

Who should judges be in a transforming society? An analysis of the constitutional requirements for judicial selection in South Africa.

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DECLARATION

I, Gregory Solik hereby declare that the work on which this thesis is based is my original work (except where acknowledgements indicate otherwise) and that neither the whole work nor any part of it has been, is being, or is to be submitted for another degree in this or any other university.

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INTRODUCTION

Judges have always played an important role in public life. One of the earliest and, by all accounts, perceptive pronouncements on the organisation and composition of the judiciary is to be found in the Old Testament:¹

'This is no way to go about it. You'll burn out, and the people right along with you. This is way too much for you—you can't do this alone. Now listen to me. Let me tell you how to do this so that God will be in this with you. Be there for the people before God, but let the matters of concern be presented to God. Your job is to teach them the rules and instructions, to show them how to live, what to do. And then you need to keep a sharp eye out for competent men — men who fear God, men of integrity, men who are incorruptible—and appoint them as leaders over groups organized by the thousand, by the hundred, by fifty, and by ten. They'll be responsible for the everyday work of judging among the people. They'll bring the hard cases to you, but in the routine cases they'll be the judges.'

The challenges inherent in the administration of justice were a matter of pressing social concern in the Book of Exodus, some 3000 years ago. This dissertation is concerned with the same issues of adjudication in the superior courts of South Africa. The purpose is to challenge assumptions about who we believe should be afforded the privilege of adjudicating in a transforming society under the Constitution.² This is an inquiry about the nature of justice. The practice of justice requires not only active advocates for the vulnerable, marginalised and people without resources; it requires that those who adjudicate in the superior courts protect, advance and enable ordinary citizens to live bigger, larger and more meaningful lives.

Chapter I opens with a simple question: what is it that judges do? The aim here is to try and pull the function, jurisdiction, and structure of the superior courts into sharper focus by addressing three vital questions: (i) How should we think about superior court adjudication? (ii) What are the *forms* of superior court adjudication? And, (iii) What are the limits and constraints of the current forms of superior court adjudication? This deductive process, I demonstrate, reveals the extent to which an uncritical and inaccurate understanding of what it is that judges do and *where* they do it prevails in South Africa.

¹ E Petersen *The Message: The Bible in Contemporary Language* (2002) Exodus 18:17-23.

² Constitution of the Republic of South Africa, 1996.

This is also an inquiry about injustice. Injustice is the outcome of having skewed neighbourly processes, including adjudicatory processes, where some are put at an unbearable disadvantage by the social, economic and political realities operating in that society.³ It is here where citizenship begins to become meaningless. The consequence is that superior court adjudication is in urgent need of triage – matching the right issues with the right adjudicatory processes. I show that recent statistics and reports from over a decade of new dispute resolution forums in the fields of labour law and competition law, challenge traditional notions of superior court practice in profound ways and provide a catalyst for rethinking adjudication under the transformative mandate of the Constitution.

With this deeper understanding of what judges do, Chapter II interrogates section 174(1) and (2) of the Constitution, which establishes criteria for judicial selection. The *Helen Suzman Foundation v Judicial Service Commission*⁴ litigation ('HSF Litigation') will be used as a basis for this analysis. The aim is to show that both the conceptions of 'fit and proper' and 'appropriately qualified' ('constitutional requirements') offered by the Helen Suzman Foundation ('HSF') suffer two serious defects. The first being that they tend to reinforce stereotypes about who we think judges should be, and second, the constitutional requirements are invoked broadly across superior court selection without a concomitant understanding of the nuances and subtleties involved in the adjudicatory processes at each level of the superior courts. I therefore provide a comparative analysis of the criteria used by the Judicial Appointments Commission ('JAC') established in the United Kingdom in 2006,⁵ in order to gather suggestions for reform.

³ See for example, W Brueggemann 'An Invitation to Justice', November 2011, available at <http://vimeo.com/17359821> accessed on 13 February 2014.

⁴ *Helen Suzman Foundation v Judicial Service Commission* (WCHC) Case Number: 8647/13 ('HSF v JSC' or 'HSF Litigation').

⁵ See K Malleson 'The Judicial Appointments Commission in England and Wales: New Wine in New Bottles?' in Malleson and Russell (eds) *Appointing Judges in an Age of Judicial Power: Critical Perspectives from Around the World* (2006) 39.

The third and final Chapter is a platform for the ideas in Chapter I and Chapter II to coalesce. I argue that in order to transform the judiciary we must first transform: (i) a limited and out-dated conception of 'superior courts'; (ii) the understanding of what tasks judges actually perform at the different levels of superior court adjudication; and (iii) finally, our understanding of 'merit'. An important finding here is the emergence of what I call 'constitutional imagination', the ability to give expression to the Constitution and its vision for society. I use this, and other findings, to provide new draft criteria for the Judicial Service Commission ('JSC') to consider when appointing judges to superior courts.

CHAPTER I: WHAT IS IT THAT JUDGES DO?

I Adjudication

Among my favorite leisurely activities is watching soccer. One of the aspects of the game that I find most intriguing is the people selected to supervise games. Football referees enjoy full authority to enforce the laws under which the participants choose to play and their decisions are unappealable, except in exceptional circumstances. Traditionally, referees were amateurs. But today of course, as with the commercialisation of most sports, it is increasingly becoming a profession in its own right. Because of the difficulty of the task and the pressure involved in adjudicating in front of an unforgivable jury, referees are commonly abetted by two assistant referees, formerly known as linesmen, and in some matches, also by a fourth official.

Interestingly, referees in the main, are not chosen from the ranks of footballers.⁶ It does not follow, in this regard, that because you are fast, or skillful, or because you can pass and dribble, score goals or defend them, you will make a good referee. Putting aside for the moment, that the position of referee might be unattractive to high-profile sportsmen and women, the most obvious reason might be that they involve different skills.

Being a referee although requiring an understanding of the game, entails a different set of skills.⁷ Their main duty is to control the match in co-operation with the assistant referees and, where applicable, with the fourth official.⁸ Good referees understand how to adjudicate fouls, appreciate the rhythm of games, the nature of big derbies, how to control flaring tempers, tolerate petty tackles, and maintain the

⁶ J Ashdown and P Bandini 'Have any former professional footballers become referees?' 31 March 2010, available at <http://www.theguardian.com/football/2010/mar/31/have-former-footballers-become-referees> accessed on 13 February 2014.

⁷ The referee's powers and duties are described by the Fédération Internationale de Football Association ('FIFA') in a manual called, 'The Laws of the Game' (2011), available at http://www.fifa.com/mm/document/affederation/generic/81/42/36/lawsofthegame_2011_12_en.pdf#last accessed on 6 February 2014. Their main powers include stopping, suspending or terminating the game for any infringements of 'the Laws', which includes taking disciplinary action.

⁸ Id at 25.

respect and authority of the players, so that the contest does not descend into a free for all.⁹

Extending this analogy to the courtroom, why is it then, that judges traditionally have been selected from the ranks of advocates? Is it fair to assume, that because one is familiar with the processes of formulating (culturally) persuasive legal argument, or carving out a client's case within a set of accepted rules of principles, that you might *a priori* have learnt something about settling disputes? What is the 'skill', or skills of administering justice? How does one best qualify to be capable of deciding between two competing claims of right, or the provenance of fault, or just and equitable remedies, or as will become evident in this essay, solving problems of a socio-political and legal nature. The Constitution places a very exacting set of demands on those bestowed with the privilege of adjudication: it is a document orientated towards achieving social transformation; that is challenging established power structures in order to create a more free, equal and democratic society.¹⁰ Are advocates, and increasingly lawyers and academics, best placed to undertake the mammoth task of interrogating and reconstructing the common and customary law of this country? Why is it, that soccer players never become referees?

It is natural to think of adjudication as a means of settling disputes and controversies.¹¹ According to Fuller, adjudication, in its most traditional form, is a device, which gives formal and institutional expression to the influence of reasoned argument in human affairs.¹² That is, it is a form of social ordering institutionally committed to 'rational' decision-making by an impartial judge, who is open to persuasion by legal proofs. Judges here, exercise their skills in empirical fact-finding

⁹ Assistant referees, have a very specific and unforgiving jurisdiction: deciding whether players are off-sides.

¹⁰ 'The commitment...to transform society... lies at the heart of our new constitutional order' *Soobramoney v Minister of Health (KwaZulu-Natal)* 1998 (1) SA 765 (CC). See also P Langa 'Transformative Constitutionalism' (2006) 17 *Stellenbosch Law Review* 3 at 4. See Generally D Davis & C Klare 'Transformative Constitutionalism and the Common and Customary Law' (2010) 26 *South African Journal on Human Rights* 403 at 437.

¹¹ L Fuller 'The Forms and Limits of Adjudication' (1978) 92 *Harvard Law Review* 353 at 357 ('Forms and Limits').

¹² *Id* at 366.

and logical reasoning.¹³ This form of dispute resolution is what makes participation particularly unique in superior courts. What ever heightens the significance of this experience, 'lifts the process of adjudication towards its optimum expression.'¹⁴

Critical legal theory,¹⁵ building on the gains made by the Legal Realism Movement¹⁶ has no doubt provided powerful critiques of this standard view of the process of adjudication. My interest here, though, is not so much the extent to which these theories, and other critiques, revealed the pervasiveness of gaps, conflicts and ambiguities present in the law, as well as the indeterminacy of popular legal tools such as *stare decisis* and other accepted legal canons to solve them.¹⁷ Rather, my concern is why, despite the availability of such critiques, and the transformative mandate of the Constitution,¹⁸ traditional South African legal culture¹⁹ continues to treat the issue of who judges should be with pervasive formalism,²⁰ as evidenced in the HSF litigation.

Both the examples of football referees and judges cover the subject matter of adjudication in the broadest sense. But does the comparison of playing versus adjudicating football games, and the practice and adjudication of law, hold? If not, why so? Although the origins of Lon Fuller's discursive essay, *The Forms and Limits* emerged from a small philosophy group at Harvard in the late 1950s, the framework of his original inquiry remains helpful and I adopt it below.

¹³ Unlike elections and contracts, in which decisions are reached by votes or negotiation, Fuller's whole analysis was derived 'from one simple proposition', namely, 'that the distinguishing characteristic of adjudication lies in the fact that it confers on the affected party a peculiar form of participation in the decision, that of presenting proofs and reasoned arguments for a decision.' *Id* at 364.

¹⁴ *Id* at 364.

¹⁵ See especially R Unger *The Critical Legal Studies Movement* (1983) and R Unger *What Should Legal Analysis Become?* (1996).

¹⁶ See generally J Singer 'Legal Realism Now' (1988) 76 *California LR* 465 and D Kennedy 'Form and Substance in Private Law Adjudication' (1976) 89 *Harvard Law Review* 1685.

¹⁷ See Davis & Klare *op cit* note 10 at 437.

¹⁸ *Id* at 13.

¹⁹ I adopt what Davis & Klare at 406 call the characteristic legal values, habits of mind, repertoire of arguments and manners of expression.

²⁰ There is a complete absence of critical jurisprudence in this area constitutional reform. See Davis & Klare *op cit* note 10 at 408.

II Forms of adjudication

By speaking of the forms of adjudication, we can begin to trace the development of the ways in which adjudication is and, as will become clear, should be organised and conducted. For, it must follow, that in order to know who judges should be, we must first know what it is that they do.²¹ The forms of adjudication are therefore concerned with the ways in which it may be organised and conducted. Traditionally, the 'purest' forms are those that best guarantee the party's participation in the decision by proofs and reasoned arguments. This concept still dominates mainstream legal thought, as the HSF argues, 'the ultimate arbiters of disputes about constitutional values' judges must be appropriately qualified, experienced, and technically able.²² That is to say, capable of reasoned and rational decision-making. Any mixed, parasitic, and perverted forms of adjudication, to borrow Fuller's own words, must therefore, be adopted with caution.²³ This apparent caution was based on the concern that a judge might be lured out of his or her role as the objective, impartial and removed adjudicator.

But it is exactly these 'perverted' and 'mixed' forms of adjudication that hold such promise. The doomed consequences of Fuller's approach might be easy to predict. For many South Africans the daily experience of living in a country that suffers from severe inequality, foreshadows the hunch that elevating and rationalising legal analysis in this strict way inevitably throws light upon its own limitations. This limitation

²¹ Not in a political or philosophical sense but a practical sense. What I hope becomes clear is how little we have been able to adapt in our understanding and engagement with making adjudication work: who should be entitled to perform the function of judicial officer; what are the array of skills present in the art and science of judging; what are the legal problems most in need of resolution; what are the obstacles to fair and equal access to courts; what class, social and racial prejudices continue to exist without complete or partial-justification; and how do we ensure adjudication creates spaces for the resolution of disputes that enables, in contradistinction to the past, the opportunity for citizens to live bigger and larger lives.

²² Helen Suzman Foundation Press Statement 'The JSC: Guarding the Gatekeepers' 13 April 2013 available at <http://hsf.org.za/resource-centre/hsf-briefs/the-jsc-guarding-the-gatekeepers> accessed on 5 February 2014.

²³ Fuller op cit note 11 at 396, '[t]his is what I have called a "mixed" form of adjudication. In fact the device as I have stated it amounts to a mixture of adjudication and negotiation. All mixed forms have their dangers, and tripartite arbitration is no exception. The danger lies in the difficult role to be played by the flanking arbitrators. They can be neither wholly advocates nor wholly judges. They cannot perform their role adequately if they are view.'

exists both as a form of legal *and* political practice. First through legal design – the inaccessible courtroom – and second, through discouragement; subduing the political imagination, which creates and enables alternative forms of citizen participation.²⁴ The consequences of this political and legal limitation are always disastrous. It is no exaggeration that the vast majority of citizens increasingly cannot afford access to justice in superior courts.

In order to bring the superior court system into sharper focus it is necessary to update of our conceptual understanding of the superior courts in line with recent legislative developments. Periodically reviewing these changes and their intended consequences will reveal the extent to which the courts have been able to adapt successfully as spaces for solving society's problems. An important part of this process is identifying bottlenecks in adjudicative processes. Armed with this deeper analysis government and legal reform lawyers can more accurately and critically say this is who judges should be.

Superior courts in South Africa

Chapter 8 of the Constitution provides the blueprint for the administration of justice in South Africa. The courts are independent and subject only to the Constitution and the rule of law.²⁵ Judges are those adjudicators appointed to the following benches: the Constitutional Court ('Constitutional Court', or 'CC'), the Supreme Court of Appeal ('Supreme Court of Appeal', or 'SCA') and the High Court of South Africa, including courts of a similar status of the High Court.²⁶ The Constitution Seventeenth Amendment Act, 2013 ('Amendment Act') now amends section 166 of the Constitution – the 'Judicial system' – to read follows:

'The courts are -

(a) the Constitutional Court;

²⁴ Unger, op cit note 15 at 105.

²⁵ Section 165(2) of the Constitution.

²⁶ Section 166(a)-(e) of the Constitution.

- (b) *the Supreme Court of Appeal;*
- (c) *the High Court of South Africa, and any high court of appeal that may be established by an Act of Parliament to hear appeals from any court of a status similar to the High Court of South Africa;*

[Para. (c) substituted by s. 2 of the Constitution Seventeenth Amendment Act of 2013]

- (d) *the Magistrates' Courts; and*
- (e) *any other court established or recognised in terms of an Act of Parliament, including any court of a status similar to either the High Court of South Africa or the Magistrates' Courts.*

[Para. (e) substituted by s. 2 of the Constitution Seventeenth Amendment Act of 2013]

The purpose of the Amendment Act is to provide for a single High Court of South Africa, to enable the Constitutional Court to be the highest court in all matters, and to regulate the jurisdiction of the SCA.²⁷ The Constitutional Court is now the highest court of the Republic and may decide, in addition to constitutional matters, any other matter on the grounds that it raises, 'an arguable point of law of general public importance which ought to be considered by that Court.'²⁸

The Amendment Act must be read with the Superior Courts Act.²⁹ Published in late 2013, the two acts together consolidate and rationalise the legislative reform geared towards establishing a judicial system suited to the requirements of the Constitution pertaining to superior courts.³⁰ There are further on-going legislative reforms geared towards strengthening the institutional arrangements relating to the judicial branch of the state, but they will not be discussed here.³¹ This entire process however, gives effect to item 16(6)(a) of Schedule 6 to the Constitution, which instructs that all courts, including their structure, composition, functioning and jurisdiction, must be rationalised with a view to establishing a judicial system suited to

²⁷ Preamble to the Amendment Act.

