News & Views FOR MAGISTRATES

NOVEMBER 2003

When does accepting a gift or favour amount to corruption?

Jane Franco

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To take a bribe or to use one's judicial office to further personal interests is corrupt and dishonest. However, the issue is complicated because giving gifts to show appreciation for something is "a normal and acceptable practice in society". As Burchell and Milton note, "the difficulty in separating legitimate reciprocity from a corrupt bribe... is not always a simple matter."[2]

The following scenarios illustrate situations where the line may be difficult to draw:

1. You are currently making renovations to your home. You have had continual problems with the builders. Would it be appropriate to write a letter of complaint to the company using the departmental letterhead and which contains your title?
2. The President has invited all the magistrates and staff in your office to a dinner at his official residence. The President has done the same thing with all other magistrates and judges. At the end of the dinner, you are all presented with dinner services. What would you do?[3]

The Corruption Act, which applies to judicial officers, is the starting point.

In terms of the Act one must look at the intention of the judicial officer concerned in receiving the benefit. If there was no corrupt purpose in accepting or procuring the benefit, in the sense of an intention to influence the exercise of his/her judicial duties, it would not be illegal to accept the benefit or procure the favour.

However, an activity may not be corrupt in the sense of being illegal under the Act, but may nonetheless be corrupt in ethical terms. Many codes prescribing ethical conduct for judicial officers prohibit abuse of position and the acceptance of benefits. For example, our Code of Conduct for Magistrates[4] disallows the acceptance of gifts or favours "of whatever nature which may unduly influence ...[the] execution of official duties or [which] create the impression that this is the case".[5]

"Judicial Ethics in South Africa" provides that " A judge should not lend the prestige of the judicial office to advance the interests of the judge or others".[6]

In other words a judicial officer should not abuse his/her position.

Let's analyse the scenarios above to see if they would amount to corruption in the statutory sense or in ethical terms:

Scenario 1

Using the letterhead would not amount to an offence in terms of the Corruption Act because the magistrate is not procuring any benefit to which he is not entitled, with the intention of performing some irregular act in the exercise of official duties.

However, it may amount to misconduct in ethical terms on the basis of abuse of position if it could reasonably be perceived that the magistrate intended to use the letterhead to exert some influence over the builder.

Scenario 2

There are two issues that arise out of this question: Firstly, is it appropriate for members of the judiciary to attend functions at the invitation of the President? Secondly, is it appropriate for them to accept gifts from the President?

As regards the first issue, it would not be an offence under the Act to accept the dinner invitation because the dinner was part of a series of such events hosted for all members of the judiciary, It can be seen as an official function and not a personal invitation to the magistrate concerned. Moreover, "the fact that the judiciary must be separate and independent from the executive does not mean that they have to treat each other as pariahs."[7] It is the gift that raises potential problems.

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Gifts and corruption *continued from page 1*

The difficulty in assessing this issue is that the State President represents the executive branch of government and is ex officio always a party to proceedings before the court in respect of criminal matters. If the intention of the magistrate concerned in receiving the gift was to show the State some undue bias in the exercise of his or discretion in a criminal matter that may come before him/her, then accepting the benefit would be an offence under the Act.

But that does not address the question of civil court magistrates and the more pertinent issue of separation of powers. These need to be determined with reference to the other considerations.

Accepting a gift from the President would undoubtedly create the impression that the doctrine of separation of powers has been transgressed. Given that one of the rationales behind the separation of powers doctrine is that the judiciary must be independent of the legislature and the executive because of its function as "watchdog" over these two branches, the inference would be that the magistrate concerned is, in some way, in the President's pocket and therefore not independent. In this particular situation, however, we are told that the other members of the judiciary were bestowed with the same benefit. Nonetheless, the situation is unethical for magistrates whether or not they actually had some corrupt purpose in mind in accepting the gift because of the impression of bias that it creates in the minds of the public. Accepting the gift would also be unethical as it amounts to a Magistrate abusing their position as an independent member of the judiciary.

