

A few reflections on the role of courts, government, the legal profession, universities, the media and civil society in a constitutional democracy

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Summary

This contribution is a reworked version of a lecture presented at the Faculty of Law, University of Pretoria, commemorating the University's centenary celebrations. Contrasting the pre- and post-constitutional legal landscapes, Justice Van der Westhuizen emphasises that political meddling in judicial affairs, previously left in a legal void, is now very clearly circumscribed by the constitutionally-entrenched principles of separation of powers and independence of the judiciary. Justice Van der Westhuizen proceeds to analyse aspects of the relationship between the courts, on the one hand, and the government, the legal profession, universities, the media and civil society, on the other hand. The relationship between courts and the government is fraught with tension, but so far the executive has readily complied with almost all court decisions, and the court has steered a cautious course when it comes to interference in the legislature. The importance of the legal profession, both inside and outside courtrooms, is underlined, and the crucial role of universities in fostering free speech is emphasised in the contribution. Turning to the media, Justice Van der Westhuizen acknowledges the importance of an informed public, and

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responsible reporting. He takes the media to task for some irresponsible and factually incorrect reporting. In conclusion, the author emphasises the important role of civil society and of continuous debate, analysis and criticism in the attainment of 'our constitutional project'.

1 Introduction

In the early 1970s, when I studied law at the University of Pretoria, maverick law professor Barend van Niekerk, who during his relatively short lifetime actively campaigned against apartheid, against capital punishment, against the treatment of Red Army Faction members by the West German government, for the retention of the historic Durban station building and for or against a range of other causes, addressed a public meeting in Durban. The apartheid regime was at the height of its power, supported by its draconian system of so-called security laws. Section 6 of the Terrorism Act of 1967 empowered the police to detain, without trial for virtually indefinite periods, persons suspected of being in possession of information about so-called terrorism or terrorists. The purported purpose was to gather information about terrorists. Detainees were held in solitary confinement until they provided information to the satisfaction of their interrogators and could testify against accused in terrorism trials.

In his address, Professor Van Niekerk criticised section 6 and urged courts not to admit evidence given by witnesses detained in terms of the provision, because they were likely to have been tortured or otherwise coerced and their testimony would therefore be highly suspect. He offered an activist academic opinion, nothing more; he made no threats to die, kill or crush. A terrorism trial was underway in Pietermaritzburg, not far from there. The professor was charged with contempt of court. Under the *sub judice* rule, it was a criminal offence to attempt to influence a court. Soon afterwards, the Minister of Justice and Police spoke at a police passing-out parade in Pretoria. He referred to allegations that section 6 detainees were tortured and that their evidence would be suspect, but emphatically assured the public that this was not the case. Again a terrorism trial was underway. It was apartheid South Africa. The Minister was not charged. In a delightful piece in the *South African Law Journal*,¹ Van Niekerk and Tony Mathews questioned the objectivity and independence of the prosecuting authority – the Attorney-General at the time – and complained that Van Niekerk was selectively targeted for prosecution, for political reasons. Why was the

¹ AS Mathews & B van Niekerk 'Eulogising the Attorney-General: A qualified dissent' (1972) 89 *South African Law Journal* 292. See also J Dugard 'Prosecuting a minister for contempt of court' (1972) 89 *South African Law Journal* 364. Ellison Kahn writes movingly of Van Niekerk's life in his 1981 tribute 'In memoriam: Barend van Niekerk' (1981) 98 *South African Law Journal* 402.

Minister not also charged with contempt of court under the *sub judice* rule? After all, they reasoned, the Minister should know far better than a mere professor whether detainees are tortured or not and presumably has a much more persuasive influence on courts!

At that time, most law teachers and students at my university probably thought, however, that not only Professor Van Niekerk, but also section 6 detainees, got what they deserved.

From this glimpse into history, two things are noticeable. In pre-constitutional South Africa, attempts to influence courts in their judgments were met with the force of the criminal law — well, at least sometimes, perhaps depending on the position of the perpetrator. Hence, allegations of politically motivated selective prosecution did occur. Enough of the professor's history, though.² Many more people were subjected to prosecution for political reasons, with much more serious consequences.

We are now living in a constitutional democracy, under a written Constitution which guarantees the independence of courts, requires the prosecuting authority to act without fear, favour or prejudice and protects free expression as a basic right. And, of course, the Faculty of Law of the University of Pretoria is probably the leading human rights champion on the African continent.