²⁸ Section 3 of the Amendment Act, read with section 167 of the Constitution.

²⁹ 10 of 2013.

³⁰ Section 2(1) of the Superior Courts Act.

³¹ The Jurisdiction of Regional Courts Amendment Act, 20 of 2008; South African Judicial Education Institute Act, 14 of 2008.

the requirements of the Constitution. All courts other than the Constitutional Court, the SCA and the divisions of the High Court of South Africa may decide any matter determined by an Act of Parliament, but a court of a status lower than a High Court of South Africa may not enquire into or rule on the constitutionality of any legislation or any conduct of the President.³² The Superior Courts Act therefore addresses administrative and procedural matters pertaining to superior courts, most of which are not relevant here.³³

The Constitutional Court is a single court without divisions, which sits in Braamfontein, Johannesburg. The CC comprises 11 judges, and any matter before the CC must be heard by at least eight judges.³⁴ It is now the highest court in all matters and continues to enjoy exclusive jurisdiction in terms of section 172(4) of the Constitution.³⁵ Application to the CC is made by way of notice of motion, supported by an affidavit. There are no witnesses and thus no oral evidence is admissible.³⁶ It is a process based purely on the papers. Statistics for the financial year ending 2011/12 reveal that the CC received 123 applications, dismissed 76 applications, and handed down 35 judgments.³⁷ In the year ending 2011/2012 it had a budget of R90 993 000. Compare this to the SCA for same year period.

As a general rule, the SCA sits in panels of five or three Judges, depending on the nature of the appeal.³⁸ The SCA decides cases upon the record of the proceedings after considering the written and oral arguments presented.³⁹ Witnesses

³² Section 6 of the Amendment Act.

³³ Section 6 of the Superior Courts Act establishes nine divisions of the High Court of South Africa mirror the provincial delineation in the Constitution.

³⁴ Section 167(2) of the Constitution read together with section 12 of the Superior Courts Act .

³⁵ The exclusive jurisdiction provisions under Section 167(4) of the Constitution remain unchanged. Further, the CC still makes the final decision on whether an Act of Parliament, a Provincial Act or the conduct of the President is constitutional.

³⁶ See 'Rules of the Constitutional Court', available at <http://www.constitutionalcourt.org.za/site/thecourt/rulesofthecourt.htm> accessed on 31 January 2013.

³⁷ Department of Justice and Constitutional Development 'Annual Report' (2011/2012), available at http://www.justice.gov.za/reportfiles/report_list.html accessed on 5 February 2014 ('Annual Report 2011/2012').

³⁸ See section 13 of the Superior Courts Act.

³⁹ See 'About the SCA', available at <http://www.justice.gov.za/sca/aboutsca.htm>, accessed on 10 February 2014.

do not appear before the court, and the parties need not be present during the hearing of an appeal.⁴⁰ The seat of the SCA is at Bloemfontein. The Supreme Court Act, and now the Superior Courts Act, makes provision for a session of the court to be conducted at another place by reason of exceptional circumstances, but this rarely happens.

The SCA bench comprised 25 judges of appeal, including the Judge President and his Deputy in the year 2011.⁴¹ In the year ending 2011/12 the SCA saw 119 criminal appeals enrolled and 83 were finalised; 222 new petitions were enrolled and 189 finalised. Furthermore, 601 civil appeals were enrolled, and 259 were finalised, 412 new petitions were enrolled and 427 were finalised.⁴² In the actual year of 2011, it handed down 249 judgments. The budget for the SCA for the year ending 2011/2012 was R20 800 000. Considering that the SCA is often the final arbiter of civil and criminal disputes, that is a remarkable output considering that it operates on a budget less than a quarter to that of the CC.⁴³

However, the jurisdiction of the SCA has not been left unharmed during the recent rationalising process. Generally, the SCA has jurisdiction to hear and determine an appeal against any decision of a high court as well as constitutional issues. But importantly, the Amendment Act has confined the jurisdiction of the SCA in one important way. The amendment of section 168(3)(a) of the Constitution now reads:

⁴⁰ Id.

⁴¹ I have used the figure provided in the Department of Government Communication and Information System 'Pocket Guide to South Africa Yearbook' (2011/2012) available at <http://www.gcis.gov.za/content/resourcecentre/sa-info/pocket-guide-south-africa-20112012> accessed on 13 February 2014 ('SA Yearbook 2011/2012'). I acknowledge that the composition might be slightly different at date of writing. For example currently the SCA comprises 22 judges, including the President and Judge President. See 'Judges of the Supreme Court of Appeal', available at <http://www.justice.gov.za/sca/judges.html> accessed on 13 February 2014.

⁴² See also SA Yearbook 2012/2013 at 139.

⁴³ See also, Sammie Moshenberg 'the United States Presentation to Paarl Judicial Selection Meeting' (unpublished paper) 27 September 2013, '[T]he nine justices on the Supreme Court hear fewer than 100 cases per year. The 13 federal Circuit Courts of Appeal hear about 60,000 cases per year and so are almost always the last word on important constitutional rights cases for the states that fall under their jurisdiction. The 94 federal District Courts hear hundreds of thousands of cases. As with the Supreme Court, the judges confirmed by the US Senate to the other federal courts have life-time tenure.'

'The Supreme Court of Appeal may decide appeals in any matter arising from the High Court of South Africa or a court of a similar status similar to the High Court of South Africa, except in respect of labour or competition matters to such an extent as my be determined by an Act of Parliament.' (my emphasis)

This is an interesting diminution in jurisdiction that no doubt takes notice of the developments in superior court practice over the last two decades. The Renaming of High Courts Act, 30 of 2008 lists the 13 high courts in South Africa. There are two more high courts projected for completion: the Limpopo High Court in 2014, and the Mpumalanga High Court in 2016.⁴⁴ Currently, Mpumalanga, a province of 4 039 939 million (7.8 percent of the population), does not have a high court. In 2011/12, high courts enrolled 27 804 new civil matters for trial and finalised 28 886 (which included settlements and withdrawals) and 49 868 default judgment applications.⁴⁵ The high courts received 104 884 new motion applications and finalised 82 431 matters. In 2011/12, the high courts received 902 first-appearance criminal matters and finalised 1 130 cases. The budget for the year ending 2011/2012 was R353 832 000, about four times that of the Constitutional Court. This of course says nothing about magistrates' courts, where ordinary people encounter the law. Because the focus of this paper is on superior courts, I will not address this structure.

The court structure outlined here presents an introduction into traditional forms of superior court adjudication. But this is an inaccurate and uncritical reflection of superior court work. The Constitution demands a vigorous inquiry into the relationship between the exercise of power, and the procedural framework by which such power dynamics are maintained. To this end, it set up special courts on equal footing to the high courts that would target focal areas of inequality: competition practices, land reform, and labour practices.⁴⁶ It seems that, generally, it would be fair to claim that the South African legal community is yet to grasp the importance and magnitude of

⁴⁴ Department of Justice and Constitutional Development 'Annual Report' (2012/13), available at http://www.justice.gov.za/reportfiles/report_list.html accessed on 5 February 2014 ('Annual Report 2012/2013') at 75.

⁴⁵ Annual Report 2011/2012 op cit note 37 at 20 and Annual Report 2012/2013 id at 24.

⁴⁶ The Labour Court and Labour Appeal Court; The Land Claims Court; The Competition Appeal Court; The Electoral Court; and The Tax Court.

the body of work these courts produce. Perhaps this is because the introduction of specialised courts is still relatively new and their impact has yet to be fully digested. But the combined effect of their contributions towards the efficient administration of justice can no longer be ignored; in pure financial terms, their budget alone for the year ending 2011/2012 was more than twice that of the SCA, at R41 516 000,⁴⁷ and their workload challenges the high courts as the busiest spaces for adjudication in South Africa.

The next section will take a closer look at two specialised courts – those that the SCA no longer has appellate jurisdiction over – and the design of their adjudicative systems. The purpose of this being to draw attention to the potential of these powerful alternative forms of adjudication, which provide a persuasive basis to challenge basic, but deep-seated assumptions about how we think about judges, what they do, and where they work.

Specialised courts

The first is the Competition Tribunal ('Tribunal') and the Competition Appeals Court ('CAC'). The Tribunal adjudicates competition matters and has jurisdiction throughout South Africa and is independent and subject to the Constitution and the rule of law. The powers of the Tribunal are quite simply awesome, and they reflect the commitment of South Africa's first democratic government to strengthen the competition regime in the context of the country's highly concentrated economy.⁴⁸

The Competition Act originally provided that the CAC was the final court on all competition issues other than those that raised a constitutional issue. However, The Supreme Court of Appeal found in the *American Natural Soda Ash Corporation and Another v Competition Commission of South Africa* ('ANSAC') that under the

⁴⁷ Annual Report 2011/2012 op cite note 37 at 58.

⁴⁸ The Competition Act, 89 of 1998 ('Competition Act'). See also, Competition Tribunal Report, 'Unleashing the Rivalry: Ten Years of Enforcement by the South African Competition Authorities' (2009) at 1, available at <http://www.comptrib.co.za/assets/Uploads/Reports/unleashing-rivalry.pdf> accessed on 3 February 2014 ('Unleashing the Rivalry'). Also, importantly, this is one area where the SCA and CC's record has been mixed: See generally, Davis & Klare op cit note 10.

Constitution, the CAC could not be a final court of appeal and that, even in non-constitutional matters, appeals could still be made to the SCA.⁴⁹

*'In accordance with the Act's own injunction, it must be interpreted consistently with the Constitution. In accordance with sound constitutional hermeneutics, its provisions should if possible be interpreted so as not to render them unconstitutional.'*⁵⁰ (My emphasis.)

Reasoning for this judgment was based on *National Union of Metalworkers of South Africa and Others v Fry's Metals (Pty) Ltd*⁵¹ where the Supreme Court held that the Constitution vests the SCA with power to hear appeals from the Labour Appeal Court ('LAC') in both constitutional and non-constitutional matters, and that the provisions of the Labour Relations Act⁵² ('LRA') that confer final appellate power on the LAC must be read subject to the appellate hierarchy created by the Constitution itself.⁵³ This appeal process, however, is patently illogical. For example, the high profile *Senwes* matter originally proceeded from the Competition Tribunal⁵⁴ where argument was first heard in November 2007, then proceeded on appeal to the CAC,⁵⁵ then to the SCA,⁵⁶ and finally to the Constitutional Court for a decision in April 2012, some five years later. The late Lord Chief Justice Bingham set out seven criteria by which a legal system should be assessed.⁵⁷ One of the core tenets was that means must be provided for resolving *bona fide* civil disputes without prohibitive cost or delay. An appeal structure as cumbersome and as costly as this clearly flouts this basic requirement.

Fortunately this situation will now be changed with the introduction of the Superior Courts Act. The CAC will now finally enjoy authority in relation to competition

⁴⁹ (2005) 3 All SA 1 (SCA).

⁵⁰ *Id* at 13.

⁵¹ 2005 (3) All SA 318 (SCA).

⁵² 66 of 1995.

⁵³ ANSAC *supra* note 49 at 13-14.

⁵⁴ Competition Tribunal found that *Senwes* had contravened section 8(c) of the Competition Act, 89 of 1998 ('Competition Act') in the *Competition Commission vs Senwes Limited* (2009) 1 CPLR 18 (CT).

⁵⁵ *Senwes Ltd v Competition Commission of South Africa* (2009) 2 CPLR 304 (CAC).

⁵⁶ *Senwes Ltd v Competition Commission* (2011) 1 CPLR 1 (SCA).

⁵⁷ Tom Bingham *The Rule of Law* (2010).

matters, subject to appeals to the Constitutional Court when in the public interest. I mention this in such detail because it points to a problem with the common belief, and indeed, comfort found in legal assurance, that a court like the SCA might be more competent than a 'lower court'; even over an specialised appeal court exercising its own jurisdiction. What it does do, if anything, is prove that judges in an appeal court like the SCA do not so much exercise expert legal knowledge, but rather their generic ability to assimilate information quickly, apply facts to the law, and interrogate technical problems, which entail very complicated non-legal socio-economic issues.

But the Amendment Act has a second important consequence: that we ought to give more credence to the Tribunal as an adjudicative body. Although the rules of procedure and evidence at the Tribunal are less stringent than the Uniform Rules of Court, should these Tribunal 'members' not be considered to perform the kind of work that judges do?⁵⁸ Institutionally, the Tribunal is equal to the high courts; its independence is guaranteed in the same way;⁵⁹ and, the matters before the Tribunal entail complex questions of law and evidence. If so, does this not challenge profoundly what we readily accept as, 'judge' and how they ought to function?⁶⁰

To this end, notwithstanding the complexity of the adjudicative role and the powerful influence of the companies and industries that appear before them, the Tribunal's membership – or composition of 'judges' – is mixed. In terms of section 28 of the Competition Act, the Tribunal must collectively represent a broad cross-section of the population of the Republic and 'comprise sufficient persons with legal training.'⁶¹ Each individual member of the Tribunal must, however, have suitable qualifications and experience in 'economics, law, commerce, industry or public

⁵⁸ See Competition Tribunal 'Rules for the Conduct of Proceedings in the Competition Tribunal' (Effective from 1 February 2001) available at <http://www.comptrib.co.za/the-act/tribunal-rules-and-flowcharts/> accessed on 13 February 2014.

⁵⁹ See sections 20 and 28 of the Competition Act.

⁶⁰ See The Tribunals, Courts and Enforcements Act, 2007 as well as LJ Carnwarth 'Tribunals and the Courts – the UK Model' (2011) 24 *Canadian Journal of Administrative Law and Practice* 5. See also, 'Basic Principles of the Judiciary endorsed by the United Nations General Assembly in 1985' available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx> accessed on 14 February 2014.

⁶¹ 'Qualifications of members of Competition Tribunal', set out in section 28(1) of the Competition Act.

affairs.⁶² The complicated nature of competition law no doubt influenced this decision, and the Tribunal currently consists of lawyers, academics and those that specialise in commercial and economic matters, some full-time and others part-time.⁶³ This innovative mix of lawyers and other skilled professionals seems not to have impacted the imagination of the JSC and other legal reform advocates, especially in the context of transformation. Indeed, the JSC took the view that appointing lay economists to an appeal court bench was not constitutional.⁶⁴ This is despite the fact that when the Competition Act was first passed in 1998, the Court was originally conceived to be made up of a bench of three high court judges and two further members who would be appointed because of their expertise in the field of economics.⁶⁵

Although these two points about jurisdiction and composition may seem cursory, they point to something more fundamental: a possible recipe for rethinking adjudication in South Africa, in line with the constitutional mandate for transformation.⁶⁶

In order to bolster this proposition, I will show that the potential in competition law regulation is not isolated. A second example is made by way of the LRA. The drafters of the LRA were acutely aware of the historical inequality in the labour market when it designed the adjudicative system for labour relations in South Africa. At the core of the provisions was an intention to create a legislative system that would advance economic development, social justice, labour peace and the democratisation of the workplace, which included taking on private power.⁶⁷ Section 167(1) establishes the Labour Appeal Court ('LAC') as a court of law and equity. In doing so, it created two new institutions for dispute resolution and adjudication: the Commission for

⁶² Section 28(2)(b) of the Competition Act.

⁶³ 'Competition Tribunal Membership' available at <http://www.comptrib.co.za/about/members/> accessed on 13 February 2014.

⁶⁴ *Id.*

⁶⁵ Unleashing the Rivalry *op cit* note 48 at 5.

⁶⁶ Preamble to Competition Act, 'That apartheid and other discriminatory laws and practices of the past resulted in excessive concentrations of ownership and control within the national economy, inadequate restraints against anti-competitive trade practices, and unjust restrictions on full and free participation in the economy by all South Africans.'

⁶⁷ Section 1 of the LRA.