Notes

1 Based on paper delivered at the CMJA Regional Colloquium on Combating Corruption within the Judiciary May 2003.
2 Burchell, Jonathan and Milton, John, *Principles of Criminal Law*, 1994 at 582.
3 This scenario was raised at the CMJA Colloquium op cit.
4 Code of Conduct for Magistrates (Regulation 54A promulgated in terms of Section 16 Magistrates Act 90 of 1993).
5 Code of Conduct for Magistrates op cit Article 7.
6 Article 30; although we do not yet have an official code for the higher judiciary, "Judicial Ethics in South Africa" prepared by a committee of judges is a working draft for such a code, contained in "Proposals for a mechanism for dealing with complaints against judges, and for a code of ethics for judges" (2000) 117 *SALJ* 377.
7 Judge Kriegler speaking at the CMJA Colloquium op cit.

Magistrates' powers trimmed

Karin Lehman
Dept of Commercial Law, UCT

In the recent decision of *S v Mugeri*, Judge EM Patel clarified the meaning of Section 52(1) of the Criminal Law Amendment Act, in light of the amendments made to it by Section 34(b) of the Judicial Matters Amendment Act 62 of 2000.

The question before Judge Patel was: *Is a regional magistrate, who has convicted an accused of an offence listed in Part 1 of Schedule 2 of the Criminal Law Amendment Act, obliged to stop the proceedings in the regional court immediately on conviction, and commit the accused for sentencing by the High Court?*

Counsel for the State argued that a regional magistrate is obliged to stop the proceedings. Counsel for the accused argued that section 52(1) instead obliges a regional magistrate to first hear evidence relevant to sentencing. *Only if* the magistrate then forms an opinion that the offence merits punishment in excess of its jurisdiction, is the magistrate obliged to commit the accused for sentencing by the High Court. The interpretation advocated by counsel for the accused would mean that if the magistrate did not consider the offence as one which merited punishment in excess of 15 years, sentencing could remain in the Magistrates Court. Thus, the magistrate would be entitled to pass sentence herself, notwithstanding the fact that the accused had been convicted of a Part 1 offence.

Judge Patel correctly rejected the interpretation contended for by counsel for the accused. Judge Patel pointed out that section 52(1) was amended to clarify the section. Under the pre-amendment section 52(1), it appeared as if the legislature had intended, with respect to all Schedule 2 offences, that an accused only be committed for sentencing to the High Court if the regional magistrate was of the opinion that the offence concerned merited punishment in excess of 15 years imprisonment. However, the 'old' section 52(1) did not distinguish between Part 1 and Part 2, 3 and 4 offences. The new section 52(1) does draw a distinction. This distinction was deliberately introduced by the legislature to ensure that in respect of Part 1 offences, regional magistrates refer the case to the High Court for sentencing. The legislature requires that magistrates do so, as part of its strategy to combat serious crimes. People convicted of Part 1 offences must be sentenced to life imprisonment, a punishment that exceeds the jurisdiction of the regional court.

Various mandatory minimum sentences are also laid down in respect of Part 2, 3 and 4 offences. Some exceed the jurisdiction of the regional magistrate's court, and some do not. In respect of offences for which the minimum sentences exceed the regional court's jurisdiction, the court may refer the matter to the High Court for sentencing. However, the court is not required to do so the moment the accused is convicted of a Part 2, 3 or 4 offence. Instead, Judge Patel held that the full-bench decision of the TPD in *Myinijana v S, Manong v S*, remains correct so far as the approach to be followed in respect of section 52(1)(a) and (b)(ii), the Section that refers to Parts 2, 3 and 4 offences, is concerned. The *Myinijana* case held that with respect to the 'old' section 52(1) that drew no distinction between the different parts of Schedule 2, that regional magistrates should first decide on an appropriate sentence for themselves, taking into account whether there are substantial and compelling reasons justifying the imposition of a sentence less than the prescribed minimum. Only if the regional magistrate thinks that the appropriate sentence would exceed the court's maximum 15-year punishment jurisdiction, is it necessary to refer the matter to the High Court. Judge Patel held that this is still the correct approach for Part 2, 3 and 4 offences, but not for Part 1 offences, in light of the amended wording of Section 52(1).

The decision binds regional magistrates' courts subject to the jurisdiction of the TPD, and all regional magistrate's courts in other parts of the country unless their own High Courts reach a contrary view. All such regional courts will in future be required, on convicting an accused of a Part 1 offence, to stop the proceedings without further ado and commit the accused for sentencing to the High Court.

