in the process of producing a judgment in the Constitutional Court and in her chambers specifically:

*The role of law clerks in judgment-writing varies from chambers to chambers. All clerks are involved in cite-checking, which is a thorough process that takes several days and includes a read-through of the judgment by the clerks. For the rest, the involvement of law clerks varies. In my chambers, the law clerks would often be asked to write a memorandum on a particular legal issue, or assist with footnotes on the draft judgment.*<sup>140</sup>

Professor Crayton of the University of North Carolina-Chapel Hill, a beneficiary of the Constitutional Court’s foreign clerks programme, clerked for Chief Justice Sandile Ngcobo in 2003. He attested to the enriching experience he gained in that court thus –

*For me, the job was the professional experience of a lifetime. Having clerked in the American federal court system, the Court offered an exciting opportunity to think critically about many of the rules and principles of law that I obtained in the United States. Evident in the Court’s handling of its case load is a*

<sup>137</sup> Corder & Brickhill (note 2 above) 369–371.

<sup>138</sup> Corder & Brickhill (note 2 above) 370.

<sup>139</sup> Corder & Brickhill (note 2 above) 373.

<sup>140</sup> O’Regan (note 129 above) 410.

*creativity of thought in using constitutional interpretation to promote social change. That creativity is understood as a virtue among the Judges, and I think that this consensus invokes a special collegiality within the institution and the highest respect from those parties whose disputes are resolved by the Court. The hallmark of the Court is that virtually all of the work is a product of collaboration among the Judges, the clerks and the administrative staff. As South Africa moves further in its effort to achieve its goal of development and transformation, the Court will be a diligent guardian to assure the protection and promotion of the Constitution.<sup>141</sup> (My emphasis.)*

(d) *Supreme Court of Appeal*

The Supreme Court of Appeal (SCA) is the successor to the Appellate Division established in 1910 when the Union of South Africa formed.<sup>142</sup> In accordance with the Seventeenth Constitutional Amendment of 2012, the SCA now functions as an intermediate court of appeal hearing appeals from the High Court in all matters in which leave to appeal to the SCA has been granted in terms of section 17 of the Superior Courts Act 10 of 2013. The court comprises the President and Deputy President of the SCA and a number of judges of appeal determined by an Act of Parliament.<sup>143</sup> The composition of the justices of appeal who sit in the SCA changes each term.<sup>144</sup> Presently there are 26 positions in the SCA which are filled by permanent and acting justices of appeal including the SCA President and Deputy President. The court sits in panels of five or three judges of appeal, depending on the nature of the appeal. The composition of the panels differs for each case.<sup>145</sup>

The duties of law clerks in the SCA are very similar to those highlighted by Corder and Brickhill regarding law clerks at the Constitutional Court – with the exception being that in the SCA, a pool of not more than six law clerks, officially known as ‘law researchers’ who are appointed on a permanent basis, serve all 26 of the judges of appeal (including acting judges) on an availability basis, where editing judgments takes precedence

<sup>141</sup> See D Globalizado ‘Work On! Constitutional Court of South Africa Invites Applications for Foreign Law Clerks’ 19 January 2014 blog available at <http://ilg2.org/2014/01/19/work-on-constitutional-court-of-south-africa-invites-applications-for-foreign-law-clerks-rolling-deadline/#more-4328> (accessed 25 August 2015).

<sup>142</sup> See the section on ‘About the court’s position in the justice system’ on the website of the Supreme Court of Appeal at <http://www.justice.gov.za/sca> (accessed 25 August 2015).

<sup>143</sup> ‘About the court’s position’ (note 142 above).

<sup>144</sup> ‘About the court’s position’ (note 142 above).

<sup>145</sup> ‘About the court’s position’ (note 142 above).

over all other clerk duties. Ordinarily, judgments are checked for style, grammar, authorities and substance by individual researchers with the general turnaround time of 24 hours. The law clerk who was responsible for checking the judgment is further required to prepare a media summary on the judgment. Due to the proportionally smaller pool of law clerks available in the SCA, research on issues arising in appeals pending in the court is confined to being undertaken during recess when the judges of appeal are preparing for the forthcoming term.

Between two and three judges of appeal are responsible for the shortlisting of applicants and for interviewing and managing them. As part of their employment, law researchers in the SCA are required to undergo a standard state security clearance facilitated by the Office of the Chief Justice and State Security Agency.<sup>146</sup>

SCA law researchers at the SCA also receive competitive salaries at the public service salary level 9, and their employment benefits include a pension contribution and medical aid contribution. They occupy a common office with an open plan in which their workstations are arranged in a manner that facilitates consultation and discussion with each other, especially for collaborative tasks. Save for the understandable and inevitable preferences of some judges because of the synergy that naturally develops between judges and law researchers, they are available to all judges of appeal.

SCA law researchers further assist the judges of appeal with extra-curial work such as the preparation of lectures, conference papers and speeches on legal themes or contributions to academic works provided that the researchers do not have other work related to the court's work.

The point has been made by a former member of the SCA, Mr Justice Edwin Cameron, a retired Justice of the Constitutional Court, that the establishment of the SCA dating back to the establishment of the Union of South Africa, retains many proprietary practices which have been observed and retained through the years for the efficient running of the court.<sup>147</sup> In this context, the law researcher is a relatively recent addition to the staff complement of the court.<sup>148</sup> Before the employment of law researchers in the SCA, the court staff had always been composed of the judges' secretaries, ushers, the registrar and administrative clerks in

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<sup>146</sup> Presumably so do law clerks and law researchers throughout the South African superior courts.

<sup>147</sup> E Cameron *Justice: A Personal Account* (2014) 17–18.