Conciliation, Mediation and Arbitration ('CCMA') and a specialist system of labour courts with an exclusive labour law jurisdiction.⁶⁸

The establishment of the CCMA as the entity responsible for dispute resolution in certain categories of disputes, which includes 'rights' disputes that may be referred to arbitration or adjudication, was an important and innovative reform that made adjudication in this field far simpler, more accessible and quicker. The CCMA is subject to the oversight of the Labour Court (LC) and the LAC, where unresolved rights disputes can be referred either to arbitration or to adjudication by the LC. The LC and LAC were thus created to operate as superior courts, with exclusive jurisdiction to decide matters arising from the LRA. According to the South Africa Year Book, the Labour Court and Labour Appeal Court received 11 235 new cases in the 2011/12 financial year and finalised 6553 matters.⁶⁹ The Superior Court Act now cements the LAC as the final arbiter of disputes, subject to an appeal to the Constitutional Court.

Not only does this position, like with the Tribunal, add credence to the LC and the LAC, but to think of the LC and the LAC without the CCMA is not only disingenuous, but legally dishonest. These trials are nothing more than an appeal from a mediation process. The whole point of the CCMA was to resolve disputes by conciliation so as to reduce the incidence of industrial action and litigation.⁷⁰ Indeed, although special labour courts evidently perform important oversight functions, their workload pales in comparison to the engine room of the CCMA. Referrals to the CCMA, for the year ending 2011/2012 consisted of a phenomenal 161 674 cases. Of that number, the CCMA's caseload for arbitration has been fairly large ranging

⁶⁸ There are two important decisions that relate to this issue. The first is *Chirwa v Transnet Limited* 2008 (4) SA 367 (CC) ('Chirwa') and the second is *Gcaba v Minister for Safety and Security* 2010 (1) SA 238 (CC) ('Gcaba'). In terms of the former, the majority of the court decided that the Constitution must be interpreted to draw a distinction between constitutional rights to administrative justice and to fair labour practices. In *Gcaba*, Van der Westhuizen J adopted a purposive reading of s 157 of the LRA, affirming the finding in *Chirwa* and holding that the Labour Court has exclusive jurisdiction to hear labour matters.

⁶⁹ Annual Report 2011/2012 op cit note 37 at 20.

⁷⁰ The Explanatory Memorandum accompanying the Labour Relations Act (LRA).

between 38,319 (2007/8) and 49,799 (2010/2011).⁷¹ Again, the structure of the arbitration process seeks to, ‘ensure that arbitration hearings are conducted more swiftly than conventional litigation and in accordance with the goal of providing dispute resolution that is “simple, quick, cheap and non-legalistic”’. And by all accounts, it has achieved this goal.⁷²

Although the tasks, processes and powers of each forum – the CCMA and the LC and LAC – are no doubt different, the nuances of which will not be traced here, their functions are concerned with the same body of work. And yet inherent prejudices or perhaps a lack of imagination within South Africa’s legal culture insists that there is something more special about the judicial task performed at the LC and the LAC, when in fact the only legitimate difference is that those at the LC and the LAC perform the same task better, ostensibly because of their skill and/or experience. Any doubt about this proposition is quashed by the LRA itself, which specifies that LC judges themselves need not be judges of the High Court – although they must be legal practitioners - and are subject to a different appointments procedure.⁷³

What this insidious adjudicative inequality reveals, in ways we normally do not even realise, is that adjudication when humanising private power is less praiseworthy than run-of-the-mill civil work, where private power, uses courtrooms to enforce its

⁷¹ P Benjamin ‘Assessing South Africa’s Commission for Conciliation, Mediation and Arbitration (CCMA)’ (2013) *International Labour Office Working Paper* No. 47 at 19.

⁷² ‘When compared to conventional courts, whether civil courts with general jurisdiction or specialised labour courts, the CCMA has proved highly successful. Specifically, it has succeeded in providing enhanced and expedited access to dispute resolution to employees who generally would not otherwise have had the resources to bring legal challenges against decisions by their employers in conventional litigation proceedings. Id at 45.

⁷³ See Section 153 of the LRA. In terms of the LRA, the President, acting on the advice of National Economic Development and Labour Council (‘NEDLAC’) and the JSC, must appoint judges to the Labour Court who are either a judge of the High Court; or a person who is a *legal practitioner* and has knowledge, experience and expertise in labour law. However, The Judge President and the Deputy Judge President of the Labour Court must be both judges of superior courts and must have knowledge, experience and expertise in labour law. See section 153(2) of the LRA. This appointment procedure, which involves NEDLAC, plays a significant role in the appointment of Labour Court judges, enabling the social partners to play an active role in determining the composition of the Court. See further, 152(1)(c) of the LRA.

various contracts, claims against government and collect money.⁷⁴ There are no local studies of the true costs of the civil litigation system in South Africa, but research in the United States shows unequivocally that although state civil justice systems play an indispensable role by serving as the *primary* forum in which disputes can be resolved, 'state civil justice systems create huge costs, many previously unexamined, that burden [the] state and national economies.'⁷⁵

But there is a deeper anomaly. Precisely because it involves humanising corporate power rather than enabling the *status quo*, we do not associate this type of adjudication with judge work. The caution, or danger that Fuller warned against, which was the encroachment of functions such as negotiation, bargaining, and generally the work that involves reimagining legal solutions is the very *stuff* of transformative constitutionalism. Why, then, is there a fear of the legal imagination to embrace more constructive and reconstructive practices of legal analysis and by implication, legal practices? In terms of section 34 of the Constitution, everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, *another independent and impartial tribunal or forum*.

The popular conceptions of judges as legislators, most famously captured by the conception of Dworkin's Hercules J,⁷⁶ although less prominent and more sophisticated, still holds powerful sway over popular conceptions about who judges should be. Indeed, imagination around alternative legal institutions demands, urgently, new possibilities, and a renewed discourse around which we can energise and organise for more just administration processes. Central to this process is to gather

⁷⁴ The assertion is based on my studies of the High Court Rolls in the Western Cape for the year 2011. There are however comparative studies, which corroborate my findings. See for example, LJ McQuillan et al 'Jackpot Justice: The True Cost of America's Tort System' (2007) and for a general discussion see N Ferguson 'The Great Degeneration: How Institutions Decay and Economics Die' (2012).

⁷⁵ Jackpot Justice op cit note 74 at vi.

⁷⁶ I am not distinguishing between hard cases, or different types of judicial review, as Jeremy Waldron discusses in, J Waldron, 'The Core of the Case Against Judicial Review' (2006) 115 *Yale Law Journal* 1346 at 1353 'This is an Essay about judicial review of legislation, not judicial review of executive action or administrative decision making'. The conception of Hercules J was introduced in R Dworkin 'Hard Cases' (1975) 88 *Harvard Law Review* 1057.

data on what courts adjudicate in order to more critically understand judge work. These processes have commenced,⁷⁷ but have yet to be drawn together in a pattern of consistency that makes the vision of alternative adjudicative both possible and exciting. And so, the combined work in the fields of competition and labour law not only provide invaluable lessons, but provide evidence for a strategy to reconceptualise who judges actually are, what they do, and where our judges work.

III The limits of adjudication

Introduction

In the previous section I began to outline that at least in two important areas of South African legal practice, and in not inconsequential ways, judges – or members of alternative adjudicative models – successfully operate under a ‘perverted’ form of adjudication. Indeed, they have used the social justice mandate that underpins the Constitution, emboldened by their institutional design, to radically tackle the issues of work and economic life. But, even the divisions of the High Court of South Africa, the SCA and the CC – more traditional forums of adjudication – judges do not only confine themselves to adjudicating between competing claims of right, or the provenance of fault; they deal with the kind of issues Fuller would regard as tasks inherently unsuited to adjudication.⁷⁸ South African judges solve, regularly, problems of a socio-political and legal nature entailing complicated polycentric issues framed by our past. Their responses overtly revealing attitudes towards separation of powers theory, legal theory and the like, but also sub-conscious prejudices towards race, class and gender equality. Whatever the political, legal and personal constraints operating on the judiciary, it has a mandate to make available, practically and imaginatively, the space in which the real work of social reform can occur.⁷⁹

⁷⁷ See for M Wesson & M du Plessis, ‘The Transformation of the Judiciary’ (Fifteen Year Policy Review, South African Presidency; available at http://www.thepresidency.gov.za/docs/reports/15year_review/jcps/transformation_judiciary.pdf accessed on 13 February 2014, and also the Legal Practice Bill [B 20—2012] GN 35357 of 15 May 2012.

⁷⁸ Fuller op cit note 11 at 393.

⁷⁹ See Unger *What Should Legal Analysis Become?* op cit note 15.

By speaking of the limits of adjudication,⁸⁰ we are here able to identify what kinds of social interactions should properly be assigned to certain adjudicative forums. One way to understand this problem is by triage: a medical process of determining the priority of a patient's treatments based on their severity of their condition. Victor Flango and Thomas Clarke address this concept by simply asking which disputes belong in court, in an essay of the same name.⁸¹ This is a process of rationing treatment efficiently and fairly when resources – public and private – are both insufficient and largely unequal. The authors argue that uncontested issues and issues not adversarial do not require adjudicatory processes even though they remain under court jurisdiction. For example, much trial work has shifted from dispute resolution to routine administration, and that many issues do not involve cases of controversy.⁸²

Triage is necessary to match the right issues with the right adjudicatory processes.⁸³ The first step is a screening process. A major component of this work is to identify which disputes truly belong in a full adversary process of adjudication, because, as Robert Tobin remarks, [t]he relatively inflexible and formal nature of the adversarial system does not suit most disputes'.⁸⁴ Types of cases that are well suited to adjudication include: cases raising constitutional issues or conflict-of-law issues; criminal cases where death penalty, life sentence, or other significant loss of liberty is a potential outcome; and civil cases (contract or delict) with high stakes. Here the most important judicial skill is assessing proofs and arguments, developing the law and providing reasoned analysis.

If the stakes are not high enough, or the time and costs involved in the adversary process seem inadequate, some legal leaders suggest a more cooperative

⁸⁰ This practical question addresses an aspect of adjudication that Lon Fuller's idealistic essay could not possibly have conceived of: how, in a deeply unequal world, where litigants cannot access proper representation, where the queue for the court is long and arduous, where almost all issues are polycentric, do we best settle disputes and controversies.

⁸¹ V Flango & T Clarke 'Which Disputes Belong in Court?' (2011) 50 *Judges Journal* 22.

⁸² *Id.* at 23.

⁸³ *Id.*

⁸⁴ R Tobin *Creating the judicial Branch: The Unfinished Reform* (1999) quoted in V Flango & Clarke *id.*

approach, '[m]ore and more judicial experts recognize the inadequacy of the win/lose system of traditional courts for dispute resolution. A system of mediation/arbitration could let all parties be winners, or at least have their interests be considered promptly and fairly.'⁸⁵ Types of cases that are well suited to this type of adjudication include: divorce proceedings with issues of custody, child support, abuse or neglect; mental health and drug cases; and, crimes involving juveniles. Disposition of the case does not depend on applying the facts to the law, but rather, 'diagnostic adjudication', where judges must fashion appropriate remedies. Here the most important judicial skill is a sense of equity and justice.

Alternatively, cases that are likely to benefit from a modified adversarial process may be the following: cases likely to raise constitutional issues; criminal cases involving loss of liberty, but less so than more serious crimes; civil cases with moderate stakes; and, public interest cases.⁸⁶ The suggestion here is that many cases in the courts today are not conflicts at all, and cases that are not in dispute or not having two sides ought to be screened out of the adjudication process. In the words of a former federal judge, 'the courts are being asked to solve problems for which they are not institutionally equipped or not as well equipped as other available agencies'.⁸⁷ So triage is about using judge time efficiently, setting up specialist tribunals⁸⁸ to deal with particular types of disputes, critically assessing the nature of common disputes whether criminal or civil, creating spaces for solving legal problems and most of all bettering the system of administrative justice. Given the sheer immensity required for transformation, are we asking too much of our judges?

⁸⁵ G Stephens 'Participatory Justice' in Edward Cornish (ed) *The 1990s & Beyond* (1990) 100 quoted in Vlango & Clarke op cit note 81 at 25.

⁸⁶ Vlango & Clarke op cit note 81 at 27.

⁸⁷ S Rifkind 'Are We Asking Too Much of Our Courts' (1976) 70 *FRD* 96 at 97 quoted in Vlango & Clarke op cit note 81 at 23.

⁸⁸ For example, magistrate's courts should be empowered to deal with administrative issues under the Promotion of Administrative Justice Act, 3 of 2000 ('PAJA') in line with the provisions under the definition of 'Court'. See LJ Carnwarth op cit note 60 at 5-10; R Creyke 'Administrative Justice: beyond the Courtroom Door' 2006 *Acta Juridica* 257; C Saunders 'Apples, oranges and comparative administrative law practical steps' 2006 *Acta Juridica* 423.

Triage

So what are the limits and constraints of the current forms of adjudication in South Africa? South Africa ranks as one of the most unequal countries in the world.⁸⁹ The unemployment rate, including discouraged workers is estimated to be as high as 36.8 percent in 2013.⁹⁰ With a total population of R52.98 million in 2012, that amounts to just under 20 million individuals. We are a country that cannot afford to save – the savings-to-disposable-income ratio of households in the latest study by the Institute for Race Relations was zero percent.⁹¹ In 2012, the ratio of household debt to disposable income was high as 75 percent.⁹² Certainly there are few precedents for this kind of debt around the world.⁹³

The costs of high court litigation are therefore often affordable. In the recent decision of *Camps Bay Ratepayers and Residents Association and Another v Harrison and Another*⁹⁴ the CC expressed its disquiet at counsel's fees which have burgeoned in recent years, '[t]o say that they have skyrocketed is no loose metaphor'.⁹⁵ The reality of course, is that poor and middle class⁹⁶ people do not litigate in superior courts. Corporations and wealthy individuals do. But to this end, we are yet to develop a discourse that more accurately assesses *what* they are litigating. Most court analysis over the past 15 years has focused on the CC,⁹⁷ as the CC is the

⁸⁹ South Africa currently has a Gini coefficient of 0.63. See World Bank data available here <http://data.worldbank.org/country/south-africa> accessed on 13 February 2014.

⁹⁰ J Kane-Berman (eds) (2012) 'Fast Facts' (South African Institute of Race Relations) at 28 ('Fast Facts').

⁹¹ Id at 5.

⁹² Id.

⁹³ Ferguson op cit note 74 at 2.

⁹⁴ 2012 (11) BCLR 1143 (CC).

⁹⁵ Id at 10, 'No matter the complexity of the issues, we can find no justification, in a country where disparities are gross and poverty is rife, to countenance appellate advocates charging hundreds of thousands of rands to argue an appeal.'

⁹⁶ The middle group in South Africa, comprising 4.2 million households, is quite poor, receiving between R1,520 and R4,560 as their total household income per month for a household of four in 2008. See J Visagie 'Who are the middle class in South Africa? Does it matter for policy?' 29 April 2013 available at

<http://www.econ3x3.org/article/who-are-middle-class-south-africa-does-it-matter-policy#sthash.bHx4Nkhr.dpuf> accessed on 13 February 2014.

⁹⁷ Fore example, Wesson & du Plessis op cit note 77.

final arbiter of constitutional issues. But to focus on the CC at the expense of a complimentary analysis of SCA and high court jurisprudence means that we have a very limited conceptual base to claim what our courts are doing as a superior court bench. More than anything however, it is an indictment on the profession's class bias.

An assessment of the weekly roll at the Western Cape High Court for the year 2011, for example,⁹⁸ reveals that the following matters occur frequently: sequestration and insolvency matters; default judgment and summary judgment applications for monies owing to large banks; divorce proceedings; and of course, civil and criminal trials. This is a direct reaction to the national and global economic down-turn precipitated by the Great Recession in 2009, from which South Africa, like many countries, continues to suffer.⁹⁹ The origins of the financial crisis has a serious and complicated history, but involves in no small part the reckless lending of large public banks all over the Western world, including investment banks.¹⁰⁰ The economic impact of the recession on our adjudication processes receives almost zero attention. Do most of these cases require the full protection of the full adversarial system?

Generally, the SCA is a forum well suited to 'pure' adjudication. There are no witnesses, argument is on paper delivered by experienced counsel and judges develop the law in high profile cases. Or so we think. In the year 2011, the largest area of law within the 249 judgments handed down was not delict, commercial or contract law: it was criminal law.¹⁰¹ That is a very peculiar fact. Instinctively we tend to assume that the SCA does, in the main, deal with commercial, delict and contractual issues more often than not. It is a peculiar fact because regional magistrates' courts have jurisdiction to deal with serious criminal offenses, and yet our most skilled jurists

⁹⁸ Available at <http://www.westerncape.gov.za/sites/www.westerncape.gov.za/files/court-roll-thursday-19-september-2013.pdf> accessed on 14 February 2014.