Decentralising the administration of courts in Norway

Harald Jølle
Head Judge of Lyngdal District Court, Norway

Until recently, the Norwegian Ministry of Justice ran the central administration of the Supreme Court, the Courts of Appeal and the District Courts (partly equivalent to Magistrates Courts). In 1999, the Norwegian Commission of the Courts proposed the establishment of a Central Court Administration. In assessing whether the courts should be administered more or less independently of the executive, a majority of the Law Courts Commission found it necessary to mark this more strongly by establishing a new independent administrative body. This was adopted by our Government and later by Parliament.

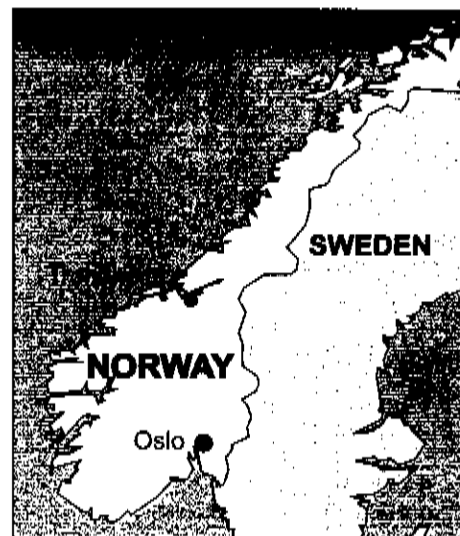
Our new Central Court Administration is led by an independent Board. It consists of seven members; three judges and two lawyers, appointed by the Government, and two representatives of the general public, elected by Parliament. At present, the board has four female members, including the chairperson.

As part of an ongoing policy to move administrative functions out of the capital, this new administrative body was situated in Trondheim; Norway's third largest city. The Central Court Administration has taken over, from the Ministry of Justice, the functions of personnel administration. Further functions include drafting and allocating the Courts' budgets, ensuring that the courts had serviceable premises and appropriate equipment, training and developing the organisation of the courts. Functions of the Board include the appointment of the director of the Central Court Administration and the handling of cases of great importance or matters of principle.

Norwegian judges have been relatively free to take on extra-judicial activities in addition to their official functions. A system of approval and registration of such activities has been introduced. The register is open to the public, and is also on Internet. This gives both parties and their lawyers in any court case access to information that may determine whether they should move to disqualify a judge.

A new complaints and disciplinary body (the Supervisory Committee of Judges) has also been established. Anyone who has been subjected to alleged misconduct of a judge in the performance of their office can bring a complaint against the judge. Complaints can also be brought before the committee by a court president, the Central Court Administration and the Ministry of Justice, and the disciplinary body can take up cases on its own initiative. Misconduct outside the performance of office, if it is deemed to significantly affect a judge's work, can also be brought before this new body. The committee can react in the form of a "warning" or "criticism", in cases where the conditions for more severe reactions, such as dismissal and punishment, are not present.

In Norway, as in none of the other Scandinavian countries, we do not have written ethical rules for judges. This new disciplinary body will therefore be an important contributor to the development of how to define "conduct as befitting a judge".



Transformation of the judiciary

Andre le Grange
Magistrate at the Bellville Magistrates Court

Excerpts from a paper delivered at the Conference of the International Association of Judges – African Region

Themes discussed include peace and stability in Africa, the need for the judiciary to reflect the society it serves, the transformation of the judiciary to meet the demands of a new society and criteria for transforming the judiciary.

By virtue of their expertise, judicial officers have a special contribution to make in the administration of Justice in fostering universal respect for fundamental human rights. They are also uniquely placed to help those who have been aggrieved to find redress. Legal remedies are often available. However, remedies are only beneficial, in any given case, if a judge is aware of these rights and applies them.

Judges and magistrates have a creative function. They cannot afford to mechanically follow the rules laid down by the legislature. They must interpret these rules so to reconcile them with the wider objectives of Justice which are encapsulated in the International norms of Human Rights. Justice according to law has never meant justice only according to the law written by Parliament. Justice includes other laws: written, unwritten and dug out from nature, custom and the life of the people.

Transforming a judiciary to meet the demands of civil society is not any easy task. In our male dominated societies we men sometimes, and often deliberately, lose sight of the rights of women.