<sup>148</sup> See also the above extensive quote from Justice Wunsch in terms of which he notes that: 'An overseas donor has provided funds for the engagement of six research clerks to be shared by the members of the Supreme Court of Appeal and they are already functioning.' See Wunsch (note 3 above) 36.

the latter's office. Traditionally, the editing of draft judgments of the SCA was done by the judges of appeal themselves as part of their collaborative and 'collegial deliberation'<sup>149</sup> and it remains so.<sup>150</sup> In his acceptance address on the occasion of the conferment of the LLD *honoris causa* by Rhodes University on 6 April 1990, Chief Justice Corbett said the following in this regard:

*We always sit in panels of five, or sometimes three, and we work together as a team – and, I think, a very happy, well-adjusted team at that. Every judgment that is delivered by the Court, that generally appearing under the name of an individual judge, represents an amalgam of the ideas, ingenuity, legal knowledge and expertise, humanity and wisdom of every member of the panel. And in every case the composition of the panel varies. So I thank you for honouring my judicial colleagues in this way. Speaking purely of them, I believe that the honour is well deserved.*<sup>151</sup>

The practice for reviewing draft judgments has since been spelt out in the court's *Judgment Style Guide*<sup>152</sup> adopted by the members of the court and revised from time to time. It is particularly useful for the acting judges of appeal who change from term to term. The *Judgment Style Guide* provides, *inter alia*, that 'judgments should be circulated both in hardcopy and electronically. Prior to circulation all references *must* be checked by one of the researchers.' It goes on to prescribe that 'Corrections or suggestions should be sent to the scribe [ie the writing judge] either in marked hard copy or electronically' adding that law researchers should 'Check with the scribe as to his or her preference.'

The comprehensive expectations for and responsibilities of law researchers in the SCA are spelt out in their performance agreements which they are required to sign and adhere to with quarterly monitoring and reporting. The agreement places different weighting expressed in percentages on their different duties styled 'key result areas' (KRAs).

<sup>149</sup> See Corder & Brickhill (note 2 above) 373, quoting Justice O'Regan.

<sup>150</sup> PM Nienaber 'Producing a Judgment in the Appellate Division' in E Kahn (ed) *The Quest for Justice: Essays in Honour of Michael McGregor Corbett Chief Justice of the Supreme Court of South Africa* (1995) 285–303.

<sup>151</sup> E Kahn 'Michael McGregor Corbett – Gamaliel Redux' in E Kahn (note 150 above) 39.

<sup>152</sup> Compare with the US *The Bluebook: A Uniform System of Citation*, published currently in its twentieth edition, which prescribes the most widely used legal citation system in the US. For a history on this reference guide see C Hurt 'The Bluebook at Eighteen: Reflecting and Ratifying Current Trends in Legal Scholarship' (2007) 82 *Indiana Law Journal* 49 at 51–52.

The review and editing of judgments is prioritised above all duties both in practice and undertaking with a 30 per cent KRA weighting in terms of which the following are performance prescripts and corresponding attainment indicators:

- (a) Thorough proofreading of draft judgments ensuring there are no stylistic, syntactical or grammatical errors.
- (b) Cite-checking of judgments both against the record and ensuring citations are correct.
- (c) Checking the judgment for substantive errors and suggesting amendments where necessary.
- (d) Effecting changes to judgments where necessary.
- (e) Ensuring the judgment complies with the requirements and prescriptions of the *Style Guide*.
- (f) Drafting of media summaries for the purposes of posting [them] on the Supreme Court of Appeal website and for distribution to the media.

Research is given an equal KRA weighting of 30 per cent with corresponding performance measures including tracing and sourcing authorities for judges from various sources both physically and electronically such as law reports, textbooks, etc.

The ‘agenda setting’ case-flow management and administrative role is managed by the President of the court with the assistance of the Deputy President and has been explained and described in detail by Chief Justice Corbett.<sup>153</sup> It involves the compilation of the court *bulletin* and *roll* which entails reading the parties’ filed practice notes and drafting summaries as well as the roll, which are reviewed and checked by law researchers. This is also a very important duty which carries a KRA weighting of 20 per cent in the performance agreements of law researchers.

Sitting in court during the hearing as acting registrar to record time for argument of each party is part of the duties of a law researcher, important for taxation purposes.

Finally, to a lesser extent, law researchers in the SCA are expected to assist the court staff and law researchers or law clerks from other courts as part of their KRAs with a weighting of ten per cent.

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<sup>153</sup> Nienaber (note 150 above) 288–290.

(e) *High Court*

In accordance with section 166(c) of the Constitution and section 6(1) of the Superior Courts Act 10 of 2013, South Africa has a single High Court consisting of several Divisions.<sup>154</sup> Each Division of the High Court consists of a Judge President and one or more Deputy Judges President, each with specified headquarters within the area under the jurisdiction of that Division, and so many other judges as may be determined under section 6 of the Superior Courts Act.

The narratives given by Justices Diemont, Bresler and Wunsch quoted above still hold sufficiently true of the role of law clerks in the High Court.

Judges of the High Court have law clerks who assist them with administrative tasks. They often read the papers or sit through the trial and are thus fully involved in the case from beginning to end. This law clerk earns a competitive salary and can spend up to three years with a judge. They therefore have the ear of the judge and may therefore influence decision-making to the extent that law researchers are simply unable to.

In addition, approximately 15 years ago, the High Court Divisions across the country also employed law researchers who perform similar functions to law researchers in the SCA. Large divisions such as the Gauteng Division of the High Court, Johannesburg, have up to seven law researchers. Since most of them are law graduates or have completed an LL.M degree or articles of clerkship, they also assist the judge with research and editing judgments.

## V THE CHARACTER AND QUALITIES OF A LAW CLERK

For the benefit of posterity, this collated exposition of the modern institution of law clerks is concluded with the expected character of a prospective law clerk. The author is regularly approached by prospective law clerks for pointers in preparation for an interview.

Since law clerks discharge an important para-judicial function, the qualities required for those that assume this role are justifiably onerous and must be seen and treated with the seriousness the role deserves.

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<sup>154</sup> There is a Division of the High Court for each of the nine provinces of the country. See in this regard the *Renaming of High Courts* 2014 (3) SA 319.