⁹⁹ See Joseph Stiglitz *The Price of Inequality* (2012).

¹⁰⁰ Which coincided with legislation passed by Congress designed to increase the percentage of low-income families to own their homes through government-sponsored entities such as Fannie Mae and Freddie Mac. See Ferguson *op cit* note 74 at 56-7.

¹⁰¹ Judgements available for the year 2011 are available at www.saflii.org accessed on 13 February 2014.

are overseeing their appeals, with no small measure of infrequency.¹⁰² Although the SCA of course dealt with commercial, delictual and contractual issues, it also dealt with the following areas of law in some consistency: property, administrative law and procedure related issues.¹⁰³

Compare this to the 37 cases handed down by the 11 justices of the Constitutional Court in 2011. Although the judgment rate of the CC is significantly less than the SCA, the decisions of that year affected a wide range of important issues relating to public life. The CC determined that the provisional sentence procedure set out in Rule 8 of the Uniform Rules of the High Court was unconstitutional;¹⁰⁴ it revolutionised mineworkers' compensation in *Mankayi v AngloGold Ashanti Ltd*;¹⁰⁵ it held, on a close 5-4 split that the Constitution's scheme, taken as a whole, imposes a duty on the state to set up a concrete, effective and independent mechanism to prevent and root out corruption in *Glenister*;¹⁰⁶ and, interestingly, just under two percent of its judgments that year involved cases relating to evictions, which allowed the court to continue its progressive pro-poor jurisprudence.¹⁰⁷ But an even more interesting fact is that the CC overturned the SCA's judgments in no less than five important decisions: the SCA not affording a petitioner for leave to appeal a fair

¹⁰² Annual Report 2011/2012 op cit note 37 at 37. See section 89(2) of the Magistrates' Courts Act, 32 of 1944 'the court of a regional division shall have jurisdiction over all offences except treason'.

¹⁰³ I analysed the decisions of 2011 and broke them down into key legal issues and the following areas of law were prominent.

¹⁰⁴ *Tweejonge Gezellen (Pty) Ltd v Land and Agricultural Development Bank of South Africa t/a The Land Bank* 2011 (3) SA 1 (CC).

¹⁰⁵ 2011 (3) SA 237 (CC). When the Court assessed the constitutionality of the compensatory schemes for employees suffering diseases at work under the Compensation for Occupational Injuries and Diseases Act (COIDA), on the one hand, and Occupational Diseases in Mines and Works Act (ODIMWA), and found not only that the Supreme Court of Appeal erred, but that they could enforce their common law right compensation.

¹⁰⁶ *Glenister v President of the Republic of South Africa* 2011 (3) SA 347 (CC).

¹⁰⁷ *Residents of Joe Slovo Community, Western Cape v Thebelisha Homes* 2010 (3) SA 454 (CC); *Governing Body of the Juma Masjid Primary School v Essay NO* 2011 (8) BCLR 761 (CC); *Hajfejee N.O v eThekweni Municipality* 2011 (6) SA 134 (CC); *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties* 2012 (2) SA 104 (CC); *Pheko v Ekurhuleni Metropolitan Municipality* 2012 (2) SA 598 (CC); *Occupiers of Portion R25 of the Farm Mooiplaats 355JR v Golden Thread Limited* 2012 (2) SA 337 (CC); *Occupiers of Skurweplaas 353 JR v PPC Aggregate Quarries (Pty) Ltd and Others* 2012 (4) BCLR 382 (CC).

trial;¹⁰⁸ changing the way lawyers think about the common law and mineworker compensation;¹⁰⁹ protecting the right to freedom of expression;¹¹⁰ access to confidential information held by the state;¹¹¹ and delict.¹¹²

The last instance, which held that the Minister for Safety and Security was vicariously liable for the assault and rape of a young woman by a policeman who was on ‘standby duty’, is yet another example of post-apartheid jurisprudence embarking on a new and complicated trajectory. Francios Du Bois’s article *State Liability in South Africa: A constitutional remix*, in which he analyses government’s special duty to protect the public, argues convincingly that over the past 15 years, South African law has loosened its close historical ties in this field to the common-law family of legal systems.¹¹³ Today, ‘its willingness to provide remedies in delict for omissions on the part of public officials and institutions, especially when they have breached duties arising from fundamental rights, contrasts sharply with English law....’¹¹⁴ This is interesting because although judges in South Africa use the same ‘conceptual apparatus’ as their common law counterparts, ‘they come to very different conclusions.’¹¹⁵

This is not of course to suggest simply that the SCA has struggled to grasp the implications of the transformative mandate of the Constitution when developing the

¹⁰⁸ *Qhinga and Others v State* 2011 (9) BCLR (CC). The applicants were convicted of attempted murder and robbery with aggravating circumstances solely on the basis of statements and pointings-out as evidence after trials-within-the-trial were conducted. The trial proceedings had not been forwarded to the SCA, nor had they had sight of the record. The applicants argued that the SCA could not have considered its application without that information. The Constitutional Court agreed.

¹⁰⁹ *Mankayi v AngloGold Ashanti Ltd* supra note 105.

¹¹⁰ *Citizen 1978 (Pty) Ltd and Others v McBride* 2011 (4) SA 191 (CC).

¹¹¹ *President of the Republic of South Africa and Others v M & G Media Limited* 2012 (2) SA 50 (CC). The matter stems from a request by the publisher of the *Mail and Guardian* newspaper, brought under the Promotion of Access to Information Act, that the President make public a report drafted by two South African judges on the 2002 presidential elections in Zimbabwe.

¹¹² *F v Minister of Safety and Security and Another* 2012 (1) SA 536 (CC). The case involved a successful application for leave to appeal against a judgment of the Supreme Court of Appeal, which held that the Minister of Safety and Security was not vicariously liable for the assault and rape of a young girl by a policeman who was on ‘standby duty’. The Court overturned this decision.

¹¹³ F Du Bois ‘State Liability in South Africa: A constitutional remix’ (2010) 25 *Tul. Eur. & Civ. LF* 139.

¹¹⁴ *Id* at 1.

¹¹⁵ *Id* at 4.

common law in major cases. The Constitutional Court too, as Davis and Klare point out evidences a more complicated and ambiguous story.¹¹⁶ The CC has for example sometimes missed out on pushing the 'transformative envelope', most notably on questions of economic distribution.¹¹⁷ The difficulty was well summed up by Justice Sachs in *Prince v the President of the Cape Law Society and Others*:¹¹⁸

'The search for an appropriate accommodation in this frontier legal territory accordingly imposes a particularly heavy responsibility on the courts to be sensitive to considerations of institutional competence and the separation of powers. Undue judicial adventurism can be as damaging as excessive judicial timidity.'

The result is a mixed array of approaches that often tend to sway between two polar opposites: a traditional approach and a transformative approach, which illustrates the complexity of the task of transformative constitutionalism.¹¹⁹

IV Conclusion

The point of this first chapter was to expose the fault lines in three important ways: how we think about adjudication; the forms of adjudication; and the limits of adjudication as spaces for solving legal problems. The fields of labour and competition law provide important lessons because they challenge traditional notions of how to adjudicate, where to adjudicate and who should adjudicate. As models for dealing with and responding to the inequality in these fields, they provide inspiration for superior court reform, especially when thinking about who judge should be. To this end, the triage conducted shows that at a high court level, judges perform much routine administration, dealing with commercial matters that reflect the global economic climate. Often these do not simply relate to complex matters of law, but rather, more nuanced problems of restitution, debt, sentencing and fairness. This

¹¹⁶ Davis & Klare op cit note 10 at 414.

¹¹⁷ Id.

¹¹⁸ 2000 (3) SA 845 (SCA).

¹¹⁹ These difficulties present themselves most starkly in the inherent tensions between the past and the future: Roman-Dutch law confronts the Constitution; the common law must be infused with constitutional 'values'; traditional legal reasoning must be balanced by just and equitable outcomes; and the institutional culture of the SCA clashes sometimes with the institutional culture of the new Constitutional Court.

matters a great deal. The HSF, like many, argue that only the finest intellectual and skilled practitioners should be appointed to the bench. However, it is clear that the skills required are far more varied, and judges perform an array of duties.

Further in terms of the SCA and CC, the work of transforming the law is a complicated task, and the SCA often errs. This is less to do with legal ability, and more to do with understanding, and embracing, the constitutional mandate of the Constitution, and the transformative role that judges play. This signifies that we must need something more than mere 'technical ability' in order to judge in a transforming society.

And so, knowing that: the forms of adjudication are wider than we might think; that many cases do not belong in high courts; that judges need more than mere technical skill to adjudicate in terms of the Constitution; that judges at a high court are not as busy with 'hard cases', the foundation upon which we argue who judges should be is cast into doubt.

CHAPTER II: WHO SHOULD JUDGES BE?

V South Africa

Introduction to the administration of justice

Based on Chapter I, Chapter II interrogates the meaning of section 174 of the Constitution using the HSF litigation as a discussion point. I criticise HSF for perpetuating uncritical assumptions about desirable judicial qualities and abilities. My approach is anchored in the transformative mandate of the Constitution, which envisions a very particular role for judges in a transforming society. As item 16(6)(a) of Schedule 6 to the Constitution dictates: all courts, including their structure, composition, functioning and jurisdiction, must be rationalised with a view to establishing a judicial system suited to the requirements of the Constitution. I try to add meaning to that vision and what it means for those we choose to adjudicate disputes in superior courts, particularly in light of the findings in Chapter 1 of this thesis. In doing so, I draw on a comparative analysis of the recent developments in the United Kingdom brought about by the Constitutional Reform Act, 2005 ('Constitutional Reform Act').

The constitutional mandate

The Constitution was passed as the supreme law of the Republic to achieve the following:¹²⁰

1. Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;
 2. Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law;
 3. Improve the quality of life of all citizens and free the potential of each person;
- and

¹²⁰ Preamble to the Constitution.

4. Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.

Under this constitutional mandate, judicial authority is vested in the Courts.¹²¹ The courts are independent and subject only to the rule of law.¹²² *The discussion document on the transformation of the judicial system and the role of the judiciary in the developmental South African State* ('Discussion Document') sets out the role of the judiciary and the courts in transforming the state and society. Traditionally, 'the role of courts has been its preserved power to resolve disputes among citizens, and between citizens and the state', but as the Discussion Document explains, 'in constitutional democracies, the judiciary has the significant task of safeguarding and protecting the Constitution and its values'.¹²³ In doing so, these uniquely transformative features of our Constitution seek to redress the legacy of inequality and deprivation implanted during 300 years years' of colonialism and apartheid.¹²⁴

So any account of adjudication and all that it entails: judicial review – whether of executive power, legislation or administrative decision-making – or the adjudication of 'hard cases', or even the regular work of high courts, has to be based on this underlying constitutional 'role'. This raises some interesting questions about democracy. Jeremy Waldron,¹²⁵ for example, has written persuasively that judicial review of legislation is undemocratic. However, South Africa has its own version of democracy and so, although it seems obvious to say, these problems must be tested against this very specific constitutional context.¹²⁶ For this reason I have avoided an engagement with abstract jurisprudential discussions about what it is that judges do. Rather, I have tried to point to the importance of the underlying *modus operandi* of constitutional theory in South Africa and what it means for interpreting section 167 of the Constitution.

¹²¹ Section 165(1) of the Constitution.

¹²² Section 165(2) of the Constitution.

¹²³ Department of Justice and Constitutional Development 'Discussion document on the transformation of the judicial system and the role of the judiciary in the developmental South African State' (February, 2012) at 13.

¹²⁴ *Id* at III.

¹²⁵ Waldron *op cit* note 76.

¹²⁶ See section 167 of the Constitution.

And so, although it is human nature to forget in the humdrum practice of life, the Constitution is a perpetual public declaration that the shared common purpose of the judiciary is to deliver equality and justice. The courts therefore have an express and powerful mandate to ensure observance of the Constitution.¹²⁷ This power is rooted in the obligation to develop the common law, found in the development clauses of sections 39(2) and 8(3) of the Constitution. Important legislative developments such as the PAJA add credence to this through, for example, its just and equitable remedy in section 8.¹²⁸ The theory of government, including that of the adjudicative branch post 1994 is therefore one based on the idea of ‘transformative constitutionalism’.¹²⁹

In honouring this constitutional mandate, superior courts very often struggle to navigate a precarious binary: traditionally hermeneutic approaches to legal problems, and more nuanced approaches to separation of powers; the right to review legislative as well as administrative actions and the implications of socio-economic rights, while honouring standard philosophical theories of restraint.¹³⁰ This is no doubt an immense social task. A good illustration of how this tension is sometimes interpreted can be found in Kriegler J’s statement in *S v Makwanyane*. The former justice states that although, ‘judicial process cannot operate in an ethical vacuum...the incumbents [of the Court] are Judges, not sages; their discipline is the law, not ethics or philosophy and certainly not politics.’¹³¹

¹²⁷ K O’Regan ‘Checks and Balances Reflections on the Development of the Doctrine of Separation of Powers Under the South African Constitution: FW De Klerk Memorial Lecture, Potchefstroom’ (2005) 8 Vol 1 *PER* 120 at 129. See also, K O’Regan “Breaking Ground: Some Thoughts on the Seismic Shift in our Administrative Law” (2004) 121 *South African Law Journal* 424 at 437.

¹²⁸ In addition to the common law grounds, where setting aside and correcting were the primary remedies, the PAJA provides various other orders: orders to give reasons, declaring rights and in exceptional cases, paying compensation. This sets the scene for a difficult balancing act. See for example, *Millennium Waste Management v Chairman, Tender Board: Limpopo Province* 2008 (2) SA 481 (SCA) and of *AllPay Consolidated Investment Holdings & others v The Chief Executive Officer of the South African Social Security Agency & others* [2013] ZASCA 29.

¹²⁹ See for example, K Klare ‘Legal Culture and Transformative Constitutionalism’ (1998) 14 *SAJHR* 146 and A Van der Walt, ‘Transformative Constitutionalism and the Development of South African Property Law’ Part 1 (2005) 4 *TSAR* 655.

¹³⁰ For a discussion see JR de Ville *Constitutional and Statutory Interpretation* (2000).

¹³¹ 1995 (3) SA 391 (CC) at 207. See also *Du Plessis v De Klerk* 1996 (3) SA 850 (CC).

That position is not an entirely true reflection of the CC's constitutional contract, and the record of the CC since then certainly does not bear witness to that testimony. Indeed, the CC judges are in some respects 'sages', entrusted with a very special role: protecting and giving substance to the vision of the Constitution. Having such an institution is necessary in a transforming society, where the law and its principles require reconstruction. This role includes monitoring the separation of powers, deciding on the constitutionality of any amendments to the Constitution, and holding the legislature and the executive to the text of the Constitution.¹³²

In fulfilling its mandate the CC has broken new ground in developing the law within the context of South Africa's broader constitutional democratic project and commitment to the principle of legality and the rule of law,¹³³ and in so doing, forced judges, to develop a more critical and sophisticated mode of adjudicating the exercise of public power. This must be part of their role: laying the foundation for reconstruction through the fulfilment of their institutional mandate. The SCA, as judges and as an institution, and similarly at a high court level, ought to follow suit.

Although there are many illustrations of this mandate, a recent example of how this was achieved can be found in the decision in *Maphango and Others v Aengus Lifestyle Properties (Pty) Ltd*, which was heard in November 2011 at the Constitutional Court.¹³⁴ Although as Judge Cameron points out, the narrow question in the case was whether a landlord is entitled to cancel a lease and evict its tenants, the more important question lay in the impact of the protection the Constitution affords against eviction.¹³⁵

¹³² K O'Regan 'Checks and Balances Reflections on the Development of the Doctrine of Separation of Powers Under the South African Constitution: FW De Klerk Memorial Lecture, Potchefstroom' (2005) 8 Vol 1 *PER* 120 at 129.

¹³³ *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC) ('Fedsure'); *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC) ('SARFU'); *Pharmaceutical Manufacturers Association of South Africa: Ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) ('Pharmaceutical Manufacturers Association').

¹³⁴ 2012 (3) SA 531 (CC).

¹³⁵ *Id* at 1.