The appointment of judicial officers in transforming a judiciary is at the heart of a just society. Therefore, appointment of judicial officers only according to quota allocation of the various population groups, or perhaps according to the various ethnic groups, or even gender, religious or political groups will rarely bring about a just society we desperately seek in modern days.

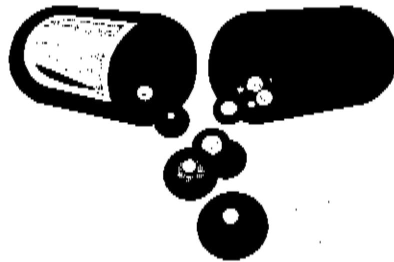
Affirmative action is a concept and application that is globally applied, where discrimination of race and gender, was the order of the day in a society. However, caution should be exercised so that the application of affirmative action does not become a tool to demean the self-esteem and self-worth of appointees.

Chemical castration: the constitutional implications*

Cathy Powell
Lecturer in Public Law, UCT

Found guilty of child abuse in a Durban Magistrates Court, Dean Foster was ordered to submit to an anti-androgen drug for three years. He had proposed the sentence himself. Additional sentences, including fines and submission to psychotherapy, were imposed. But, Foster will not be imprisoned providing that he abides by the conditions attached to the sentence.

Anti-androgen drugs lower libido by suppressing male sex hormones. Some anti-androgens can be more effective than actual castration because they suppress more sex hormones than physical castration would. However, not all punishment falls within Constitutional parameters. . This sentence infringes a range of constitutional rights. Section 12 prohibits cruel, inhuman or degrading punishment and protects bodily and psychological integrity (including control over one's own body), while section 14 protects privacy.



We can see that together, these rights militate against chemical castration. Furthermore, the core concept underlying these rights, that of dignity (s 10), cannot be reconciled with such a practice. South African courts have recognised the cruelty of both physical and psychological violence in their rejection of corporal punishment and the death penalty. Nevertheless, dignity requires more than a mere absence of violence.

According to both foreign law and South African case law, the right to dignity incorporates the protection of an inviolable intimate sphere.

Our sexuality is integral to our bodies and intimate relationships and is central to our human experience. Therefore, an intrusion on our sexuality infringes our dignity, privacy and our bodily integrity and is a cruel, inhuman and degrading punishment.

The Constitution allows rights to be limited if the limitation is reasonable and justifiable (s 36). In its analysis of the limitation, a court must weigh up various factors including the purpose of the limitation. A possible purpose for chemical castration is retribution. This was recognised in the death penalty case but held to carry less weight than other goals of punishment, such as deterrence. Another possible purpose is prevention. It must also be shown that anti-androgens do prevent sexual offenders from abusing children again. Proponents of chemical castration assume that there is a biological reason for sexual abuse. Psychological research maintains that rape and sexual abuse are fundamentally violent, rather than sexual, acts, motivated by a need to dominate. As child abuse can occur without sexual intercourse, we need to be sure that removal of the physical sex drive will also remove the psychological drive behind abuse. There is, however, no evidence to this effect. On this basis alone, chemical castration could fail the test in section 36.

It will probably be found that the sentence of chemical castration is an infringement of Foster's rights of dignity, privacy, bodily integrity and freedom from cruel, inhuman and degrading punishment. Can he waive these rights? *Mohamed v President of the RSA* 2001 (7) BCLR 685 (CC) left open the issue of whether constitutional rights can be waived. Nonetheless, for a valid waiver, the person waiving their rights has to have been made aware of the exact nature and extent of the rights being waived and the ensuing consequences. It is uncertain what the full consequences of anti-androgens are (and the court order does not identify *which* anti-androgens will be used). However, even if Foster were to waive his rights in a fully informed manner, it should be borne in mind that chemical castration failed the limitations analysis not just for failing to protect Foster himself, but for failing to protect a vulnerable group in society. It could be argued that, in this case at least, the right was not his to waive.

* *This is a shortened version of a comment in the newsletter* Lawsure.

What would you do?