This contribution contains a number of fairly loosely-linked reflections or notes on the role of various components of society in our democratic order. I shall briefly touch on aspects of the concept of constitutional democracy and the position and role of the courts in our Constitution, against the background of our history, whereafter I shall refer to the role of government, the legal profession, universities, the media and civil society, including the right and duty to report, analyse, debate, comment and criticise.

I do not claim to represent the Constitutional Court, or the opinion of any of my colleagues on the Court. Naturally, I am unable to express views on matters pending or expected to be brought before any court or other tribunal, including the court of which I am a member. My remarks are intended to be taken on the level of principle.

2 Historical dimension

A reminder of the role of law and the courts in apartheid South Africa may provide a useful perspective on the present situation.

In the absence of a constitution as supreme law, a sovereign but undemocratically elected parliament enacted laws that could not be tested by courts. Little needs to be said about the massive violation

² The background and relevant portions of the address are reproduced in the judgment in that case, reported as *S v Van Niekerk* 1972 3 SA 711 (A). Also see J Dugard 'Judges, academics and unjust laws: The Van Niekerk contempt case' (1972) 89 *South African Law Journal* 271.

of almost all recognised human rights that apartheid was. The policy and practice of apartheid was embodied in laws. Apartheid was lawful and the legal order became an apartheid order. Apartheid laws were enforced by the courts and practices and circumstances directly or indirectly created by apartheid were accepted by the courts as normal, right and the *boni mores* of our society.

Law was a tool in the hands of the apartheid regime. Judges and other lawyers applied and practised apartheid laws because they agreed with them, because they were so much part of the system that they never thought of questioning them, because they benefited from them, or because they overcame their discomfort with them by arguing that the law was the law, which their task was to accept and apply. The legal system's lack of legitimacy in the eyes of very many people reached crisis proportions. Anti-apartheid lawyers and accused persons used the courts as strategic sites of struggle and utilised the space created by court procedures to fight political battles, because no other forum or arena was available for lawful political activity.

Thus, a cynical instrumentalist attitude to law and the courts prevailed amongst the legislature, the executive, the judiciary, lawyers and litigants, at least in areas with political implications. In fact, it became increasingly difficult to isolate non-political areas of law from the politics of apartheid. Even those accused of common crimes came to be seen as victims of an apartheid or class-based criminal justice system and many an undefended accused suffered as a result of poverty and lack of understanding of the system. As a result of the apartheid system, most black people simply did not feature in areas of commercial law which facially appeared to be free of politics.

The role of judges under the apartheid order became the focus of much debate and views expressed by human rights lawyers ranged from statements that an appointment to the bench should be refused, that judges should resign, to arguments that judges should as activists refuse to apply blatantly unfair laws, or at least utilise spaces for discretion to rule in favour of human rights. There was also the view that judges were simply obliged to apply laws on the statute book and were not to blame for their unfair nature.³ In the absence of a constitution as supreme law, the dilemma was of course where to find any concrete or more or less objective higher law or guiding principle to override unfair laws — in natural law, international law, the principles of common law, the principles of natural justice, or simply one's own subjective views of fairness and justice.

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See eg J Dugard 'Judicial process, positivism and civil liberty' (1971) 88 *South African Law Journal* 181; C Forsythe 'Recent cases: Recent judicial attitudes to free speech' (1977) 94 *South African Law Journal* 19; R Wacks 'Judge and injustice' (1984) 101 (1984) 226; J Dugard 'Should judges resign? A reply to Professor Wacks' (1984) 101 *South African Law Journal* 286; J Wacks 'Judging judges: A brief rejoinder to Professor Dugard' (1984) 101 *South African Law Journal* 295; H Corder *Judges at work* (1984); A van Blerk 'The irony of labels' (1982) 99 *South African Law Journal* 365.

The respect for the law and courts that did exist was power-based, rather than value-based, as far as the majority of the population was concerned.

3 The present constitutional order

Our present situation is very different. The Constitution of 1996 resulted from the struggle for democracy and was democratically agreed to by the representatives of the vast majority of people.