The applicants were tenants in a block of flats in the inner city of Johannesburg. The respondent landlord, a property investment company, bought the building, upgraded it, and then wanted to increase the rent. In order to do so the respondent cancelled the leases. In turn, the respondent offered new leases on identical terms, though at new and much higher rents. When the tenants resisted the landlord brought eviction proceedings. The tenants lost in the South Gauteng High Court and the Supreme Court of Appeal, protecting the common law right to terminate lease agreements. The critical question was whether the landlord was lawfully entitled to exercise the bare power of termination in the leases solely to secure higher rents. Cameron J held:

*'It is enough to say that in my respectful view the High Court and the Supreme Court of Appeal under-assessed the power of the statute. In particular, they overlooked the history and setting of the statute, its broad definition of "unfair practice", its clear intimation that invocation of lease terms may constitute an unfair practice and the carefully balanced powers that are conferred on the Tribunal.'*¹³⁶ (My emphasis.)

Judge Cameron provides two important lessons. The first is that, in contrast to the SCA, he interrogates the basic assumptions about the law of lease and contract, and delivers a judgment which alters the common law in a way that re-imagines how the law ought to operate under the Constitution. In doing so, we receive a manifestation of the quality, 'commitment to constitutional values'. This is the kind of work that judges are called to do, and it is the kind of work that not only requires knowledge of the common law, but the ability to re-imagine it completely.

Criteria for judicial selection

Knowing the awesome power that judges exercise in a constitutional democracy and the powerful constitutional and legislative tools they are equipped with to perform that task, who should judges be? What criteria should be used to select judges? When a judge takes office, she or he promises to be faithful to the Republic, to uphold and protect the Constitution, and to administer justice to all persons without

¹³⁶ Id at 56.

prejudice, fear, or favour.¹³⁷ Section 174(1) of the Constitution provides a qualifying threshold: to become a judge, you must be ‘appropriately qualified’ and ‘a fit and proper person’.¹³⁸ Section 174(2) further mandates that, ‘[t]he need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed.’

The public body entrusted with the responsibility of selecting judges is the JSC. The JSC was established in terms of Section 178 of the Constitution, and its function is to select fit and proper persons for appointment as judges and to investigate complaints about judicial officers.¹³⁹ There can be no dispute that issues relating to processes of the JSC are constitutional matters of profound import.¹⁴⁰ The only criteria for selection used by the JSC when appointing candidates for judicial appointments, which was determined at a Special Sitting held on 10 September 2010, are as follows:¹⁴¹

‘Criteria stated in the Constitution

1. *Is the particular applicant an appropriately qualified person?*
2. *Is he or she a fit and proper person, and*
3. *Would his or her appointment help to reflect the racial and gender composition of South Africa?*

Supplementary Criteria

¹³⁷ Section 165(2) of the Constitution.

¹³⁸ Section 174(1) and (2) reads as follows:

‘174. Appointment of judicial officers

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

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

¹³⁹ The Judicial Service Commission Act, 9 of 1994.

¹⁴⁰ *Hlophe v Premier of the Western Cape Province, Hlophe v Freedom Under Law* 2012 (6) SA 13 (CC).

¹⁴¹ JSC Criteria available at <http://www.justice.gov.za/saiawj/saiawj-jsc-criteria.pdf> accessed on 28 January 2014.

1. *Is the proposed appointee a person of integrity?*
2. *Is the proposed appointee a person with the necessary energy and motivation?*
3. *Is the proposed appointee a competent person?*
 - (a) *Technically competent*
 - (b) *Capacity to give expression to the values of the Constitution*
4. *Is the proposed appointee an experienced person?*
 - (a) *Technically experienced*
 - (b) *Experienced in regard to values and needs of the community*
5. *Does the proposed appointee possess appropriate potential?*
6. *Symbolism. What message is given to the community at large by a particular appointment?*

These criteria are deeply problematic. There is no rational distinction between ‘criteria stated in the Constitution’ and ‘supplementary criteria’, except that the latter is perhaps meant to add substance to the former. The criteria under ‘supplementary criteria’ read arbitrarily; for example, they tend to conflate the skill required, i.e., sound knowledge of law and its application, with examples of how the abilities would be demonstrated, i.e., rapidly absorbs and analyses complex and competing factual and legal material. Not only do the content of these criteria remain completely open to interpretation as the legislative framework does not expressly detail how they should be read together, but the process of deliberation and selection is ‘shrouded in obscurity’.¹⁴² The procedure for the JSC, established by the JSC’s Rules for Procedures, provides no substance to an otherwise summary of the formal procedures required for nomination and selection.¹⁴³

Does the HSF v JSC litigation provide a way forward?

This is perhaps why the JSC has been the subject of litigation in recent years. Earlier in April 2011 – before the interviews that gave rise to the HSF litigation – the JSC interviewed candidates for judicial appointments in the Western Cape High Court (‘WCHC’, or ‘Western Cape High Court’). Of the seven candidates, one was black, six

¹⁴² *Judicial Service Commission v Cape Bar Council (Centre for Constitutional Rights as amicus curiae)* (2013 (1) SA 170 (SCA) at 53 (‘*JSC v Cape Bar Council*’).

¹⁴³ It simply requires that after completion of the public interviews, the Commission shall deliberate in private and shall, if deemed appropriate, select the candidates to be recommended for appointment in terms of section 174(4) of the Constitution by consensus or, if necessary, by majority vote.

were white and one was a woman. Although all candidates were interviewed, the JSC decided to recommend only one of them for judicial appointment, who happened to be black. The result was that the other two available positions remained vacant, at least until the next meeting of the JSC.¹⁴⁴ The Cape Bar Council took umbrage. It approached the WCHC for an order declaring, amongst other things, that the proceedings were inconsistent with the Constitution, unlawful and consequently invalid.¹⁴⁵ The WCHC held that the failure by the JSC on 12 April 2011 to fill two judicial vacancies was unconstitutional and unlawful. This was confirmed on appeal in *Judicial Service Commission v Cape Bar Council*¹⁴⁶ where the SCA held that the JSC is under a constitutional obligation to act rationally and transparently in deciding whether or not to recommend candidates, which includes giving reasons; the response that the particular candidate did not garner enough votes, is no answer.

On 17 October 2012, the JSC interviewed eight candidates for appointment as judges of the Western Cape High Court to fill five vacancies at that court. The JSC advised the President to appoint the 'Successful Candidates'.¹⁴⁷ On 7 February 2013, the President appointed them as such.¹⁴⁸ The reception from the legal fraternity was mixed.¹⁴⁹ Again the JSC was subject to intense scrutiny.

Former Deputy President of the Supreme Court of Appeal, Mr. Justice Harms requested reasons for the JSC's decision not to recommend Mr Gauntlett, one of the 'Unsuccessful Candidates',¹⁵⁰ for judicial appointment. Justice Harms had nominated Mr Gauntlett for appointment as a judge. In a letter dated 6 November 2012 ('the first

¹⁴⁴ *JSC v Cape Bar Council* supra note 142 at 2.

¹⁴⁵ *Cape Bar Council v Judicial Service Commission* (Centre for Constitutional Rights and another as amici curiae) 2012 (4) BCLR 406 (WCC).

¹⁴⁶ *JSC v Cape Bar Council* supra note 142 at 51.

¹⁴⁷ Honourable Madame Justices Judith Cloete and Babalwa Mantame and the Honourable Mr Justices Mokgoatji Dolamo, Owen Rogers and Ashton Schippers, as judges of the Court.

¹⁴⁸ 'President Jacob Zuma appoints Judges to various court divisions' available at <http://www.gov.za/speeches/view.php?sid=34102&tid=98038> accessed on 28 January 2014.

¹⁴⁹ N Tolsi 'JSC 'fixated' on race and gender' *M&G* 07 June 2013; C du Plessis 'The JSC should do what Afrikaners did' *City Press* 16 June 2013; C du Plessis 'JSC faces own "spy tapes" debacle' *City Press* 27 October 2013.

¹⁵⁰ Ms Nonkosi Saba and Messrs Jeremy Gauntlett and Stephen Koen.

JSC letter'), the Secretariat of the JSC replied to this request for reasons. In its letter,¹⁵¹ the JSC provided the following reasons:

'As to Advocate Gauntfett SC, his excellence and experience as a lawyer were acknowledged. A concern was raised, however, that he has a "short thread" and that he can be acerbic at times. Some Commissioners accepted his assurance that as a Judge one is removed from the Immediate combative situation that counsel usually find themselves in, but strong reservations were also expressed as to whether, as part of his attributes, he has the humility and the appropriate temperament that a judicial officer should display...

Another very important consideration was the demographic composition of the Cape High Court Bench. It was argued that considering the number of white male Judges in that Court as compared to other races was such that were two white males to be appointed (at that stage the focus was on Advocates Gauntlett SC and Rogers SC) the Commission would be doing violence to the provisions of section 174(2) of the Constitution....'

These reasons canvass fully the factors taken into account by the JSC when exercising its power under the Constitution to advise the President on judicial appointments. These reasons form the basis of the current litigation. On 4 June 2013, the HSF took the JSC to the Western Cape High Court. The HSF requested the following declaration: that the decision taken by the JSC under section 174(6) of the Constitution to appoint the Successful Candidates, and not the Unsuccessful Candidates, was unlawful and/or irrational and invalid.¹⁵² Alternatively, the HSF requested a declaration that the process followed by the JSC was unlawful and/or irrational and invalid.

At the centre of this litigation is how section 176(1) and (2) should be read. The JSC patently distinguishes between the factors of race and gender, which it groups together with jurisdictional requirements of section 174(1), on the one hand, and relevant factors, which it calls 'supplementary criteria'. This application raises the question of how section 174 of the Constitution can best be interpreted in light of South Africa's broader constitutional project and commitment to the principle of

¹⁵¹ HSF v JSC Founding Affidavit, Annexure 'FA5'.

¹⁵² HSF v JSC Founding Affidavit at 2-3.

legality and the rule of law.¹⁵³ First, it raises the issue of what we mean by fit and proper and appropriately qualified. The HSF does not expressly distinguish between 'fit and proper' and 'appropriately qualified', but rather provides an open and extensive list of factors that together add colour to the idea of who judges should be. They are summarised as follows:¹⁵⁴

(i) knowledge of the law; (ii) ability expeditiously to assimilate unfamiliar aspects of the law; (iii) analytical ability; (iv) intellectual integrity, (v) impartiality; (vi) a good working knowledge of social, political and economic reality; (vii) a good temperament; (viii) communication skills; empathy, compassion and knowledge of local communities; (ix) a diverse bench to ensure the public's confidence; and lastly (ix) administrative

The HSF says that in a constitutional democracy an independent judiciary must be staffed by judges of the highest intellectual ability and moral character, who understand and live the spirit of the Constitution.¹⁵⁵ Second, the injunction created by section 174(2) is meant to account for South Africa's unique history and to correct the inequalities wrought by a system of discrimination and exclusion, and raises the issue of how section 74(1) and (2) should be read together. The HSF argues that describing these other factors as supplementary, the JSC on a 'systemic level' fails to understand the nature of its discretionary power.¹⁵⁶ The factor in section 174(2) is simply one of the factors, which the JSC is obliged to consider and does not assume pre-eminence. In other words,

*'[n]one of these factors, including the race and gender of a particular candidate, will be decisive in all cases. Rather, they form part of a basket of relevant considerations. The JSC is not permitted to pick and choose. All are relevant and all are material.'*¹⁵⁷

¹⁵³ *Fedsure* supra note 133; *SARFU* supra note 133; *Pharmaceutical Manufacturers Association* supra note 133.

¹⁵⁴ *HSF v JSC* Founding Affidavit at 34.

¹⁵⁵ Helen Suzman Foundation Press Statement 'HSF Takes Judicial Service Commission to Court' 7 June 2013, available at

<http://politicsweb.co.za/politicsweb/view/politicsweb/en/page71654?oid=381717&sn=Detail&pid=71616> accessed on 28 January 2014.

¹⁵⁶ *HSF v JSC* Founding Affidavit at 52.

¹⁵⁷ *HSF v JSC* Founding Affidavit at 35.

The protest is that the JSC elevated this factor in section 174(2) to such a level of importance that it precluded appointment of more than one white male to the WCHC as the bench did not broadly reflect the racial and gender composition of South Africa. The HSF considers this an error of law.¹⁵⁸ Is the JSC's position defensible? What are the consequences of lumping these criteria together? What does 'appropriately qualified' mean?

As Cowen points out, the concept of 'appropriately qualified' is contested and fraught.¹⁵⁹ Despite this, there seems to be some consensus: forensic skills; intellectual capacity; writing and analytical abilities; knowledge of the law and its underlying principles are all necessary.¹⁶⁰ Furthermore, the ability to adjudicate disputes in a broad range of fields, including constitutional adjudication, which requires giving content to the normative value system underlying the Constitution, is essential.¹⁶¹ Cowen makes further reference to the increasing need for administrative capacity and communication skills.¹⁶² Because the superior courts have general jurisdiction, and we do not have a highly developed system of special tribunals, other than the specialist courts already discussed, the dominant selection theories advocate that judges are to have a very diverse skill set.

The limits of this approach, much like the approach to the forms of adjudication, although an excellent account of what 'appropriately qualified' might mean in a country as complicated as South Africa, still suffers from two serious flaws. The first is that this approach succumbs to the same fate as those who have not conducted the necessary triage of superior court practice. Not knowing what our superior courts are doing and to what extent, means that the desirable qualities and abilities favoured are often heavily biased. The result is inevitably one of myth-making: '[b]ecause some

¹⁵⁸ *HSF v JSC* Founding Affidavit at 47.

¹⁵⁹ The only research in South Africa directly on the constitutional requirements established in section 174 is Susannah Cowen's 'Judicial Selection in South Africa' (2013) *DGRU Working Paper Series*, available at

<http://www.dgru.uct.ac.za/usr/dgru/downloads/Judicial%20SelectionOct2010.pdf>

¹⁶⁰ *Id* at 37.

¹⁶¹ *Id* at 30.

¹⁶² *Id* at 37.

fields of law arise more commonly in litigation' Cowen writes, '*perhaps* commercial law, public law and criminal law' (my emphasis) skill and experience in identified areas can be regarded as essential.¹⁶³ But the previous Chapter illustrated how loose and uncritical such discourse is: what *is* commercial law post the Great Recession? How do we understand issues of over-indebtedness, globalisation, trade, reckless lending, and how do we situate them within the context of a theory of community; the jurisdiction of city-states that high courts are meant to serve?

The approach by the HSF loses ground in a second important way. Although the HSF, like Cowen, recognise that the fit between skills and judicial roles may differ according to each court, they do not provide a formula to aid the JSC to make more sophisticated appointments at each court. By providing a simple basket of desirable qualities without a critical understanding of a court's needs means that the definition of merit remains, by and large, trapped in its historical roots. The consequence being that the concept of merit continues to mirror the qualities of those candidates who currently exercise power: white males with degrees from prominent universities in South Africa and abroad, who speak and think in a particular way, without any serious strategy for transformation.

The same problems arise with discussions about 'fit and proper'. Again, there is no established set of criteria for determining this requirement. Shientag, in his 1944 piece, *The Personality of a Judge* chose eight 'cardinal virtues', which encompassed a characteristic mix of admirable qualities such as: independence and impartiality, courtesy and patience, open-mindedness, the virtue of an understanding heart and the virtue of social consciousness.¹⁶⁴ The HSF cite too, the need for intellectual integrity and impartiality, which most people instinctively support. Natural justice demands the rule against bias (*nemo iudex in causa sua*) and the right to a fair hearing (*audi alteram partem*).

¹⁶³ Id at 33.

¹⁶⁴ BL Shientag *The Personality of a Judge and the Part it Plays in the Administration of Justice* (1944).

We can accept with no great difficulty that independence, impartiality and fairness, integrity, judicial temperament and commitment to constitutional values are desirable virtues of good character.¹⁶⁵ The importance of the quality of independent-mindedness is reflected in South Africa's Guideline for judges.¹⁶⁶ To be a judge, you need to be able to form your own opinions regardless of the pressure felt, both internal and external. This is what Atticus tries to explain to his daughter in the now famous book *To Kill a Mockingbird*, as to why he chose to defend Tom Robinson:¹⁶⁷

'Atticus, you must be wrong.... said Scout.

'How's that?'

'Well, most folks seem to think they're right and you're wrong....'