The first and second appellants in a Supreme Court of Appeal (SCA) case had initially appeared before a regional magistrate on charges of robbery. The second appellant had appeared before the magistrate in prison clothing and the charge sheet included a cover sheet which described the accused as 'gevonnis', indicating that he had been sentenced to imprisonment. Thus, the magistrate would have been aware that the appellant had at least one prior conviction. Section 89 of the Criminal Procedure Act 51 of 1977 provides:

'Except where the fact of a previous conviction is an element of any offence with which an accused is charged, it shall not in any charge be alleged that an accused has previously been convicted of any offence, whether in the Republic or elsewhere'.

The appellants were convicted for robbery and sentenced to 10 years' imprisonment each. The high court granted both appellants leave to appeal to the SCA on their convictions generally. It also granted the second appellant leave to appeal on the question of whether his right to a fair trial, protected in s 35(3) of the Constitution had been violated. The SCA found that leave to appeal generally should not have been granted but did consider, in detail, whether the right to a fair trial had been violated.

A court can reverse a conviction on the basis of irregularity in the proceedings only if the court finds that 'a failure of justice has in fact resulted from such irregularity'. This has been interpreted to mean that there must have been 'actual and substantial prejudice to the accused'. *What would you do? Should the magistrate have recused himself or herself? Should the conviction have been set aside on the basis of an irregularity?* ***Answer on page 7.***

Magistrates and the Domestic Violence Act: Issues of interpretation

Lillian Artz, *Institute of Criminology, UCT*

This is a new report based on research conducted by the Consortium of Violence Against Women.

In an effort to understand the constraints and limitations of the Domestic Violence Act, the Consortium on Violence against Women has monitored the implementation of this act since 2000. The Consortium's first research report - *Monitoring the Implementation of the Domestic Violence Act: First Research Report* - was a comprehensive study that examined the implementation of the Act from the perspective of criminal justice personnel themselves. Three additional studies have been published since the First Report. These are *Implementation of Bail Legislation in Sexual Assault Cases, Domestic Violence and Development: Looking at the Farming Context* and *Bail in Sexual Assault Cases: Victims' Experiences.*

The different 'angles' from which the Consortium has examined the implementation of the Domestic Violence Act has furnished useful information on the daily operation of the Act, the complexities of applying progressive legislation in poorly resourced communities as well as the innovative application of the Act by the criminal justice system and their social and legal agents. These studies reveal a great deal about the role and function of the police and the clerks of the court. It became increasingly apparent that the management of domestic violence cases within the criminal justice system and the effectiveness of the Act were often dependent on how magistrates decided on these matters. This study therefore set out to investigate how magistrates interpret and apply the Domestic Violence Act.

It has become clear that one of the key contributions to be made to improve the implementation of the Domestic Violence Act is ensuring that constructive "dialogue" occurs between criminal justice personnel. By systematically working through the "nuts and bolts" of criminal justice machinery, great strides can be made in improving access to justice for victims of interpersonal violence. It is hoped that this report, our suggested guidelines for the implementation of the Act and the redesigned Domestic Violence Act forms assist this process.

If you are interested in receiving a copy of this and the other reports please contact: Elaine Atkins at the Social Justice Resource Project, Institute of Criminology, phone (021) 650-2983 or email eatkins@law.uct.ac.za, or Joyce Maluleke at the Gender Directorate, Department of Justice, phone (012) 3151668/70 or fax (012) 325-9713.

Lilian Artz, Penny Parenzee and Kelley Moult from the Consortium of Violence Against Women.

Magistracy celebrates Women's Day in the Western Cape

By JF van Schalkwyk, Khayelitsha Magistrate

On 8 August a group of about 80 people from the legal fraternity, predominantly magistrates, converged upon the Khayelitsha Magistrate's Court. They came to celebrate National Women's Day with a difference.

The objective was to honour the input of women that has ensured the liberation, empowerment and emancipation of women.The Gender Desk of the Justice Officer's Association of South Africa, in partnership with the Department of Justice and Constitutional Development hosted the event.

Mr CJ Musi, President of JOASA proponent and advocate for gender equality was the programme director. He read a moving poem titled 'I Rise' by the Maya Angelo.