Given their duties and expectations upon them, law clerks must be fit and proper.<sup>155</sup> They must have as good as possible a ‘polishing hand’<sup>156</sup> and a firm command of language.<sup>157</sup> They must have a passion for learning and aspire ‘to preserve the precious stores of knowledge,’<sup>158</sup> espouse intellectual honesty;<sup>159</sup> have an insatiable hunger for knowledge and perfect techniques

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<sup>155</sup> They must have unimpeachable integrity. In terms of the principle in *Fredonia Broadcasting Corp* (note 14 above) 255, and other cases – *R v Sussex Justices, Ex parte McCarthy* [1923] All ER Rep 233; *R v Essex Justices, Ex parte Perkins* [1927] All ER Rep 393; *In re Corrugated Container Antitrust Litig.*, 614 F.2d 958 (5<sup>th</sup> Cir. 1980) 968; *Hall v Small Business Administration* (note 15 above); *Hunt v Am Bank & Trust Co of Baton Rouge*, 783 F.2d 1011 (11<sup>th</sup> Cir. 1986) 1016; *Oliva v Heller* (note 16 above); *Parker v Connors Steel Co* (note 11 above); *In re Allied-Signal Inc, et al, Petitioners* (note 17 above); *Vaska v State*, 955 P.2d 943 (Alaska 1998); and *Doe v Cabrera* (DC) unreported civil action no 14-1005 (RBW) of 30 September 2015 – clerks must be careful not to later become involved in litigation in cases about which they acquired intimate knowledge during their clerkship, which principle in any case finds universal application in respect of all counsel.

<sup>156</sup> C Visser ‘Ellison Kahn’ in C Visser (contributing ed) *Essays in Honour of Ellison Kahn* (1989) 8–10, where it is inter alia said in a tribute to that great professor that he ‘checks for accuracy [of] every reference in a manuscript submitted to him, he brings it into house style, and he makes such editorial changes as he considers necessary for the purposes of accuracy, clarity and grammatical correctness.’ Herman also notes that the ‘clerk as editor eliminates any errors of punctuation and grammar, and will indicate authorities that ought to be included in or deleted from the draft. Suggestions for re-organisation of the reasons or for reworking difficult passages are made. Many hours are spent reading and rereading draft judgments with painstaking care, searching for errors and formulating improvements.’ See MJ Herman ‘Law Clerking at the Supreme Court of Canada’ (1975) 13 *Osgoode Hall Law Journal* 279 at 285.

<sup>157</sup> See Rt Hon Lord Alfred Denning MR *The Discipline of Law* (1979) 5; A Scalia & BA Garner *Making Your Case: The Art of Persuading Judges* (2008) 61. See also BA Garner *Legal Writing in Plain English: A Text with Exercises* 2 ed (2013).

<sup>158</sup> See first quotation from Carson under (a) *The father of modern judicial clerkship* above (Carson (note 26 above) 525–526). Lord Denning advises that, ‘As a pianist practices the piano, so the lawyer should practise the use of words, both in writing and by word of mouth.’ Denning (note 157 above) 7.

<sup>159</sup> Clerks must guard against plagiarism. Most importantly, clerks must not be guilty of what Justice William H Rehnquist intimated in an article he wrote as a young Arizona attorney and former law clerk to Justice Robert H Jackson that ideologically liberal law clerks might be manipulating the review of petitions for *certiorari* and tricking their more conservative justices into voting in a more liberal fashion. See WH Rehnquist ‘Who Writes Decisions of the Supreme Court’ *U.S. News & World Report* 13 December 1957 issue. See also *In re Allied-Signal Inc* (note 17 above), where the court held ‘few knowledgeable people would expect

for editing judgments<sup>160</sup> and research.<sup>161</sup> They must be acquainted with the available legal research resources<sup>162</sup> and be proficient at locating the law with relative ease and efficiency.

A law clerk must be possessed of a critical, analytical and unassuming mind. And due to their service to justice, they must have a genuine deference for the judicial process and the tenets of our constitutional democracy founded on the rule of law, the separation of powers and judicial independence. In light of their position – privy to the inner workings of courts – they must gladly assume the cloak of anonymity in service of the judges and courts which they serve with an unflinching sense of duty. And they must be discreet pertaining to all confidential information they come upon during their service.<sup>163</sup>

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that it would ordinarily cause most law clerks to actually commit the serious ethical breach of seeking to influence a judge improperly.'

<sup>160</sup> As it has been asserted that, 'A well-trained law clerk, especially one who has had considerable law journal experience, can aid his judge in polishing the language of opinions and in spotting ambiguities and other slips that may return to plague the court later. Even a judge who is a precise and clear drafter can use an editor, for the best of us can be misled by our own words and feel sure that what is crystal clear to us is equally clear to all who read.' (See Herman (note 156 above) 285.) Since a very important part of the law clerk's job is assisting judges to edit judgments, it is helpful if they read up on the subject-matter of judgment writing. See for instance MM Corbett 'Writing a Judgment' (1998) 115 *South African Law Journal* 116; H Gibbs 'Judgment Writing' (1993) 67 *Australian Law Journal* 494; F Kitto 'Why Write Judgments?' (1992) 66 *Australian Law Journal* 787; and MD Kirby 'On the Writing of Judgments' (1990) 64 *Australian Law Journal* 691.

<sup>161</sup> SR Elias & Nolo legal editors (eds) *Legal Research: How to Find & Understand Law* 16 ed (2012); see also W Putman & J Albright *Legal Research, Analysis, and Writing* 3 ed (2013). Due to our system of *stare decisis*, law clerks ought to keep abreast of judgments of the Constitutional Court, Supreme Court of Appeal, and further, in light section 39(3) of the Constitution, they must be aware of notable judgments of the apex courts of comparable foreign jurisdictions such as the Supreme Court of Canada, UK Supreme Court and US Supreme Court etc.