*'They're certainly entitled to think that, and they're entitled to full respect for their opinions,' said Atticus, 'but before I can live with other folks I've got to live with myself. The one thing that doesn't abide by majority rule is a person's conscience.'*¹⁶⁸

Modern pressures, both external and internal, can be ponderous, especially those decisions fraught with political consequences or those that might seem to be unpopular. *S v Makwanyane*, again does not disappoint in this regard, and the CC emphasised that it would not be diverted from its duty, 'to act as an independent arbiter of the Constitution'.¹⁶⁹ But despite the comfort drawn from former Chief Justice Chaskalson's fine words, and the admirable stance in the conviction of his own impartiality, recent research shows that judges are not as independent as they might think. In his article, *If Judges Aren't Politicians, What Are They?*¹⁷⁰ Cass Sunstein points out that judicial predispositions matter, and they help explain why judges are divided on some of the great issues of the day. He argues that judicial voting becomes a lot more ideological when judges sit on panels with two others appointed

¹⁶⁵ Id at 43.

¹⁶⁶ Guideline for Judges of South Africa: Judicial Ethics in South Africa (2000).

¹⁶⁷ G Solik 'Transforming the Judiciary: Who should judges be?' (2013) 1 *PLJ* 1 at 4.

¹⁶⁸ H Lee *To Kill a Mockingbird* (1966).

¹⁶⁹ The classic example in South Africa is the death penalty decision of the Constitutional Court in *S v Makwanyane* 1995 (3) SA 391 (CC).

¹⁷⁰ C Sunstein 'If Judges Aren't Politicians, What Are They?'

8 January 8 2013, available at <http://www.bloomberg.com/news/2013-01-08/if-judges-aren-t-politicians-what-are-they-.html>

by presidents of the same political party and that judges get far more moderate when they sit on panels with two other judges appointed by presidents of the other political party.

Indeed, lawyers regularly reach for qualities like intellectual integrity, as the HSF has done, or to endorse qualities such as judicial temperament, humility and open-mindedness, without any indication of how these actually exist and are constrained in practice. In his recent book, *Thinking, Fast and Slow*, Nobel Prize author Daniel Kahneman writes about biases and intuition in judgment and decision-making.¹⁷¹ The aim of the book is to improve the ability to understand errors in judgment and choice by providing a richer and more precise language to discuss them.¹⁷² The book is a tale of two modes of thought: system one, which operates automatically and quickly with little effort, and system two which requires effort in thinking, usually when apply oneself to more complex computations,¹⁷³ for example, checking the validity of a complex logical argument.

The book, and the research over many decades, carry instructive lessons for those interested in the quality of judicial decision-making. Both the controlled operations of system two and the core of system one, continually construct a 'coherent' interpretation of what is going on in the world around us.¹⁷⁴ Kahneman provides overwhelming evidence that we employ shortcuts of intuitive thinking, which result in cognitive biases as manifestations of these heuristics. And that these shortcuts embedded in 'system one' enjoy overwhelming influence over how we make decisions. Because of this, often, although not always, systematic deviations from a standard of good judgement in various human behaviours become apparent. Because these biases affect belief formation, prejudice, views on happiness, business and economic life, it is important that judges are aware of these heuristics in their work.

¹⁷¹ D Kahneman *Thinking, Fast and Slow* (2012).

¹⁷² Id at 4. It builds on earlier research the he conducted with Amos Tversky, including the article 'Judgment under uncertainty: Heuristics and Biases' (1974) 185 *Science* 1124, which is available as Annexure 'A' to the book *Thinking, Fast and Slow*.

¹⁷³ Id at 20-21.

¹⁷⁴ Id at 12.

Even writing this paper I know that any lawyer who reads these lines will overestimate their ability to be impartial, as we are all prone to do.¹⁷⁵

For example, Kahneman recalls a disturbing demonstration of depletion effects in judgments in a study reported in the *Proceedings of the National Academy of Sciences*.¹⁷⁶ The participants were eight parole judges in Israel. The applications for parole appeared in random order each day, with the judges spending on average roughly six minutes on each application. What the researchers found was 65 percent of all requests were granted after a food break, whereas the approval rate dropped dramatically to about zero percent just before the meal break. This data, as Kahneman suggests, provides bad news. Tired and hungry judges tend to fall back on easier default position of denying requests for parole.

You will recall that in 2011/12, high courts enrolled 27 804 new civil matters for trial and finalised 28 886 (which included settlements and withdrawals).¹⁷⁷ However, the high courts received a further 104 884 new motion applications and finalised 82 431 matters. It thus becomes obvious that motion court is a core component of the administration of justice, and therefore potentially, as Kahneman research shows, ripe for biases to play themselves out in ways that are potentially unjust. The point being that personal heuristics combined with external stimuli entails that judges and those that run the administration of justice ought to recognise situations where mistakes are probable, and implement mechanisms to avoid avoidable mistakes in routine work, as well as when the stake are high. Is this perhaps one explanation of the poor decision in *Qhinga* where the SCA considered and refused an application without the relevant information?

¹⁷⁵ See Generally A Tversky & D Kahneman op cit note 171.

¹⁷⁶ Kahneman op cit note 171 at 43 referring to the study by S. Danziger et al 'Extraneous factors in judicial decisions' (2011) 108 *Proceedings of the National Academy of Sciences*, available at <http://www.pnas.org/content/108/17/6889.full>

¹⁷⁷ Annual Report 2011/2012 op cit note 37 at 20.

Indeed, what the decisions like *Brisley v Drotsky*¹⁷⁸ and *Afrox Healthcare*¹⁷⁹ show from a socio-psychological perspective, and what critical legal theorists have pointed out, was that the supreme court was operating on a shared set of assumptions – heuristics – which in turn lead to biases, about the way in which ordinary people enter into contracts, and how the foundations of the law over time, through principle and precedent, corroborate unproven factual scenarios, or scenarios that have changed over time: '[a] reliable way to make people believe in falsehoods is frequent repetition, because familiarity is not easily distinguished from truth'.¹⁸⁰

Kahneman's work serves as a criticism of the HSF's far too ready acceptance of concepts such as independence and impartiality without locating them within a more rigorous discourse about natural cognitive constraints and external influences on judicial decision-making. Especially in everyday judging, but also of course in our appeal courts. That is not to say we should not work hard to identify independent thought-leaders; of course, we should, but we need to focus on entrenching impartiality through institutional and personal safeguards. As Justice O'Regan recently points out, we must keep prejudices in check.¹⁸¹

*'If all judges are from the same background, she explained it is easy to entrench prejudice and it is not easy to know your own prejudice. Diversity makes us aware of our prejudices, and thus promotes open-mindedness in the judiciary.'*¹⁸²

One of the most powerful ways to do this is to have a diverse bench. This is where the HSF Litigation becomes so important for the legal profession:

'Judicial diversity is likely to increase judicial dissent and hence, as we have seen, improve the quality of decisions. Against the backdrop of the American legal system, Sunstein suggests that the Chief Judges who appoint three-judge panels should appoint panels in American courts with a mix of Republicans and Democrats. While South Africa does not share the stark political divide that America enjoys, there is

¹⁷⁸ *Brisley v Drotsky* 2002 (4) SA 1 (SCA).

¹⁷⁹ *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA).

¹⁸⁰ Kahneman op cit note 171 at 62.

¹⁸¹ Circulated Minutes from Judicial Appointments Conference: Grande Roche Hotel, Paarl 27 September 2013.

¹⁸² Id.

*certainly value in ensuring that panels of judges do not all share a common background.*¹⁸³

In terms of race, and from a textual perspective, regard must be had to the words ‘must be considered’ in section 174(2) of the Constitution. To consider something means to ‘take it into account’ and ‘considered’, the past participle of ‘consider’, means to ‘think carefully about something before making a decision.’¹⁸⁴ ‘Must’ naturally indicates that there is an obligation to consider. The HSF recognises that section 174(2) is meant to account for South Africa’s unique history and to correct the inequalities ‘wrought by a system of discrimination and exclusion’.¹⁸⁵ They also recognise that ‘an essential feature of a successful legal system is that it is considered legitimate by the people over whom it presides.’¹⁸⁶ Despite this, the HSF submits that the JSC cannot operate in a way that discards other relevant factors. The JSC is not entitled to pick and choose. All are relevant and material. And so, while race and gender are materially relevant, considering ‘humility and judicial temperament’ as a decisive factor in Gauntlett’s appointment means that the JSC failed to consider the relevant factors it delineated above.¹⁸⁷

To my mind, at any rate, this reasoning seems self-defeating. The Constitution is very clear: the JSC is entitled to consider questions of race every time it makes appointments, and its exercise of power has to meet the threshold requirement of rationality, as all exercise of power is subject to the rule of law and principle of legality.¹⁸⁸ In light of the transformative mandate of the Constitution, I am of the opinion that *in principle* the JSC is entitled not to appoint a white man to the bench because of the racial profile of that bench, provided the reasons disclosed give effect to a defensible plan of redress, including the work of that court, and the skills that the JSC is looking to acquire. Whether the bald assertion in this case can be defended

¹⁸³ P Langa ‘The Emperor’s New Clothes: Bram Fischer and the Need for Dissent’ (2007) 23 *SAJHR* 362.

¹⁸⁴ *HSF v JSC* Founding Affidavit at 30.

¹⁸⁵ *HSF v JSC* Founding Affidavit at 25.

¹⁸⁶ *Id.*

¹⁸⁷ *HSF v JSC* Founding Affidavit at 40-41.

¹⁸⁸ Sergeant at the Bar, ‘Greater transparency could encourage better JSC appointments’ *M&G* 23 November 2012, and the views expressed by the Institute for Accountability in South Africa available at http://www.ifaisa.org/Gauntlett_SC.html

remains to be seen, but it does elicit a far more difficult decision that commentators have led us to believe.¹⁸⁹

First, as Kate Malleson points out, the problem with a lack of diversity is that, '[o]ne almost inevitable effect of selecting judges from a narrow group is that the characteristics of that group tend to become synonymous with merit.'¹⁹⁰ The HSF feels there is a great loss to the system because Mr Gauntlett epitomises for them, and many others, the ideal judge. But Mr Gauntlett, as technically skilled as he no doubt is, has to be considered within a far broader framework of merit, from a far wider perspective, which includes the expectations of millions of ordinary South Africans.

The second related point is that the pool of available candidates for judicial appointments is so thin that unless 'radical' interventions are made, such as not appointing someone like Mr Gauntlett within the context of this case, the bench will continue to be characterised by a distinctive white hue. Black female advocates make up four percent of the profession compared to the 57 percent of white males (89 and 1 367, out of a total of 2 384 advocates respectively) with 69 Indian and just 37 coloured female advocates in the entire country.¹⁹¹ A recent survey of large corporate law firms showed the disparity not only between racial composition but also between race, position, and influence, paints a bleak picture.¹⁹² Whatever the legal and political approach to race ensues in the courts, the JSC cannot ignore hundreds of years of racial inequality, and the manifestation of that history; the day-to-day reality of

¹⁸⁹ The problem for me is in the nature of reasons given, which lack detail. I personally think that not employing a white male who is considered 'ascerbic' and lacking in judicial temperament at high court is perfectly justifiable because of the nature of the work that is done at high courts. But I think this reasoning loses weight if we consider the same justification for a superior court post where argument is based on papers, and counsel can expect to engage solely with judges.

¹⁹⁰ K Malleson 'Rethinking the Merit Principle in Judicial Selection' (2006) 33 *Journal of Law & Society* 126.

¹⁹¹ J Kane-Berman (eds) (2012) 'South Africa Survey' (South African Institute of Race Relations) at 761.

¹⁹² Project Law: Democratic Survey of Large Corporate Law Firms, South Africa (May 2013) Plus 94 Research available at http://nu.org.za/wp-content/uploads/2013/08/Project-Law_Report_20130520_Final_Revised.pdf

geographic, linguistic and class inequality in South Africa. As the Constitutional Court held in *Bato Star*.¹⁹³

'Our Constitution recognises that decades of systematic racial discrimination entrenched by the apartheid legal order cannot be eliminated without positive action being taken to achieve that result. We are required to do more than that. The effects of discrimination may continue indefinitely unless there is a commitment to end it.'

Having said that, I must qualify the statement with a third related point. As I have argued elsewhere,¹⁹⁴ there are serious problems with an unthinking and racial application of the diversity rationale. The diversity rationale must be understood in terms of class and other socioeconomic factors if we are serious about addressing inequality and representivity. It also needs to take account of a candidate's commitment to constitutional values. What this decision signifies, more than irrationality, is the loss of faith in the JSC after a series of questionable decisions, which are shrouded in procedure that lacks transparency, and by implication, accountability.

VI The United Kingdom

Introduction: in thinking about the selection criteria, what can we learn from the UK

In the United Kingdom, prior to the Constitutional Reform Act judges were appointed by a politician, the Lord Chancellor. What is more, the court of final appeal was the Appellate Committee of the House of Lords, which was nominally part of the legislature, although in law and practice, an independent court.¹⁹⁵ The system of judicial selection prior to the mid-1990s was guided by three strict principles: appointment should be strictly on merit; part-time judicial appointment was favourable before receiving full-time appointments; and significant weight was attached to the independent views of the judiciary and members of the legal profession in considering candidates for judicial appointment.¹⁹⁶ As Lord Mackay points out, 'I considered it a

¹⁹³ *Bato Star Fishing (Pty) Ltd v The Minister of Environmental Affairs and Tourism and Others* 2004 (7) BCLR 687 (CC).

¹⁹⁴ Solik op cit note 167.

¹⁹⁵ The Constitutional Reform Act, 2005 at 34.

¹⁹⁶ Lord Mackay of Clashfern KT, with David Staff 'Selection of Judges Prior to the Establishment of the Judicial Appointments Commission in 2006' in *Judicial Appointments: Balancing Independence*,

cardinal principle to appoint to each post the candidate who appeared to me the best qualified...this principle was to prevail, without regard to gender, ethnic origin, marital status, sexual orientation, political inclination, religion or disability.¹⁹⁷

The reform however, began in earnest with the introduction of the Courts and Services Act 1990, with the aim to broaden the qualifications for appointments.¹⁹⁸ Later, in 1993, after the review of the judicial appointments system, a programme of development was introduced.¹⁹⁹ The idea was to build on the strengths of the existing system and to make the appointments system as efficient, fair and open as possible.²⁰⁰ The reform comprised amongst other things: measures to improve arrangements for forecasting and planning the numbers and expertise of the judges required at the various levels, and preparation of more specific descriptions of the work of the judicial posts to be filled and the qualities required.²⁰¹

By July 1994 specific criteria for appointment of circuit and district judges was announced as the framework within which the merits of individual candidates were to be considered. The following stand alone criteria included:

- Appropriate levels of legal knowledge and experience;
- Intellectual and analytical ability;
- Sound judgment;
- Decisiveness;
- Ability to communicate effectively;
- Ability command respect of the court users and maintain the authority of the court;

Accountability and Legitimacy (2010) at 12-13. This collection of essays has its genesis in a seminar organised by the Judicial Appointments Commission. It is a comprehensive analysis of the recent history of the appointments procedure available at http://jac.judiciary.gov.uk/static/documents/JA_web.pdf accessed on 14 February 2014.

¹⁹⁷ Id at 14.

¹⁹⁸ Id at 12-13.

¹⁹⁹ Id at 17.

²⁰⁰ Id at 18.

²⁰¹ Id at 20.

- Integrity;
- Fairness;
- An understanding of society;
- Sound temperament;
- Courtesy and humanity; and
- Commitment to public service and to the proper and efficient administration of justice.

What is so intriguing is that these criteria comprising a combination of professional skills and personal qualities remain so influential on the criteria used today. What we see now is that the criteria are organised more specifically thematically, but in substance they remain the same.

With a change of government in 1997, Lord Irvine, the new Lord Chancellor, was expected to establish a Judicial Appointments Commission, as an advisory body.²⁰² This did not happen. Instead, the Chancellor modified the open competition procedures, which had been introduced in the mid-1990s.²⁰³ In 1999, the Lord Chancellor asked Sir Leonard Peach, the former Commissioner for Public Appointments, to scrutinise the judicial appointments process.²⁰⁴ Following the Peach Report, the criteria for appointment were amended, where for example, it was now clearly stated that advocacy experience was not an essential requirement for public office.²⁰⁵ The Lord Chancellor, like his predecessor, made modest, but no doubt significant developments in reaching out to those not normally considered for judicial office: woman, and those of ethnic minority origin.²⁰⁶ The office of magistrates too, for example, was opened to blind and partially sighted candidates, and introduced arrangements for flexibility in relation to part-time judicial sittings so that, ‘those that

²⁰² Id at 24.