Section 2 of the Constitution states unequivocally that the Constitution is the supreme law of our land, that law or conduct inconsistent with it is invalid and that the obligations imposed by it must be fulfilled. But we have more than just a set of supreme legal rules. In section 1 we find the founding values of our sovereign democratic state: human dignity, equality, non-racialism and non-sexism, the advancement of human rights and freedoms, a multi-party system of democratic government to ensure accountability, responsiveness and openness, and again supremacy of the Constitution and the rule of law.

Chapter 2 contains a detailed Bill of Rights as the cornerstone of our democracy.⁴ In it the democratic values of human dignity, equality and freedom are affirmed more than once⁵ and courts, tribunals and fora are instructed to promote the spirit, purport and objects of the Bill of Rights.⁶ The Bill of Rights includes so-called socio-economic rights (for example to housing, healthcare, food, water, social security and education)⁷ next to what has been called first generation rights like human dignity, life, equality, freedom of expression and, of course, the right to vote,⁸ as well as environmental rights.⁹

The structure and wording of the Constitution embody a separation of powers. The legislative authority is vested in parliament (in the national sphere of government), provincial legislatures (in the provincial sphere) and in municipal councils (in the local sphere).¹⁰ In the national sphere, the executive authority is vested in the President as head of the national executive and exercised together with other members of the cabinet.¹¹ In the provincial sphere, the same applies to the Premier and executive committee.¹²

⁴ Sec 7(1). Also see the Preamble.

⁵ See secs 7(1), 36(1) & 39(1).

⁶ Secs 39(1)(a) & (2).

⁷ Secs 26, 27 & 29.

⁸ See secs 9, 10, 11, 12, 16 & 19.

⁹ Sec 24.

¹⁰ Secs 43, 44, 104 & 156.

¹¹ Secs 83 & 85.

¹² Sec 125. As to local government, see sec 151(2).

Section 165 of the Constitution deals with the judicial authority. In a recent address,¹³ former Chief Justice Arthur Chaskalson emphasised the explicit nature of this provision. Section 165(1) states that the judicial authority of the Republic is vested in the courts – and only in the courts; not in the government, any organ of civil society, or any disgruntled litigant.

The philosophical and historical foundations of the concept of a constitutional democracy cannot be adequately explored in this paper. To some extent, the constitutional project of our and other societies represents the latest in a series of answers to questions emanating from Hobbes, Locke and Montesquieu and ran through the creation of the Constitution of the United States of America and the jurisprudence of the US Supreme Court in *Marbury v Madison* and later cases.

During the run-up to our constitutional negotiations, human rights activists and intellectuals referred to a constitution as the autobiography of a nation, or the mirror in which a nation views itself, or a window to a nation's soul. Our Constitution has been characterised as egalitarian, post-liberal, social-democratic and a transformative document. Over the past decade, Karl Klare's concept of transformative constitutionalism has found considerable resonance in our academic literature, in jurisprudence and in civil society campaigns. The Chief Justice has referred to it as a 'permanent ideal'.¹⁴

By transformative constitutionalism, Klare meant:

a long-term project constitutional enactment, interpretation, and enforcement committed (not in isolation, of course, but in a historical context of conducive political developments) to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction. Transformative constitutionalism connotes an enterprise of inducing large-scale social change through nonviolent political processes grounded in law. I have in mind a transformation vast enough to be inadequately captured by the phrase 'reform', but something short of or different from 'evolution' in any traditional sense of the word. In the background is an idea of a highly egalitarian, caring, multi-cultural community, governed through participatory, democratic processes in both the polity and large portions of what we now call the 'private' sphere.

¹³ 'Comments made at the Gordon Institute for Business Science Forum on the independence of the judiciary' 20 August 2008.

¹⁴ See KE Klare 'Legal culture and transformative constitutionalism' (1998) 14 *South African Journal on Human Rights* 146 and a recent paper by S Liebenberg on 'The future of "transformative constitutionalism" in South Africa'. As to the ongoing debate on the Constitution and decisions of the Constitutional Court, see eg I Currie 'Judicious avoidance' (1999) 15 *South African Journal on Human Rights* 138; S Woolman 'The amazing, vanishing bill of rights' (2008) *South African Journal on Human Rights* 762. Also see W Waluchow 'Constitutions as living trees: An idiot defends' (2005) XVIII *Canadian Journal of Law and Jurisprudence* 207. I was also privileged to be able to look at the following soon to be published highly instructive pieces: F Michaelman 'On the uses of interpretive "charity"' (a response to Woolman); T Roux 'Principle and pragmatism on the Constitution of South Africa'; T Roux 'Transformative constitutionalism and the best interpretation of the South African Constitution: Distinction without a difference?' (to be published).