<sup>162</sup> Primarily they must be familiar with resources (physical and electronic) of primary sources of law such as legislation and case-law and their location through citation, chronology or subject-index, and test whether they are still good law ie, whether they are still in force, through the use of annotations and the noter-up. See T du Plessis 'Legal Research in a Changing Information Environment' 2007 (10) *Potchefstroom Electronic Law Journal*.

<sup>163</sup> *Doe v Cabrera* (note 155 above) <https://docs.justia.com/cases/federal/district-courts/district-of-columbia/dcdce/1:2014cv01005/166741/89> (accessed 6 October 2015).

Ward and Weiden note that –

*[C]lerks often had time to themselves to read and study on their own. Holmes once summoned a clerk, who was reading a novel in the next room, to discuss a case. When the clerk suggested the justice consider a particular precedent he had read while at Harvard, Holmes responded, ‘Do you think you might spare me a moment from your cultivated leisure to look out that citation?’<sup>164</sup> (My emphasis.)*

Court recess offers such necessary time for clerks unto themselves. The coinciding Constitutional Court and SCA terms<sup>165</sup> leave close to seven months of recess. For clerks these are ordinary working days with the notable difference that judges are away preparing for the ensuing term. This is the time when judges usually require detailed research on discrete points of law. However, there is generally less pressing work for clerks which allows for self-study and leisure reading – the ‘cultivated leisure’<sup>166</sup> of which Justice Holmes spoke.

To keep sharp minds, law clerks must use this time wisely and constructively for unhurried specific and general preparation for the ensuing court terms through organised reading of important authorities. The common and useful recurring themes for revision are expositions on the construction of documents, evidence and procedure, knowledge of the landmark cases and the important framework principles in private and public law. As research assistants to the judges possessed of a fine common sense and knowledge of human nature, clerks would also do well to broaden their general knowledge by reading broadly and keeping abreast with current affairs. They ought to also consider keeping their ear on the ground or fingers on the pulse of reactions (general, scholarly or judicial)

<sup>164</sup> Ward & Weiden (note 36 above) 35.

<sup>165</sup> The terms are: 15 February–31 March, inclusive; 1 May–31 May, inclusive; 15 August–30 September, inclusive; and 1 November–30 November, inclusive in terms of rule 2(1) of the Rules regulating the conduct of the proceedings of the Supreme Court of Appeal of South Africa promulgated under GN R1523 of 27 November 1998 (and amended by GN R979 of 19 November 2010, GN R191 of 11 March 2011 and GN R113 of 15 February 2013) and rule 2.1 of the Constitutional Court Rules promulgated under GN R1675 in GG 25726 of 31 October 2003. See <https://www.judiciary.org.za/index.php/judiciary/superior-courts/superior-court-terms?download=11088:court-terms-2023> (accessed 19 September 2023).

<sup>166</sup> This term seems to have been coined by the Anglo-Irish playwright Oscar Wilde (1854–1900) in his *The Soul of Man Under Socialism* 2 ed (1900) 38, when he said that ‘cultivated leisure . . . is the aim of man – or making beautiful things, or reading beautiful things, or simply contemplating the world with admiration and delight, machinery will be doing all the necessary and unpleasant work.’

to the judgments of the court they serve. However they choose to spend this valuable time, clerks must recognise the necessity to sharpen and maintain their skills, upon which judges and the accuracy of the judicial process in the courts they serve depend.

To all the above mentioned relating to the required character in clerks must be added '[m]aturity, stability and congeniality'<sup>167</sup> especially because of the inevitable 'competitive dynamic'<sup>168</sup> they work within. As to skill, it should be abundantly clear from the detailed duties of law clerks that they are expected to be intelligent, resourceful, have proven writing abilities and an ability to communicate well.

As pointed out by Corder and Brickhill, judicial work and by inference the clerkship calling sets a high premium on confidentiality because, other than colleagues on the bench, judges can else speak only to their clerks about matters they have been seized with.<sup>169</sup> To drive this home, regard must be had to the US Supreme Court written Code of Conduct for Law Clerks adopted on 3 March 1989, which still finds application today. It stipulated that:

*The law clerk owes the Justice and the Court complete confidentiality, accuracy, and loyalty. The Justice relies upon the law clerk's research in reaching conclusions on pending cases. The Justice relies on confidentiality in discussing performance of judicial duties, and the Justice must be able to count on complete loyalty.*

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<sup>167</sup> These attributes were sought after in the clerks recruited by Justice Sandra Day O'Connor. She explained that 'One thing I do look for is the person who has the ability to remain unruffled and get along.' Quoted in Ward & Weiden (note 36 above) 66–67.

<sup>168</sup> Having clerked for Justice O'Regan in 2004, Jason Brickhill noted the following during this transcribed interview forming part of the *Constitutional Court Trust Oral History Project, AG3368* of the Witwatersrand University Historical Papers research archive at <http://www.historicalpapers.wits.ac.za> (accessed 14 August 2015), regarding his experience –

'In terms of the dynamics, it's a complicated collection of people and a lot of people come into the Court with all sorts of success behind them, and there are a lot of large egos and there's a sense of competitiveness also. People competing for the attention of their own judge, competing to impress other judges, competing to outperform the other clerks. So there's a competitive dynamic. But there's also a supportive one. So we would often . . . you know, if you run into sticky issues you would debate them with other people, and a lot of my time, I remember, was spent trying to work out solutions to problems, or answers to problems, with my fellow clerks.'

<sup>169</sup> Corder & Brickhill (note 2 above) 374.

*The relationship between a Justice and a law clerk is essentially a confidential one. A law clerk should abstain from public comment about pending or impending proceeding in the Court. A law clerk should never disclose to any person any confidential information received in the course of the law clerk's duties, nor should the law clerk employ such information for personal gain. The law clerk should take particular care that Court documents not available to the public are not taken from the Court building or handled so as to compromise their confidentiality within chambers or the Court building in general.*<sup>170</sup>

The US Federal Judicial Center has made a stellar job compiling a very useful *Law Clerk Handbook*,<sup>171</sup> the second edition of which was released in 2007. The handbook details expectations for a law clerk in the US judicial setting from which much can be adapted from that refined guidebook for South African law clerks.