Judy van Schalkwyk, Senior Magistrate at Khayelitsha said the Gender Desk sought to inculcate in all magistrates greater gender awareness, especially while dispensing justice. "We have reached a stage where we should engage each male and female intellectually and rationally on the importance of a society that believes in gender equality" said Van Schalkwyk. The latter said the Commission on Gender Equality found last year that men still held senior and powerful posts whilst women held junior and administrative posts. Ms van Schalkwyk was of the view that the judiciary was also in the dock when it comes to the issue of gender equality. She maintained that "they have done too little, too late". In the Western Cape division we only have two black permanent regional magistrates and five white female an three female senior magistrates – this in a regional division that has more than 30 regional magistrates. An indictment of the judiciary!

Gertrude Fester, Commissioner on Gender Equality, and former member of Parliament, recited the poem "Say No Black Woman" by Gloria Mhlope.

The highlight of the day was Joyce Maluleke, Director of the National Gender Department of the Department of Justice and Constitutional Development's speech. She said that although much had been achieved to advance the human rights of women in South Africa since 1994, it was undisputed that the patriarchal society remains sacrosanct. She acknowledged the significance of the law as an agent for change but also they believes that the presence of women within the judiciary will help transform attitudes. Maluleke said women were discriminated against not because of the law but because of the outdated stereotypes that are prevalent in our society and judicial system. Furthermore, women embody justice and fairness. They are strong, resilient, vigilant, intelligent and compassionate. That is why we have been entrusted with the scales of justice.

In a lighter vein, the magistrates boogied to the sounds of the Marimba dancers and the Mamela Jazz Band.

Overall, the day was a huge success and a big thumbs up to gender equality and a more gender sensitive approach by magistrates to these burning issues.

Way to go! JOASA Gender Desk, Western Cape!

In search of justice fit for a rainbow nation

Excerpts from an article by
Clare Hogan
in the London Times, 19 September 2003

Since 1995 the Law, Race and Gender Research Unit (UCT) has trained hundreds of magistrates. The courses are intensive and focus on social context training. After a two-week course there are three projects, known as interventions, and a three-hour examination that tests how much each participant has understood. The projects are an opportunity to look into topics of interest. Alman and a colleague worked with deaf people, examining how they are treated in court, what facilities they would ideally like to have, and presented their findings to colleagues. She gave talks at schools about the job of a magistrate. Her last project was something few white people do – she took a trip to a Cape Flats township by public transport. "The course has made me more confident professionally and personally. I am much more aware of who I am and no longer feel that I have to apologise for being a woman, or for being white," Alman says.

The LRG courses, weekend workshops, training days and lectures are not just for "pale males". Attendance is voluntary. André Le Grange, a regional court magistrate, says: "Not only white people are racists. After apartheid I found it difficult to have contact with whites without feeling hatred and bitterness. It was only when I opened up in discussions that I realised that their fears are my fears, my concerns are their concerns; it has nothingto do with black and white – it's more about the individual. Your growing-up, the school you went to, your parents all play a part."

As lectures alone are insufficient peer facilitators are trained. Cagney Musi, a regional court magistrate who has trained as a peer facilitator, did his "intervention" at the Mitchells Plain court in the Western Cape. The area has a serious problem with domestic violence and non-payment of maintenance.

"One in four women is a victim of abuse. During a discussion with fellow magistrates I asked four court staff into our room and said to my colleagues, 'Look, one of these women might have been battered.' This brought it home to everyone. Now, instead of striking a case off the roll if the woman does not turn up for the hearing, we postpone the case and ask her to come in to explain why she didn't arrive. Perhaps her husband threatened her if she continued with it, perhaps she had childcare problems . . . this has been a big change.

The challenge of labour law

Excerpts from the inaugural lecture given by
Professor ER Kalula
at the University of Cape Town on 30 July 2003

My view is that courts in this country, particularly labour courts, have not been playing their role as they should. My contention is that the Labour Courts seem to have lost sight of labour law as a "secondary force" in labour relations. Instead, they at times seem to compete with the High Court as a "common law bench". They appear to ignore the 'protective elements' of the new South African labour laws which are central to the new dispensation.

I am, of course, keenly aware of the argument that all areas of the law have policy implications. Good judge-made law must take account of society and its realities. There is no time to articulate the special nature of labour law, save to emphasise that labour law is more disposed than many other areas of the law to the demands of the context.

There seems to be a surprising lack of expertise in some of the judgements, particularly those of the Labour Appeal Court. There is an apparent lack of leadership in the development of labour law jurisprudence.