²⁰³ Id.

²⁰⁴ Id at 26.

²⁰⁵ Id.

²⁰⁶ Id at 27.

had taken a career break could catch up more quickly...before they could be considered for full-time appointment.²⁰⁷

In 2003, the establishment of a judicial appointments commission by the UK government took the world by surprise.²⁰⁸ The JAC was set up under the Constitutional Reform Act and launched on 3 April 2006. The JAC is an independent commission that selects candidates for judicial office in courts and tribunals in England and Wales.²⁰⁹ Under the Constitutional Reform Act, the JAC has very specific duties in regard to the selection of judges. These statutory responsibilities are:²¹⁰

- to select candidates solely on merit;²¹¹
- to select only people of good character; and
- to have regard to the need to encourage diversity in the range of persons available for judicial selection.²¹²

Importantly, the JAC does not select judicial office-holders for the UK Supreme Court. Furthermore, in terms of the UK Supreme Court, a person is not qualified to be appointed a judge of the UK Supreme Court unless he has: (a) held high judicial office for a period of at least 2 years; or (b) been a qualifying practitioner for a period of at least 15 years.²¹³ According to Jonathan Sumption OBE QC, '[t]he scheme of the Act is intolerably clear. The Commission's duty is to do its best to encourage applications from the widest-possible range of eligible candidates...but having done so it must select among them according to their aptitude for the job and nothing else.'²¹⁴ Apart

²⁰⁷ Id at 28.

²⁰⁸ Malleson op cit note 5 at 39.

²⁰⁹ Information available at <http://jac.judiciary.gov.uk/about-jac/about-jac.htm> last accessed 13 February 2014.

²¹⁰ Sections 63 and 64 of Constitutional Reform Act.

²¹¹ Section 63(2) of the Constitutional Reform Act. Merit here refers to the ability to perform the functions that will be required of them if they are appointed. See J Sumption 'The Constitutional Reform Act' in *Judicial Appointments: Balancing Independence, Accountability and Legitimacy* (2010) op cit note 195 at 36.

²¹² Section 64 however, requires the commission to 'have regard to the need to encourage diversity in the range of persons available for selection for appointments'.

²¹³ Section 25 of the Constitutional Reform Act.

²¹⁴ Sumption op cit note 211 at 37.

from the overriding requirement that judges selected must be of ‘good character’, merit is the only permissible criterion. There are therefore no quotas and targets for under-represented groups. However, by encouraging diverse applications, the JAC believes it will strengthen judicial independence, diversify the composition of the judiciary, maintain and enhance the quality of the appointments and raise public Confidence in the system.²¹⁵

Criteria

The JAC has developed a set of ‘Qualities and Abilities’ against which to measure merit and these are adjusted as appropriate for different appointments.²¹⁶ As the JAC explains on its website, ‘[a]pplicants for each selection exercise will be assessed against *five of the six following qualities and abilities*. For example, for posts requiring particular leadership skills, the efficiency quality may be replaced by the leadership and management skills quality.’²¹⁷ (My emphasis.) The role of the JAC is to select and recommend candidates, not to appoint them. The skills are summarised below:

1. Intellectual Capacity

- Expertise in your chosen area of profession;
- Ability to quickly absorb and analyse information; and
- Appropriate knowledge of the law and its underlying principles, or the ability to acquire this knowledge where necessary.

2. Personal Qualities

- Integrity and independence of mind;
- Sound judgement;
- Decisiveness;
- Objectivity; and
- Ability and willingness to learn and develop professionally.

²¹⁵ Malleson op cit 5 at 46.

²¹⁶ Available at <http://jac.judiciary.gov.uk/about-jac/9.htm> accessed 10 February 2014.

²¹⁷ Available at <http://jac.judiciary.gov.uk/application-process/qualities-and-abilities.htm> accessed 10 February 2014.

3. An Ability to Understand and Deal Fairly

- An awareness of the diversity of the communities, which the courts and tribunals serve and an understanding of differing needs;
- Commitment to justice, independence, public service and fair treatment; and
- Willingness to listen with patience and courtesy.

4. Authority and Communication Skills

- Ability to explain the procedure and any decisions reached clearly and succinctly to all those involved;
- Ability to inspire respect and confidence; and
- Ability to maintain authority when challenged.

5. Efficiency

- Ability to work at speed and under pressure;
- Ability to organise time effectively and produce clear reasoned judgments expeditiously; and
- Ability to work constructively with others.

6. Leadership and Management Skills

- Ability to form strategic objectives and to provide leadership to implement them effectively;
- Ability to motivate, support and encourage the professional development of those for whom you are responsible;
- Ability to engage constructively with judicial colleagues and the administration, and to manage change effectively;
- Ability to organise own and others time and manage available resources.

It bears emphasis that the development in the UK judicial appointments process was incrementally conducted over a 16-year period. Each new development subject to professional consultation and public comment, slowly moving towards a more robust understanding of judging, and therefore appointments. It is also noteworthy that the criteria are periodically reviewed, and sometimes altered, as the requirements of the bench evolve. For example, the ‘Ability to Understand and Deal Fairly’ criterion has recently been amended. The JAC issued a consultation document aimed at all those with an interest in judicial appointments, including the judiciary, legal professional bodies and groups with an interest in diversity.²¹⁸ They wanted to know if the current merit criterion should be amended. The JAC proposed the following:

‘Social Awareness, Fairness and Public Service

- *An awareness and understanding, acquired by relevant experience, of diversity of the communities, which the courts serve.*
- *Scrupulous commitment to fair treatment and an understanding of the differing needs of court users.*
- *Commitment to public service, preferably demonstrated through experience.’*

After consultation, the JAC released a document titled, ‘Response of the Judicial Appointments Commission to the consultation exercise on amending the JAC’s merit.’²¹⁹ The JAC did not get its own way. The criterion ‘An Ability to Understand and Deal Fairly’ was not changed to ‘Social Awareness, Fairness and Public Service’, and the content is remains as quoted above.²²⁰ What is instructive here, is that the JAC was informed by what the legal community thought most fitting, and incorporated their suggestions in order to produce a more relevant version of the criterion.

²¹⁸ ‘Amending the JAC’s merit criterion: “an ability to understand and deal fairly”’.

A consultation produced by the Judicial Appointments Commission from 21 February 2011 to 21 April 2011, available at <http://jac.judiciary.gov.uk/about-jac/9.htm>, accessed on 12 February 2014.

²¹⁹ ‘Response of the Judicial Appointments Commission to the consultation exercise on amending the JAC’s merit criterion: “an ability to understand and deal fairly”’. A consultation produced by the Judicial Appointments Commission, available at http://jac.judiciary.gov.uk/static/documents/Merit_criterion_consultation_JAC_response_July_2011.pdf accessed on 12 February 2014.

²²⁰ Id.

The JAC is patently committed to transforming the judiciary by increasing the diversity of judicial appointments, and goes to some lengths to reach out to candidates that might not ordinarily consider themselves to be appropriate candidates. It would seem that part of this success, is challenging the stereotypes around who judges should be, and critically assessing which skills are needed for specific posts. For example, the main provisions of the Tribunals, Courts and Enforcement Act, 2007 ('TCE Act'), which came into force during 2008, extends the range of people who may qualify for judicial appointment. In order to be eligible for judicial appointment, you must not only be in possession of the relevant qualification, but must also have been undergone a 'qualifying period', which involves being engaged in 'law related activity' whilst holding that qualification.²²¹ Law related activities are specifically broad in connotation: advising (whether or not in the course of practice or employment as a lawyer) on the application of the law; drafting (whether or not in the course of such practice) documents intended to affect persons' rights or obligations; and teaching or researching law, irrespective whether full or part-time or for remuneration.²²²

VII Conclusion

The purpose of Chapter II was to establish the constitutional framework within which judges operate. Central to the constitutional mandate is that judges are tasked with the responsibility, which is especially acute at the CC, to generate social possibilities through the interpretation of law under the promise of the Constitution. The last two decades have born witness to the dichotomy of navigating the radical promise of a democratic and sovereign state. The CC has shown how this can be done, but more work, more creativity is necessary. The high courts, as well as the SCA need to more fully embrace this trajectory. One way to do this would be to rethink, or at least, re-examine some of the basic assumptions about the criteria for judicial selection, and by implication, who judges should be. To this end, I have shown

²²¹ See section 50 of the TCE Act.

²²² Section 52(4)-(5) of the TCE Act.

that popular conceptions of appropriately qualified typified by the HSF Litigation is largely uncritical.

The same can be said for fit and proper, and judges and government should become more aware of these problems in order to protect good decision-making. The reform in the United Kingdom is a rich resource, and we would do well to build on some of these developments. Key to their success seems to be: (i) the time taken slowly to reform the criteria through constant engagement with the legal profession and the broader community; (ii) an acknowledgment that transformation of the judiciary entails transformation of judicial institutions, through for example, the use of tribunals; and (iii) their merit criterion, although not perfect, is far wider than South Africa's and because of this, they understand more critically what kind of skills are need for certain kinds of disputes.

CHAPTER III: TOWARDS SUBSTANTIVE CRITERIA FOR SELECTION

VIII Introduction

Chapters I and II have shown that superior courts, especially at the level of the high court, point to a giant mismatch between the needs of the communities that they are meant to serve and the everyday court work they carry out. The commercialisation of the legal profession finds itself a centre stage where its script is a monotonous tale about money and how best to collect, preserve, reclaim and enforce the rules around which economics of the day can be enforced. Contemporary legal thought and its articulation is yet to give nearly enough weight to private capital and its opposition to radical democratic change. The record of the SCA in the year 2011 is itself, too, a snapshot of a longer track record, which illustrates that the SCA still grapples with the transformative mandate of the Constitution. The Constitutional Court as an institution, is geared aesthetically, psychologically and legally towards rebuilding the law of South Africa, and this is part of its success.

The most egregious laws of apartheid had to do with land tenure, geographic segregation and freedom of movement through pass laws and influx control.²²³ But the effects of the pervasive control over communities in South Africa remain. Because many South African communities still suffer from inequality in services such as education, health and sanitation; because the economic and social life in rural areas and the slums that hug the city edges are considered dirty and informal, the possibility of raising judges – because it is about ‘raising judges’ – from these communities remains fraught with challenges. The consequences of People do not litigate in superior courts, and when they do, corporations, civil society organisations or government act as their representatives.

²²³ The Natives Land Act, 27 of 1913; The Group Areas Act, 41 of 1950 (re-enacted in 1957 and 1966); Natives (Urban Areas) Consolidation Act, 25 of 1945; The Bantu Authorities Act, 68 of 1951; The Mines and Works Act, 12 of 1911.

In the main, the forms of superior court practice remain giant sentinels to both apartheid spatial planning and its legal and political thinking. If there is any doubt about this proposition one simply need remember that while there are 13 high courts there are as many as 384 magisterial districts; although there are 237 judges at the superior courts, there are roughly 1700 magistrates around the country.²²⁴ And what do these superior courts do that is more important than magistrate courts? Mostly nothing, except in cases involving the development of the common law, and serious criminal or civil cases, which happen *far* less than we think. For the most part, judges, like magistrates, are adjudicating everyday day disputes in accordance with the law.

Judges at a superior court may be more 'skilled', but the reason for this structural and jurisdictional design is not a problem of lower court competence, as is commonly proffered. It is in the first place, a problem of imagination. And it is a crisis of community. The fact that high courts have failed to reflect on their own practices and busy themselves with the important work of ordinary people; the fact that the SCA and the CC have not joined forces to create a dynamic space for legal reconstruction; the fact that we do not have the energy to reorganise and reconstruct forms of adjudication; the fact that we do not have serious judicial training institutes, are all manifestations of this institutional recidivism. The need for superior court practice triage is therefore both necessary and urgent. Despite this, however, the specialised courts provide hope. They are witnesses to the possibility of transformative constitutionalism in the design, practice and adjudication of common social problems.

Armed with this information Chapter II has shown that we must set about the important task of choosing who judges should be with a renewed understanding of their skills and qualities. These jurists must be capable of performing the tasks necessary for the resolution of disputes in a transforming society and all that that encompasses. This task is challenging, varied and daunting. Men and women of integrity, honesty and an encompassing a deep understanding of society under the Constitution must together figure out how this can be done. The Constitution is the

²²⁴ SA Yearbook 2011/2012 op cit not 41 at 341-347.

powerful enabler that provides both the foundation for this structural re-design and the legal tools necessary for its completion.

The litigation by the HSF must not be allowed to define the parameters of who we think judges should be. The notions of fit and proper and appropriately qualified offered are bereft of any critical understanding of adjudication and lure us back into the same centre stage shared by corporations, wealthy individuals and government departments. The reform found in the United Kingdom provides a spark of inspiration and we should take this opportunity to redirect the conversation based on this more thorough and useful conceptualisation. Importantly, we learn that the selection criteria evolve slowly and organically through consultation and reflection and we should embrace this process. This provides more than anything, a strategy for change. Yet, despite this progress, the UK too, ultimately suffers from the same legal conservatism.

IX Constraints

In the first place both concepts of good character and merit, or ‘fit and proper’ and ‘appropriately qualified’, represent a simple and unsophisticated aggregation of desirable qualities that are used to induce lawyers and citizens alike to unwittingly accept, and find comfort in, the Mythopoeia of Hercules J. As Jeremy Waldron observes, it was John Locke who famously rejected the idea that legal reasoning was superior to any other kind of reasoning:

“Certainly Locke rejected out of hand the view — very common today — that on issues of rights the reasoning of judicial officers (Supreme Court Justices and their clerks) is to be preferred to reason and judgment of ordinary men and women. The reasoning of legal scholars on matters of rights he regarded as ‘artificial Ignorance. And learned Gibberish.’”²²⁵

In the second place, both regimes confuse ‘Intellectual Ability’ with ‘Knowledge of the Law’. In terms of Intellectual Ability, what we should be speaking of is critical thinking skills, which is a way of deciding whether a claim is true or false. Critical

²²⁵ J Waldron ‘Participation: The Rights of Rights’ (1998) 98 *Proceedings of the Aristotelian Society* 307 at 337.

thinking can be learned, practiced and mastered. In terms of legal knowledge, expertise in a chosen area of law should be a qualifying threshold to indicate dedication to, and experience of a certain area of law, but not as an illustration of ownership over it. To think of ourselves as experts is a telltale sign of creative and imaginative degeneration where answers are found in what we ‘know’, instead of what we can discover, learn and create. The proliferation of laws both international and national, itself a consequence of heightened globalisation, must surely mean that we must staff benches not with people who claim to know, but who illustrate competence at finding out.²²⁶ Further, ‘knowledge’ of the law here must expand to connote the operation of law in social life or a ‘law related activity’.

In the third place, the discussion of personal qualities tends to devolve into a fictional account of desirable qualities such as integrity and independence without a concomitant discussion about natural biases and heuristics present in everyday court adjudication. It is understandable that the capacity for honesty, intellectual or otherwise is considered the noblest of all judicial character traits; the statement that honesty is the first chapter in the Book of Wisdom perhaps best captures why.²²⁷ Indeed, as former Chief Justice Pius Langa remarked at the Bram Fischer Lecture, ‘[t]here is no doubt that the world, and this country in particular, are in dire need of men and women of courage who follow the dictates of their conscience.’²²⁸ But as Chapter II has uncovered, humans are not nearly as independent as they might think – class, race, gender, and schooling all influence decision-making. And so it is not merely the character trait of holding fast to one’s beliefs that we should consider admirable, but conversely, the commitment to abandoning those beliefs altogether, in the hope that a new understanding, a step closer towards justice, may be revealed and handed down:

²²⁶ See for example, P Howard ‘It’s time to Clean House’, *Atlantic Monthly*, 14 March 2012 available at <http://www.theatlantic.com/politics/archive/2012/03/its-time-to-clean-house/253921/> last accessed 14 February 2014.