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<sup>170</sup> Quoted in Ward & Weiden (note 36 above) 16–17.

<sup>171</sup> See Sobel (note 87 above) at ix, preface.

## BOOK REVIEWS

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*Administrative Law in South Africa*  
by Cora Hoexter and Glenn Penfold.  
Third Edition. Juta. 2021

989 pages. Price: R1 545 (soft cover)

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Prior to the advent of the Constitution, the control of public power as well as private power when it exhibited public characteristics was constrained heavily by the Westminster doctrine of parliamentary sovereignty. Nonetheless, a viable body of administrative law had been built up prior to the advent of democracy. Take for example, the test set out in *Johannesburg Stock Exchange v Witwatersrand Nigel Ltd* 1988 (3) SA 132 (A) at 152 A–D:

‘Broadly, in order to establish review grounds it must be shown that (the administrator) failed to apply his mind to the relevant issues in accordance with the “behests of the statute and the tenets of natural justice” ... Such failure may be shown by proof, *inter alia*, that the decision was arrived at arbitrarily or capriciously or *mala fide* or as a result of unwarranted adherence to a fixed principle or in order to further an ulterior or improper purpose; or that the president misconceived the nature of the discretion conferred upon him and took into account irrelevant considerations or ignored relevant ones; or that the decision of the president was so grossly unreasonable as to warrant the inference that he had failed to apply his mind to the matter in the manner aforesaid.’

As Hoexter and Penfold note, the introduction of the Constitution of the Republic of South Africa, 1996 and, in particular section 33 thereof, together with the Promotion of Administrative Justice Act 3 of 2000 heralded the transformation of South African administrative law. Section 33, as the authors state, is not a mere codification of the common law principles of review but represented an entrenchment of rights to administrative justice.

In summary, as the authors note, the development of administrative law through the prism of the Constitution was designed to promote, as Etienne Mureinik had famously noted, a culture of justification of the exercise of power in a democratic society.

It might have been expected that the development of administrative law following the advent of the Constitution and the introduction of the PAJA would have created a certain path upon which the development of the law could have proceeded. But that has not been so. The extremely poorly drafted PAJA has vexed the courts since its introduction. For example, as Nugent JA observed in *Grey’s Marine Hout Bay (Pty) Ltd v Minister of Public Works* 2005 (6) SA 313 (SCA) at para 21, in respect of

the key definition of administrative action ‘what constitutes administrative action – the exercise of the administrative powers of the state – has always eluded complete definition. The cumbersome definition of that term in PAJA serves not so much to attribute meaning to the term as to limit its meaning by surrounding it within a palisade of qualifications.’

An additional luminous example concerns the question of whether the making of regulations falls within the scope of administrative action in terms of section 33 of the Constitution. This matter vexed the Constitutional Court in *Minister of Health v New Clicks South Africa (Pty) Ltd* 2006 (2) SA 311 (CC). While Chaskalson CJ appeared to support the view that the making of regulations fell within the scope of administrative action, that was not the approach adopted by the majority of the court. As Hoexter and Penfold note at 254:

‘Instead of concerning themselves with foreign interpretations, then, our courts would be better advised simply to interpret “decision” broadly, in order to avoid a conflict with the constitutional meaning of administrative action. Such an approach would point towards the inclusion of rulemaking within the PAJA’s definition of “decision”.’

A similar problem concerns the concept of legality which has expanded over the past two decades. In *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC) the Constitutional Court described the principle of legality as an aspect of the rule of law and as a counterpart of the right to lawful administrative action. The concept of legality and its relationship to PAJA has vexed this body of law since that case. As the authors note concerning *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd* 2018 (2) SA 23 (CC), a bifurcated approach emerged – while previously it might have been thought to be the case that all administrative action was reviewable under PAJA, suddenly, as the authors note, now its use as a pathway is dependent on the identity of the applicant: if the applicant is not an organ of State, PAJA applies but if it is an organ of State, legality applies.

Somewhat earlier in *Albutt v Centre for the Study of Violence and Reconciliation* 2010 (3) SA 293 (CC) the court appeared to avoid the application of PAJA and dealt with a special pardon dispensation announced by the President under section 84(2)(j) of the Constitution by reference to the principle of legality and the broader concept of the rule of law. As the authors note, the court’s reasoning was thoroughly subversive of the PAJA and of section 33, which mandated the enactment of this piece of national legislation.

On the other hand, as the authors write at 483:

‘The courts’ enthusiastic development of this principle [legality principle] over the last two decades suggests that (like the rule of law itself) it has

the potential to encompass the full range of administrative-law precepts. While we have not yet arrived at that point, the legality principle and the broader concept of the rule of law play a crucial role in controlling action that the ordinary rules of administrative law do not reach (and, more worryingly, some action that they *do* reach). ... [T]he already blurred line between constitutional and administrative law is given further smudging in the process.’

Unsurprisingly, the authors spend considerable time in dealing with the principles which emerged out of *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 (6) SA 222 (SCA). As they note, it is probably the most annotated SCA judgment of recent times (at 760).

In particular, after the decision in the *Oudekraal* case the concept of the collateral challenge was further developed. As Cameron said in *Merafong City v AngloGold Ashanti Ltd* 2017 (2) SA 211 (CC) at para 23:

‘Relying on the invalidity of an administrative act as a defence against its enforcement, while it has not been set aside, has been dubbed a collateral challenge — “collateral” because it is raised in proceedings that are not in themselves designed to impeach the validity of the act in question. While the object of the proceedings is directed elsewhere, invalidity is raised as a defence to them.’