I understand the restructuring of the Labour Courts is under consideration. My point is that it does not really matter whether restructuring takes place or not, or the character of such restructuring. What does matter is that expertise is developed and maintained. There can be no substitute for expertise.

Another disturbing feature of the current Labour Courts is the widespread and frequent use of practitioners as acting judges. This practice not only prevents the development of disinterested jurisprudence, but even more importantly, it undermines public confidence in the Labour Court system.

The above eclectic survey, by implication, suggests that the current labour market regulation and the institutions designed to implement it are not focusing on the needs of the vast majority in the labour markets of Southern Africa: the unemployed, underemployed and those in non-wage-employment. The informal sector in particular, unaccounted for in formal terms should not as such be ignored.

I believe that to seek the heightening of the social dimension of labour law is not to deny the relevance of the traditional labour market regulation such as ordinary case law on which labour rights and obligations depend. The fact remains that in countries where the vast majority of workers are outside the formal labour market, innovative approaches to regulation ought to be considered and adopted. It may well result in dual market regulation but there need not be any disjuncture.

The challenge and, therefore, the future of labour law in Southern Africa lie in seeking to recognise that labour law is rather a sharper instrument of social policy. It must strive to treat social protection as a central objective. This is not to deny the privity of the contract of employment. Mutual obligations and rights in the workplace remain important but they must be related to the broader realities of our countries' situations. Labour law must be part of the alleviation of poverty agenda.

Developments in traditional leadership

Professor TW Bennett
Department of Public Law, UCT

Three bills concerning traditional leaders are currently moving through legislative channels. The most important is a bill proposing a complete overhaul of the institution of traditional leadership and its remodeling according to South Africa's new structures of government. The SA Law Commission's Report (and attached bill) on Traditional Courts confirms the judicial powers of traditional leaders, but, effects significant changes to the procedures and composition of their courts. Finally, the Communal Land Rights bill eliminates traditional leaders as controllers of land subject to customary tenure.

These bills represent a long delayed attempt to reform an institution that was left largely untouched by the colonial and apartheid governments. Recently, abundant evidence has come to light revealing traditional leaders' lack of the financial or managerial skills needed to cope with the demands of modern government and corruption.

Following the constitutional negotiations, provision was made for the creation of 'houses of traditional leaders' under the Interim Constitution. Six provinces established such houses and a national body was established in Pretoria. These houses have limited powers to advise their respective legislatures on matters concerning customary law and traditional leadership. So far, apart from lobbying against state regulation of traditional circumcision ceremonies, they have not been especially productive.

The most troublesome problem is the conflict between the authority of traditional rulers in matters of local government and that of democratically elected municipalities. Although everyone concedes that the former make a vital contribution to government in rural areas, the principle of democratic election cannot be compromised. Under the Local Government: Municipal Structures Act 1998, MECs in had to request their Houses of Traditional Leaders to identify who would participate in municipal councils. Traditional rulers so identified could participate in council meetings, but, had no right to vote.

The Traditional Leadership and Governance Framework Bill of 2003 tidies up the loose ends. It gives provincial premiers the power to recognize 'traditional communities', which may, in turn, establish 'traditional councils'. These bodies will have certain statutory powers, all of which are now subordinate to the powers of municipalities. Thus, the bill provides that traditional rulers are there to support, assist, promote and facilitate. By implication they will lose their original sovereignty according to customary law.

Certain 'leadership positions', namely, kings, chiefs and headmen, are designated in the bill. Candidates for these positions must be identified by the royal family concerned, according to customary law. Thereafter, the provincial premier is obliged to confirm the appointment. No concession is made to the principle of democratic election or to the principle of gender equality.

The proposed legislation on traditional leadership dovetails with a third bill issued in 2002: that on Communal Land Rights. Security of tenure is improved and ownership of land is transferred to communities that have been in historical occupation. The bill also introduces radical changes to the customary-law tenures with a view to ensuring equal access to ownership, allocation and use of land. Foremost, the bill eliminates the extensive powers, currently wielded by traditional rulers under customary law, to allot rights and regulate land use. Instead, the bill requires communities to draw up regulations and elect administrative bodies, which will be subject to all the precepts of equality, accountability and fair administrative action. Traditional rulers may participate ex officio in these structures but their membership may not exceed 25 per cent of the total composition.