Sunstein has referred to our Constitution as ‘the world’s leading example of a transformative constitution’ and even ‘the most admirable constitution in the history of the world’ and to ‘the astonishing success of constitutional design in South Africa’.¹⁵

The Constitution also embodies protection against the abuse of power, which I believe to be perhaps the most central pathology of our society at this stage. An attitude of ‘I do it because I can’ underlies the conduct of the school ground bully, the aggressively reckless driver, rapists and other criminals, the boss who fires employees at will and some others higher up in our economic, social and political hierarchy.

Therefore the Constitution is more than just the highest law in a technical sense. The rule of law has also been said to be an idea or attitude, rather than a rule. Our constitutional project requires a massive joint effort from institutions, leaders, civil society and individuals; hence my very wide topic. The role of the courts in it is limited, but central and crucially important.

4 Courts

The functions of the courts are clearly set out in the Constitution. Those of the Constitutional Court, for example, include to take decisions on disputes between organs of state and decisions on the constitutionality of legislation and, under certain circumstances, bills, the constitutionality of any amendment to the Constitution and the question whether parliament or the President has failed to fulfill a constitutional obligation.¹⁶ The Constitutional Court is the highest court in all constitutional matters and thus decides appeals from other courts in disputes involving natural and juristic persons and the state, including criminal matters, provided that the matter is a constitutional matter or an issue connected with a decision on a constitutional matter.¹⁷

The Constitution makes it clear that courts are independent and subject only to the Constitution and the law.¹⁸ All persons to whom and organs of state to which a court order or decision applies are bound by it.¹⁹

Courts must apply the Constitution and the law impartially and without fear, favour or prejudice.²⁰ When taking office, judges swear or solemnly affirm to uphold and protect the Constitution and the human rights entrenched in it and to administer justice to all persons alike,

¹⁵ See CR Sunstein *Designing democracy: What constitutions do* (2002), eg 50 68 224 261.

¹⁶ Sec 167.

¹⁷ Sec 167(3).

¹⁸ Sec 165(2).

¹⁹ Sec 165(5).

²⁰ Sec 165(2).

without fear, favour or prejudice, in accordance with the Constitution and the law.²¹

On the independence of the courts, the Constitution is emphatic. Section 165(3) states that no person or organ of state may interfere with the functioning of the courts.

No other branch of government or institution is afforded the same level of independence by the Constitution. The state institutions supporting constitutional democracy provided for in chapter 9 of the Constitution are stated to be 'independent', 'subject only to the Constitution and the law' and they must 'perform their function without fear, favour or prejudice'. Non-interference is also required. However, they are accountable to the National Assembly, to which they must report annually on their activities and the performance of their functions.²² The Constitution requires national legislation to ensure that the prosecuting authority exercises its functions without fear, favour or prejudice, but states that the cabinet member responsible for the administration of justice must exercise final responsibility over the prosecuting authority.²³ The legislature and executive are obviously accountable to the electorate.

The independence of courts is internationally required for any democracy. The international standards, endorsed by the resolutions of the General Assembly of the United Nations (UN) in 1985, include two principles:

- (1) The independence of the judiciary shall be guaranteed by the state and enshrined in the Constitution of the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.
- (2) The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influence, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.

On the requirement of non-interference, the Constitutional Court on two occasions²⁴ cited with approval the words of Chief Justice Dickson, former Chief Justice of Canada:

Historically, the generally accepted core of the principle of judicial independence has been the complete liberty of individual judges to hear and decide the cases that come before them: no outsider — be it government, pressure groups, individuals or even another judge — should interfere in fact, or attempt to interfere, with the way in which a judge conducts his or

²¹ See the oath or solemn affirmation of judicial officers in Item 6 of Schedule 2 of the Constitution.

²² Sec 181.

²³ Secs 179(4) & (6).

²⁴ *De Lange NO v Smuts & Others* 1998 3 SA 785 (CC); 1998 7 BCLR 779 (CC) para 70; *Van Rooyen & Others v S & Others (General Council of the Bar of South African Intervening)* 2002 5 SA 246 (CC); 2002 8 BCLR 810 (CC) para 19, citing *The Queen in Right of Canada v Beauregard* (1986) 30 DLR (4th) 481 (SCC) 491.

her case and makes his or her decision. This core continues to be central to the principle of judicial independence.