In short, Cameron J was suggesting that in relation to collateral challenge a challenge to an administrative act emerges as a defence against enforcement where the administrative act has not been set aside in proceedings that are not designed to impeach the validity of the administrative act. There has, however, been considerable confusion in the development of the *Oudekraal* principle, particularly following *Department of Transport v Tasima (Pty) Ltd* 2017 (2) SA 622 (CC). Yet again, administrative law principles are shrouded in uncertainty.

There are numerous uncertainties and challenges posed by present day South African administrative law other than the ones noted in this review. They are all carefully examined and analysed by the authors. In summary, this is a monumental work which deals with all the relevant cases and controversies within the field of administrative law. Without a doubt, any judge, law teacher or practitioner dealing with administrative law will find the task immeasurably more difficult without a careful recourse to this outstanding work.

JUDGE DM DAVIS

*Retired Judge President  
Competition Appeal Court*



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*Law of Persons*

by Trynie Boezaart

Seventh Edition. Juta. 2021

252 pages. Price: R721 (soft cover)

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The aspirational nature of the transformative constitutional project in South Africa continues to serve as a catalyst for the ongoing development of the law. These developments have necessitated constant updates to existing textbooks to incorporate and evaluate the impact of the various legislative and judicial interventions. The new edition of the *Law of Persons* by Professor Trynie Boezaart is, as a result, a necessary, insightful, and timely update to a publication with an impressive publication history of more than 25 years. The seventh edition provides a comprehensive and well-structured analysis of the general principles of the law of persons in light of the applicable constitutional provisions, legislation and judicial precedent. The book demonstrates that courts remain alive to their obligation to ensure that the executive authority and the legislature adhere to their constitutional obligations. For instance, in *Kos v Minister of Home Affairs*, the court held that the Alteration of Sex Description and Sex Status Act 49 of 2003 was not implemented in accordance with its main objectives and purpose. The courts also carefully protected the child's best interests when, for instance, the child's rights to family and parental care were considered. In *Centre for Child Law v Director-General, Department of Home Affairs*, the court held that unmarried fathers are equally entitled to register their children in line with the Births and Deaths Registration Act 51 of 1992.

The book is divided into seven chapters. The first chapter mainly deals with definitions of concepts (legal subjects, including natural persons and juristic persons; legal subjectivity; status; the law of persons and justice and the Constitution). Chapter Two considers the beginning of legal subjectivity (birth, the protection of the unborn's interests, birth control, and the registration of births). There is a strong emphasis on the legal ramifications of the beginning of legal personality and the concept of birth. Chapter Three reflects on the meaning and relevance of domicile, the kinds of domicile, succession, and problem cases related to domicile (prisoners, members of the armed forces, diplomats, illegal immigrants, and persons residing at a particular place for health reasons). This chapter highlights that illegal immigrants lack domicile in South Africa and other jurisdictions. Nonetheless, they may be legalised and acquire domicile. Chapter Four considers the effect of age on status (classification of persons according to age, children's rights, infants, minors and the termination of minority). Chapter Five discusses children born of unmarried parents

(the categories of children born of unmarried parents, the status of children conceived by artificial fertilisation, proof of parentage, the legal relationship between a child and unmarried parents and changing the status of a child of unmarried parents). Chapter Six outlines the diverse factors that influence status, such as mental or physical illness, economically founded impediments, drunkenness, drug addiction, and the appointment of curators. The book aptly addresses the legal ramifications of the factors influencing status. The last chapter is allocated to the termination of legal subjectivity (determination of the moment of death, *commorientes*, proof of death, the presumption of death, the procedure in case of death, and the violation of a body or grave).

This edition incorporates valuable insights into the ongoing transformation of the law of persons in South Africa, specifically referencing the influence of the Bill of Rights and the court's role in this process. Recent examples of judicial reasoning are included to illustrate the judiciary's influence on the interpretation of various relevant Acts of Parliament. These include the Alteration of Sex Description and Sex Status Act of 2003, the Civil Union Act of 2006, the Children's Act of 2005, and the Births and Deaths Registration Act of 1992. Specific attention is given to the acquisition of parental responsibilities, the rights of unmarried fathers, surrogacy agreements and birth registration. The book contains a complete bibliography and tables of cases and statutes. The seventh edition is a well-structured, convenient, and valuable introduction to studying the law of persons.

DR ARTHUR VAN COLLER AND  
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*Faculty of Law  
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This book disseminates original research that contributes to the national, and international scene in the areas indicated below:

- i. Occupational health and safety law.
- ii. Mine health and safety law.
- iii. Occupational health and safety from an international law perspective.

As a precursor, it is important to note that this book highlights an important complementary role of occupational health and safety, and covers important domestic legislation, regulations and international instruments on occupational health and safety law in South Africa. The book serves as a reference tool for practitioners, academics and all those engaged in occupational health and safety in the public and private sectors. Furthermore, the book also provides a guiding tool for employers in order to fulfil their constitutional obligation of ensuring a healthy and safe environment for all their employees, especially in the *area of compliance* with occupational health and safety legislation and regulations.

In part 1A and B, the book deals with standards incorporated under specific regulations in terms of the Occupational Health and Safety Act, 1993 (hereafter 'OHASA'). In short, this part succinctly provides comprehensive coverage of legislation and regulations that regulate occupational health and safety. Part 1C is dedicated to the Mine Health and Safety Act, 1996 ('MHSA') including the regulations under the MHSA. This part also covers all the regulations (eg Electricity Regulations, Explosives Regulations, Machinery and Equipment Regulations, Mine Environmental Engineering and Occupational Hygiene Regulations, Rescue, First Aid and Emergency Regulations etc) that fall under the MHSA and the guidelines for the compilation of mandatory codes of practice.

In addition, part 1C provides a detailed description of the guidelines for the compilation of mandatory codes of practice in the workplace. Part 1C also provides detailed guidance notes on noise measurement of equipment to ensure compliance with MHSC standards. The remainder of part 1 provides information on how other relevant legislation (such as the National Health Act, 2003, the Compensation for Occupational Injuries and Diseases Act, 1993, the National Regulator for Compulsory Specifications Act 5 of 2008, Basic Conditions of Employment Act, 1997, Employment Equity Act, 1998 and Disaster Management Act, 2002) complements the broader framework of the MHSA and OHASA.