What would you do? (from page 4)

The answer!

The SCA found that disclosure of an accused's previous convictions does not necessarily lead to an irregularity vitiating the proceedings. This was well-established despite the provision in s 89 of the Criminal Procedure Act. In cases where there has been disclosure of a previous conviction or convictions, judicial officers have sometimes recused themselves. However, they are not compelled to do so.

There were other ways in which the judicial officer could become aware of information prejudicial to the accused. For example, A court could become privy to such information while deciding upon the admissibility of evidence. This does not render the proceedings automatically unfair.

The manner in which the information was conveyed was not important. What had to be determined in each case was whether the effect of the information created actual and substantial prejudice to the accused. In this case, there was no indication that the magistrate had been influenced by the knowledge of the appellant's previous conviction – on the facts, guilt had been established beyond a reasonable doubt. The SCA dismissed the appeals. However, the court did note that, wherever possible, potential prejudice against the accused must be removed. It is undesirable to allow accused persons to appear before the court in prison clothing.

Editorial

This edition was collated during Proudly South African week. Reading through the articles and previous issues revealed, once more, that the work of magistrates is truly Proudly South African.

Magistrates' role in South African society and in the judiciary is evolving into one of the forces through which reform can be achieved. The willingness of magistrates to join initiatives to improve their Courts, the law, their gender sensitivity and themselves and the insights they share are impressive. This is illustrated as the articles consider issues including ethics, developments in case law and legislation, activities undertaken and observations made by magistrates.

Numerous challenges remain. These range from, and extend beyond, daily working conditions and safety to applying and developing the law. Nevertheless, efforts continue and hope is maintained. As a result, magistrates are a force to be reckoned with in developing the new South Africa.

As this is the last edition of *News and Views* for this year, we would like to wish you well and urge you to send in contributions for the next issue by the end of November 2003.

— *Shaheena Karbanee*

Magistrate Leonie Windell, of the Potchestroom Court, with her baby.

Judy Naidoo and Hermann Burr can smile, knowing their initiative to advertise minimum sentencing is part of an ancient tradition to publicise crimes and consequences. This Japanese woodcut, first published in 1878, indicates that it is forbidden to damage young trees or trees in the street without reason.

From E G Hess & S Murayawa, *Everyday law in Japanese folk art*. Scientia Verlag: Aalen, 1980.

FILM REVIEW BY ANDREW PURCHASE

Max

Max is a well crafted film that tracks the seminal days of Adolf Hitler's dementia. The film is set in post-First World War Munich and chronicles the parallel lives of Max Rothman and the thirty-year old Hitler.

Both men were involved in the First World War; both are German. Returning to their mutual home town the same world is a different place to each of them. Max returns to a wealthy, Jewish family, where he tries to forget the horror of war by immersing himself in the world of New Art. He cuts a smooth, eloquent figure. The only clue that he is a war veteran is his amputated arm. In contrast, Hitler is relationally destitute, dealing with his war experience by reviving its horror in his campaign for the on-going militarization of Germany. He is cast as tramp-like, yellow-toothed and, literally, spitting in the vehemence of his anger. Unlike his counterpart who lost an arm in the war, Hitler labours under the loss of the dignity and humiliation that the Treaty of Versailles inflicted on the German nation.

They are similar in that they are both self-entitled 'futurists'. Max deliberately escapes from political ideology through his fascination with New Art, where he reduces politics to the surreal. Hitler, on the other hand, becomes increasingly frustrated with his inability to paint and eventually abandons any hope of succeeding as a painter. He declares that "New Art is politics". Max exiles himself into the world of cubism; Hitler begins his infamous crusade of nationalism.

The film falls short in its portrayal of Hitler as unthreatening and wimpish. He is insecure, diminutive and altogether sorry-looking. The film relies too heavily on the infamy of Hitler, and the character development is consequently lazy. It leaves one wondering how one of the greatest monsters of world history could have been born from that.

Overall the script is witty and well-written and will keep you well entertained throughout.

Obituary

It is with regret that News and Views notes the passing of Errol E Poggenpoel in June this year. He acted as a relief magistrate in the Johannesburg, Pretoria and Wynberg Magistrates Courts. Mr Poggenpoel is survived by his parents and two children.

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