²²⁷ Thomas Jefferson to Nathaniel Macon, January 12, 1819. Ford, 10:119. Polygraph copy at the Library of Congress accessed at <http://www.monticello.org/site/jefferson/honesty-first-chapter-book-wisdom-quotation> accessed on 15 February 2014.

²²⁸ Langa op cit note 183 .

*"Impartiality is rather difficult to obtain in any system. I am not speaking of conscious impartiality, but the habits you are trained in, the people with whom you mix, lead to your having a certain class of ideas of such a nature that, when you have to deal with other ideas, you do not give as sound and accurate judgements as you would wish"*²²⁹

Fourthly, the skills in the UK model: 'An Ability to Understand and Deal Fairly'; 'The Ability to Communicate'; 'Work Efficiently'; 'Administrative Skills'; and 'Leadership Skills' are not predominantly legal skills. In fact, out of the six classes of skills, 'legal skills' is mentioned once. Yet legal skills are treated almost always as the stronghold of merit. This is because as I have shown, we overestimate the amount of 'hard cases' judges adjudicate and underestimate how much adjudication is about routine administration, problem solving, coordinating case management, communication and speedy resolution. That is the work that communities demand.

Fifthly, the closest attribute indicative of wisdom and a capacity for discernment is the requirement: 'An Ability to Understand and Deal Fairly'. But what is that skill? How do we develop an awareness of the diversity of communities if the bench is narrow in composition when the community in South Africa is wide. What is a commitment to justice, independence, public service and fair treatment? How do we test for that? Why is a willingness to listen with patience and courtesy important when the SCA and the CC decide matters predominantly on the papers? Neatening up our thinking about judges and adding substance to the criteria for testing aspirant judicial officers will allow us the chance to deepen our democracy.²³⁰

X The Constitutional imagination

The passage from Exodus was intentionally used as a primer for the deeper implications of my analysis. Moses was an old-testament prophet whose task was to establish an alternative community. He was to nourish, nurture and evoke a

²²⁹ LJ Scrutton 'The Work of the Commercial Courts' (1923) 1 *Cambridge Law Journal* 6 at 8.

²³⁰ R Unger 'Legal Revolution' (18 October, 2011) available at <http://www.youtube.com/watch?v=rbu6DJF9oVI> accessed on 14 February 2014.

consciousness and perception that was an alternative to the dominant culture.²³¹ His job was to teach people the rules and instructions, to show them how to live, and what to do. Part of this entailed keeping a sharp eye out for competent men — men of integrity, men who are incorruptible — and appoint them as leaders over groups organized by the needs of the community. These young men and women of integrity would be taught and given the responsibility for the everyday work of judging among the people. The hard cases that would be brought to Moses.

But what the Constitution offers is a foundation for building alternative communities based on human dignity, the achievement of equality and the advancements of human rights and freedoms. But it is merely that: a blueprint. The role of judges in South Africa should not be confined by narrow debates about separation of powers theory or the proper role of the courts in a democracy. The answers to those questions, although important, are located within the broader framework of our constitutional theory, which underpins the working of society and the regulation of power. To be sure, Parliament is the national forum for the public consideration of issues, passing legislation and scrutinising and overseeing executive action.²³² The executive, local government, Chapter 9 Institutions, Provinces – all have their respective roles to grow into. The role of the courts is not to usurp those functions as delineated in the Constitution. Parliament is responsible for drafting the laws of this country in order to build a sovereign and democratic country. Judges must always guard with jealousy the vision of the Constitution, and it is their roles as watchmen and women to preserve that vision in ways that is constitutionally permissible.

In order to do this, Davis and Klare point out that the development clauses place two very specific duties on judges.²³³ The first is the duty to ‘actively promote constitutional values, rather than merely assure the conformity of judge-made law to

²³¹ W Brueggemann *The Prophetic Imagination* (1978) at 13. I borrow the two central ideas from his concept of the ‘prophetic Imagination’ and adapt them here.

²³² Section 42(3) of the Constitution.

²³³ Davis & Klare op cit note 10 at 410.

constitutional strictures'. This concerns not just the coherence of the legal order, 'but its character'. The second is 're-imagining the common law', which they suggest is 'critically important to the success of the constitutional enterprise as a whole'. That enterprise being of course, 'to establish a society based on social justice and improved quality of life for all citizens'.²³⁴

The authors touch on the very substance of the missing ingredient in discussions about the skill of administering justice without fully giving meaning to what they mean. The authors lament that apart from a few generalisations, the courts have made little effort to 'theorise the Constitution's impact on the common law' and, 'to sketch the content of the constitutional vision of a free and equal society'.²³⁵ But both 'visioning', and 'theorising' – as character traits of those who understand the confluence of politics, law and society – are two very specific skills that have absolutely nothing to do with law. People who are especially talented in the futuristic theme are inspired by the future and what it could look like. How this skill can take shape, be developed and sustained, how we can devise strategies for its implementation, has eluded lawyers. To simply suggest that judges may employ the technique of envisioning alternatives for society based on the law without any discussion of how this unique skill may be identified, taught and developed, offers a death knell for the constitutional legal analysis envisioned by Davis and Klare.

It would help to name this ability, 'constitutional imagination'. Imagination at its core has to do with the capacity to envision, invent, create and be authentic.²³⁶ Imagination is the step before implementation.²³⁷ Imagining is about nourishing and nurturing a legal consciousness that is at once rooted in our history and politics while simultaneously pointing to the aspirations codified in the Constitution. Constitutional imagination must be rooted in the history of South Africa and the operation and injustices of the law. This will have a significant impact on the parameters of

²³⁴ *President of the Republic of South Africa v Modderklip Boerdery* (Pty) Ltd 2005 (8) BCLR 786 (CC) at para 36, quoted in Davis & Klare op cit note 10 at 410.

²³⁵ Davis & Klare op cit note 10 at 414.

²³⁶ Oxford Thesaurus of Current English (2006) at 220.

²³⁷ Walter Bruegemann op cit note 231.

constitutional imagination in South Africa.²³⁸ Here, judges must remember, and re-appropriate, the memories of its communities like Russian matryoshka dolls, stories within stories portraying personal patterns of human struggle, and continue to sketch out and add substance to the story of democracy.

Judges are always judges over communities and this must never be forgotten no matter how lost the idea has become. The legal profession has a unique position in communities across the world. Not only is its distinguishing feature that it alone among the professions is concerned with protecting the rights of citizens against public and private infringements but its historic function has been the protection of rights of the most vulnerable.²³⁹

The role of constitutional imagination is to, in the first place, criticise and dismantle the Roman-Dutch common legal law system.²⁴⁰ Roberto Unger has written about the call to take law and legal analysis back to its original purpose: to inform us, as citizens, in the attempt to imagine our alternative futures and to argue about them.²⁴¹ This sees the purpose of legal analysis within the walls of the courtroom and under the adjudication of judges as a place where the practices and exchanges, bargains and wrongdoings come under scrutiny, and the conduct is held accountable according to the overarching democratic vision established by the Constitution. This is about raising judges to understand the relationship between the institution of adjudication and the spirit of constitutional imagination, between practical arrangements and aspirational forms of life, between the past and the future.

²³⁸ H Klug 'Constitution-Making, Democracy and the "Civilizing" of Irreconcilable Conflict: What Might We Learn From the South African Miracle' (2007) 25 *Wisconsin International Law Journal* 269.

²³⁹ *LaBelle v Law Society of Upper Canada* (2001) 28255 (ON SC), "The legal profession has a unique position in the community. Its distinguishing feature is that it alone among the professions is concerned with protecting the person and property of citizens from whatever quarter they may be threatened and pre-eminently against the threat of encroachment from the state. The protection of rights has been a historic function of the law, and it is the responsibility of lawyers to carry out that function. In order that they may continue to do so there can be no compromise in the freedom of the profession from interference, let alone control, by the government...".

²⁴⁰ See Bruegemann op cit note 231 at 13.

²⁴¹ Unger *What Should Legal Analysis Become?* Op cit note 15.

Judges have done exactly this – O’Regan in *K v the Minister*, Cameron J in *Maphango*, Khampepe J in *Mankayi*, as well as in a series of cases of what Davis and Klare would call the ‘boundary cases’, which are the very best examples of constitutionally inspired common law development – but not as often as is necessary.²⁴² In order to continue this process of reconstruction, there has to be a continual resistance to the dominant and powerful legal culture, which naturally resists this change. Imagination is central to this task of legal reformation because the Constitution, and the legislative enactments giving effect thereto, provide judges with powers which they have not previously claimed, and which permits and requires new and innovative judicial interventions.²⁴³

The role of constitutional imagination in the second place is to energise and communicate to litigants as citizens of the democratic state the promise of the constitutional democracy envisioned. Constitutional Court justices have a special role, but judges of superior courts, including specialised courts must do this too, through the ordinary work of adjudication, analysis, restitution, protection of rights, orders of equity and sentencing. Here judges become protectors of the original trajectory South Africa chose to embark on. As Walter Brueggemann has written, the task of criticism and energising must be held together,²⁴⁴ because it is the binary nature of this work that keeps the wheels of justice turning.

This constitutional imagination is not just about adjudication. As has been maintained throughout this thesis it is about renewal within the chain of interrelated problems in the law and legal theory. And so it needs to be embodied in institutional arrangements as well; the courtroom design and conception, so that the possibilities of remaking society, politics, and the economy remain hopeful. With this in mind, I have drafted draft criteria for the selection of judges, set out below.

²⁴² See Davis & Klare op cit 10 at 482.

²⁴³ See similarly S Kentridge ‘The Highest Court: Selecting the Judges’ (2003) 62 *Cambridge Law Journal* 55 at 60. ‘It has given to British judges a power which they have not previously claimed, and which permits and requires hitherto unknown judicial interventions not only in the sphere of executive action but also in the sphere of legislation’.

²⁴⁴ Walter Brueggemann op cit note 231.

XII New draft JSC Criteria

PREAMBLE

The Constitution was passed as the supreme law of the Republic to achieve the following:

1. Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;
2. Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law;
3. Improve the quality of life of all citizens and free the potential of each person; and
4. Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.

THE CONSTITUTION

The Constitution established the following requirements for judicial selection:

'174. Appointment of judicial officers

- (1) *Any appropriately qualified woman or man who is a fit and proper person may be appointed as a judicial officer. Any person to be appointed to the Constitutional Court must also be a South African citizen.*
- (2) *The need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed.'* (my emphasis).

CRITERIA IN TERMS OF THE CONSTITUTION

Threshold requirements: for all candidates at all courts and tribunals

- (i) Substantial Knowledge and Experience of the Law and its Operation in South Africa

- Expertise in a chosen area of profession;
- Experience of how the law operates, or experience in a law related activity; and
- Appropriate knowledge of underlying principles of the Roman-Dutch/ English common law system as well as customary law.

(ii) Advanced Critical Thinking Skills

- Proven ability to quickly absorb and analyse information;
- The ability to acquire this knowledge where necessary; and
- The ability to critically interpret, analyse and evaluate competing claims.

(iii) An Ability to Understand and Deal Fairly

- An awareness of the diversity of the communities, which the courts serve and an understanding of the differing needs;
- Commitment to justice, independence, public service and fair treatment; and
- Sound judgment.

(iv) Integrity

- Honesty;
- The virtue of an understanding heart;
- An awareness of prejudices; and
- Good standing in the community.

Optional criteria: assessed in light of the court or tribunal in question. Judges need not display all qualities but should display at least one

(v) Constitutional Imagination:

- Appropriate knowledge of historical, sociological, ethical, and political workings of the South African Constitution;

- Capable of giving expression to the values of the Constitution;
- Appropriate knowledge of constitutional jurisprudence; and
- Commitment to the constitutional project.

(vi) Authority and Communication Skills

- Ability to explain the procedure and any decisions reached clearly and succinctly to all those involved;
- Ability to inspire respect and confidence; and
- Ability to maintain authority when challenged.

(vii) Efficiency

- Ability to work at speed and under pressure;
- Ability to organise time effectively and produce clear reasoned judgments expeditiously; and
- Ability to work constructively with others.

(viii) Leadership and Management Skills

- Ability to form strategic objectives and to provide leadership to implement them effectively;
- Ability to motivate, support and encourage the professional development of those for whom you are responsible;
- Ability to engage constructively with judicial colleagues and the administration, and to manage change effectively; and
- Ability to organise own and others time and manage available resources.

Instructions for using criteria

These draft criteria will hopefully spark a debate. The threshold criteria apply to every judge at every court. Aspirant judges must satisfy these requirements. The Department of Justice should through the Judicial Education Institute start preparing classes on critical thinking, and aspirant judges should know that this is a skill that will be required. This skill can be learnt and developed. The optional criteria can be used by the JSC to justify certain appointments after conducting the necessary triage: they may want leadership skills specifically at the expense of other qualities, or strong and efficient judges for a busy court, or a judge that has the requisite constitutional imagination. The point being here, that judges are not everything all at once, although they are all the same in terms of some basic requirements.

CONCLUSION

The earlier comparison of the adjudication of football matches, and the matters usually found in court, although broadly justifiable, is patently problematic. One major problem is that the skill required to adjudicate football games is fairly consistent, because the game is universally standardised: it takes place in one kind of arena with universal rules and principles. Adjudication in the courts on the other hand, although it may legitimately adjudicate whether a referee was biased in his adjudication of a football match, encompasses a wide array of rules and principles, often taking place in different arenas. Sometimes it may involve questions of family life, or over-indebtedness, and sometimes it involves the awesome exercises of adjudicative power: a National Assembly blocking a vote of no confidence to impeach a President.²⁴⁵

But like many institutions that need to adapt to cope with modern challenges, football adjudication is changing too. Sian Massey recently became the first female to be appointed an assistant referee at an English Premiership League game, despite huge controversy about her being female. Apparently Ms Massey started refereeing in her teens and has been nurtured by the Football Association's ('FA') development programme, as well as by a series of FA-appointed mentors and coaches, who have helped guide her through the early stages of her career.²⁴⁶ Further, goal-line technology will be used for the first time at the 2014 Soccer World Cup in Brazil this year. These developments should not be surprising.²⁴⁷

The reform brought about by the Constitution Reform Act provides invaluable lessons for the JSC: (i) consultation leads to transparency; (ii) consultation leads to a better understanding of what the legal community and the broader public view as

²⁴⁵ *Mazibuko v Sisulu* 2013 (6) SA 249 (CC).

²⁴⁶ Rory Smith 'Female assistant referee Sian Massey "epitomises quality" FA are looking for despite Richard Keys and Andy Gray' 24 January 2011 available at <http://www.telegraph.co.uk/sport/football/8279930/Female-assistant-referee-Sian-Massey-epitomises-quality-FA-are-looking-for-despite-Richard-Keys-and-Andy-Gray.html> accessed on 14 February 2014.

²⁴⁷ 'FIFA confirms goal-line technology for 2014 World Cup' 10 October 2013, available at <http://www.espn.co.uk/football/sport/story/246433.html> accessed on 14 February 2014.

desirable; (iii) there is no fixed formula for 'fit and proper' and 'appropriately qualified', and it seems best practice to keep an open mind about the evolving content thereof; (iv) technical ability, although important, is only one criteria amongst others, which should be assessed based on the court or tribunal in question; and (v) reform of judicial selection criteria must be accompanied by reform of judicial institutions.

Should Mr Gauntlett have been appointed by the JSC in April 2011? Was the decision taken by the JSC irrational and unlawful? Did the JSC misconstrue its powers? Injustice, as I mentioned, is the outcome of having skewed neighbourly processes, including adjudicatory processes, where some are put at an unbearable disadvantage by the social, economic and political realities operating in that society. The JSC is responding to a broader constitutional mandate and rationalising process that the government is undertaking, which includes the introduction of important legislation to urgently reform the courts.

The kinds of judges South Africa requires depends on what it sees as its most pressing social concerns and what type of answers are envisioned. I cannot say whether Mr Gauntlett should have been appointed or not because I do not know him and I cannot attest to his character. What I can say is that both the JSC and the HSF need to deepen their understanding of who judges should be, and the selection criteria proposed in this paper provide a good starting point for that process. In order to transform the judiciary we must first transform: (i) a limited and out-dated conception of 'superior courts'; (ii) the understanding of what tasks judges actually perform at the different levels of superior court adjudication; and (iii) finally, our understanding of 'merit'. This includes the concept of constitutional imagination; the ability to envision, to build, and to lead a community, including the legal community, towards a free and democratic society.

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