In addition, it is important to mention that the miscellaneous chapter deals perfectly with issues relating to personal protective equipment ('PPE'). And also, this part covers important aspects relating to risk management and control.

Part 2 of the book is dedicated to SANS ('SA National Standards') OHS standards. It provides detailed codes and their descriptions. And quite importantly, it also provides a compliance checklist. Several SANS OHS are provided, including access equipment, buildings, chemicals, construction, etc. Part 3 of this book deals with supplementary standards from international jurisdictions. In particular, this part reflects on International Labour Organisation ('ILO') standards and recommendations in the area of occupational health and safety. This part provides the relevant ILO instruments in the area of occupational health and safety and describes their application. It is submitted that the synopsis of the ILO instruments and recommendations on occupational health and safety provides a valuable benchmark for South Africa's compliance with international obligations as per the provisions of section 39(1)(b) of the Constitution of South Africa, 1996 ('the Constitution') read *mutandis mutandis* with sections 231 to 233 of the Constitution.

A thorough reading of the book shows that it is written by an author who is an expert in his field. In my considered view, this book provides a classic compendium of scholarly work in the field of occupational health and safety. This book is intended for practitioners, academics, students and all people who work in the field of occupational health and safety, including mine health and safety law.

The research methodology is clear and accurate and the book is well structured and systemised. The tables used in this book are also appropriate and useful, and provide an important compliance check tool.

The quality and quantity of the references is of high standard, and in most cases the author endeavoured to use recent materials, which is commendable.

All the sources used were acknowledged. In most areas of the book the author used his years of personal experience to articulate the legal rules and regulations on occupational health and safety.

This contribution represents fine scholarly contributions in the area of OHASA and MHSA. It takes you through the author's personal and professional experience of occupational health and safety law. It certainly represents one of the best contributions in the area of occupational health and safety.

PROF CLARENCE ITUMELENG TSHOOSE

*University of Limpopo, School of Law,  
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## **EDITORIAL POLICY**

The *South African Judicial Education Journal (SAJEJ)* is published by the South African Judicial Education Institute (SAJEI), Office of the Chief Justice. The aim of the journal is to encourage writers to share their knowledge of relevant issues on judicial education and matters of interest to the judiciary, legal profession and students. The journal also contributes to research on judicial education on a global scale as well as towards capacity building of new and accomplished writers.

The journal publishes articles, case notes and book reviews on topical issues relating to judicial education and the judiciary. Articles published in the journal are peer reviewed before publication and subjected to intensive plagiarism and copyright checks, through the use of applicable software. The journal is distributed in hard copy and online and can be accessed at <https://www.judiciary.org.za/index.php/sajei/sajei-publications/sajei-journal>.

The submissions should be in English and should include an abstract.

### **1. GUIDELINES FOR SUBMISSION**

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The following information should be on the cover page:

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- b. Occupation
- c. Institutional affiliation
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- e. List of keywords
- f. Signed statement that the submission is original and has not been submitted to any other publication
- g. Date of submission.

The submission should be made by email addressed to SAJEJournal@judiciary.org.za in order to facilitate online reviews.

The Editorial Board accepts only original research articles. The *SAJEI* discourages resubmission of articles unless where prior rejection is disclosed during initial submission. The contributions should be scholarly, entail an in-depth analysis of the relevant subject and must make a meaningful contribution to the body of knowledge. The submissions may therefore not be merely descriptive.

Authors should use language that is courteous to others, non-discriminatory and professional. The Editor-in-Chief reserves the right to make editorial changes where necessary to improve the quality of the article. Authors will be informed of such changes.

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The format of the submissions should be as follows:

- a. MS Word
- b. 1.5 spacing
- c. Font: Arial 11
- d. Justified alignment.

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The author will be provided with feedback and requested to resubmit a revised manuscript within two weeks. An extension will be granted by the Editor-in-Chief, where necessary.

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- 1.1 Authors and contributors must provide written confirmation that the manuscript has not been published or submitted for publication anywhere.
- 1.2 Manuscripts should comply with the *South African Judicial Education Journal* requirements set out here and in the call for papers.
- 1.3 Authors and contributors must carefully proofread their submission, and avoid typographical and grammatical errors.
- 1.4 Manuscripts must be free of ambiguity, illogicality, tautology, circumlocution and redundancy.
- 1.5 The Editorial Board reserves the right to propose changes it considers desirable in consultation with the author/s.
- 1.6 All articles will be sent to two (2) peer reviewers. This process is subject to strict confidentiality.
- 1.7 Notes will be peer reviewed by at least one (1) peer reviewer.
- 1.8 Contributions should be in the form of articles (5 000–10 000 words), notes (3 000–5 000 words) and book reviews (500–2 000 words), including footnotes. All articles should be accompanied by an abstract of approximately 250–300 words.

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<sup>1</sup> Reviewed 11 December 2023.

## 2. MANUSCRIPT FORMAT

The format of the manuscript should be as follows:

### 2.1 Abbreviations

- 2.1.1 Before using an abbreviation or acronym, first use the full name or word and reflect the abbreviation or acronym in brackets, eg African Union (later referred to as 'AU' or simply ('AU')).
- 2.1.2 Use 'para' and 'paras' only in footnotes. In the text use 'paragraph' or 'paragraphs'.

### 2.2 Capitalisation

The use of capital letters should follow the accepted English language standard.

- 2.2.1 After a colon (:) use a capital letter if a new full sentence is introduced; use lower case if it is merely a list of items.
- 2.2.2 Generally avoid capital letters; they are normally applicable to some names of entities or objects, for example Office of the Chief Justice.
- 2.2.3 When referring to books and journals please capitalise the first letter of every word in the title, except articles and prepositions: RL Bakiamung *Principles of the Law of Sentencing*.

### 2.3 Date format

The format for the date should be as follows: 17 September 2017.

## 3. REFERENCES

### 3.1 Reference to books

When referring to books, cite as follows:

- 3.1.1 When referring to a book at first instance in the footnotes: RL Bakiamung *Principles of the Law of Sentencing* (2009) 143 (Note: the first letter of every word in the title, except prepositions and articles, is in capitals; the author's name is not given; only initials are; and there is no space between initials).
- 3.1.2 Thereafter reference to the same source should be as follows: Bakiamung (note 1 above).
- 3.1.3 Where there are two authors: RL Bakiamung & PJ Van der Schaik, in the footnote there should be a full citation like Bakiamung, RL & Van der Schaik, PJ (followed by title) (1993).

- 3.1.4 Where there are more than two authors: reference in the text should be Dubelethu *et al*; in footnote Dubelethu, ZS; Bakiamung, RL & Van der Schaik, PJ (followed by title) (1993). But if the list of authors is rather long, even in the footnote you may simply say Dubelethu *et al* followed by the title and year of publication.
- 3.1.5 When referring to a **translated** source, the citation should be as follows: MD Zethu (ed) *The Philosophy of Plato* trans DW Bilala (1904).

### 3.2 Reference to journal articles

- 3.2.1 In footnotes (first reference): HB Khatib-Boakye 'A Critique of the European Charter on Trade Rights' (2008) 31 *Oxford Law Journal* 231.
- 3.2.2 In footnotes (subsequent references): Khatib-Boakye (note 1 above) 304.

### 3.4 Reference to theses and dissertations

If you refer to theses and dissertations please use the following format:

DG Mangondianga 'The Political Question of the Review of Constitution of Zimbabwe' unpublished Phd thesis, University of Zimbabwe, 2014 186.

### 3.5 Reference to newspaper articles

If you refer to a newspaper article, please cite as follows:

'The ordeal of foreigners' children' *The Citizen* 20 August 2015 3.

### 3.6 Reference to International treaties

First reference (in text): UN Committee on Economic and Cultural Rights (Committee on ECR); subsequent references in text: Committee on ECR.

### 3.7 Reference to emails and telephone communication

E-mail messages and telephone calls should be cited as below:

E-mail from A Ntanjana on 28 July 2006.

Telephone communication with A Ntanjana on 28 July 2006.

### 3.8 Reference to case law

- 3.8.1 In case names that have two or more parties on one or both sides, please use the initial parties (*Zungula v Zintle*, and not *Zungula and Another v Zintle and Others*).

- 3.8.2 Do not put case names and citations in both the text and footnote. It is preferable to have a shortened case name in the text and the full case name and citation in the footnote (in text: in *Daniels*, instead of in *Daniels v Scribante*; and in footnote: *Daniels v Scribante* followed by full citation). The footnote number should immediately follow the case name.

### 3.9 Reference to foreign case law

In referring to foreign case law see examples below:

#### 3.9.1 Canada

*Malcorick v British Colombia* (1997) 151 DLR (4th) 577

#### 3.9.1 USA

*McValley v Doceck* 397 US 235 (1970)

*S v K* (2002) 292 F 3d 597

### 3.10 Reference to websites

When making reference to a website please use the following format:

<http://www.ocj.org.za> (accessed 17 July 2016).

When an author or article is cited, provide full information, eg

International Organisation of Judicial Training ‘The Roundtable on Judicial Education and Accountability’ 21 March 2017  
<http://.....> (accessed 31 January 2007).

## 4. FOOTNOTES

In using footnotes, please take note of the following:

- 4.1 At the end of each footnote please use a full stop.
- 4.2 Please do not use *ibid*, *supra*, etc.
- 4.3 Words at the beginning of a footnote should start with a capital.
- 4.4 All footnotes should be numbered.
- 4.5 Use ‘&’ when referring to treaty articles and authors (arts 1 & 2; De Huilsig & Sefatane; *National People Party v Deputy Speaker of the National Assembly*) when referring to more than one resource. In full sentences use ‘and’ and not ‘&’.
- 4.6 Provide the full title of a journal and not the abbreviation, for example, *South African Journal of Administrative Law*, and **not** SAJAL.

## 5. QUOTATIONS

- 5.1 Quotes longer than **30** words must be indented (on left-hand side, not on right-hand side).
- 5.2 For indented quotes, use font 10 Arial italics; do not use quotation marks. And for quotes within an indented quote use single quotation marks on either side. Example of indented quote:

*The Court took a dim a view of what it saw as ‘a complete disregard of process’ and told counsel as much.....*

- 5.3 For quotes that are shorter and not indented, use single quotation marks (The witness said that she had had ‘enough for one day’ and was not prepared to remain in the witness stand for a minute longer.)

## 6. USE OF BRACKETS

Avoid the use of brackets. If what you want to bracket is a parenthetical phrase, rather use parenthetical commas or dashes.

## 7. USE OF BOLD

Please avoid the use of bold lettering.

## 8. PUNCTUATION MARKS

### 8.1. Dashes

Use dashes where appropriate; examples may be where, like commas, dashes delineate a parenthetical phrase.

### 8.2. Use of italics

Please use italics for titles of journals, books, newspapers, and case names. Italics should not be used for legislation, treaties and conventions. Words or phrases that may be in italics are the following:

7.2.1 *et al*

7.2.2 *coup d’état*

7.2.3 *ubuntu*

7.2.4 *prima facie*

7.2.5 *inter alia*

7.2.6 *per se*

7.2.7 *a quo.*

However, contributors are discouraged from using Latin phrases. Of course, at times this may be unavoidable. Where Latin is used, a translation in brackets immediately after it must be included, ie ‘the Court did this *mero motu* (of its own accord) and without any prior notice to the parties’.

### 8.3. *Apostrophes*

The modern practice is not to use an apostrophe in abbreviated plurals or plural numerals (ADSLs, and not ADSL’s; during the 1500s, and not 1500’s), unless it is used for the possessive form.



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