The procedure for the appointment and removal of judges embodied in the Constitution provides security of tenure and safeguards independence. Judges are not elected. They can be removed from office only by way of a fairly cumbersome procedure in the case of incapacity, gross incompetence or gross misconduct. They should not have to worry about income or future job offers.

Independence does not first have to be 'earned' by a court, as I once with astonishment heard a senior lawyer say at a conference. The Constitution demands it. If a court does not have it, it cannot function as a court. After all, no one has to earn the right to life, human dignity and equality. The Constitution guarantees it as a given.

The independence of courts carries with it a huge responsibility on the judiciary, though.

The first aspect of this responsibility for courts is to value, assert and protect their own independence. The judiciary must resist all attempts at interference, whether in the direct and corrupt form of bribes, or instructions or requests from the politically powerful, or favours from or for the financially powerful, or the much more difficult to detect, even in oneself, fear for rejection, or desire for popularity. Taken seriously, the constitutional imperative to act without fear, favour or prejudice may sometimes be more difficult to adhere to than at first glance appears. Judges are human, with human emotions, including fear and the need for acceptance.

Undue influence on a court does not always have to be exercised by way of concrete interference. Judges may in some situations be so much part of a political, social or cultural system that there is no need for anyone to make a telephone call to tell them how to decide; they know what is expected in the circumstances; their moral and perhaps even intellectual dependence on the system demands them to act in a certain way. They may not realise that their independence is compromised and believe that they act fairly and even fearlessly. This might have been the case with many judges during the apartheid era.

Whereas independence does not have to be earned by a court, legitimacy — or at least some forms of legitimacy — may have to be earned by a court's treatment of litigants and the public and of course its judgments, which have to be well-reasoned and properly grounded in the Constitution and the law.²⁵ The saying that justice must not only be done, but must be seen to be done, is important for legitimacy. The

²⁵ On the meanings of legitimacy, and the legitimacy of the Constitutional Court, see eg RH Fallon 'Legitimacy and the Constitution' (2005) 118 *Harvard Law Review* 1787; JL Gibson 'The evolving legitimacy of the South African Constitutional Court' in F du Bois & A du Bois-Pedain (eds) *Justice and reconciliation in post-apartheid South Africa* (2008) 229.

public must also know and see that courts are independent and will not be interfered with.

Another responsibility is to act with restraint, or constitutionally appropriate judicial modesty. The issue of restraint is not uncomplicated and has been the subject of intense and extremely instructive academic debate.²⁶ In addition to simply resolving disputes between litigants, courts — and the Constitutional Court in particular — have to pronounce on the validity of legislation and executive conduct and to guard over our Constitution, its democratic structures, and the values and rights in it, build a constitutional jurisprudence and human rights culture, protect the weak against abuse of power, facilitate access to justice for those who most need it and often cannot afford it and generally strive to further our constitutional project. And it is often said that constitutional law is necessarily ‘political’, or even that ‘law is politics’.

However, the first aspect of restraint that comes to mind is to respect the constitutionally entrenched principle of the separation of powers. For a court to unduly interfere in the functions of the legislature or executive is not only constitutionally wrong, but could put a young democracy in grave danger. This has been recognised in judgments of the Constitutional Court.²⁷

More controversial than restraint out of respect for the separation of powers is how possible ideological, political and social inclinations of judges should be handled. In the previous century, the realists pointed out the undeniable significance of these factors; the critical legal studies movement developed it, and apartheid jurisprudence proved it. Judges have to be representative of and not out of touch with the community in which they operate, because the Constitution and law is there for people. Yet, they must be independent and act without fear, favour or prejudice.

Academic views that have been expressed range from requiring judges to up front deal with and even disclose their political and other inclinations, to arguing that they must put aside and not mention these, because the very difference between the judicial and other branches lies in the distance that a court should keep from politics. Perhaps one needs a finer distinction here. Acknowledging that constitutional jurisprudence is ‘political’, or even that ‘law is politics’ in the critical legal studies sense of the term is not to say that courts must play or interfere in politics. There may be a difference between ‘the political’ or ‘community’ or ‘pluralism’, and simply practising ‘politics’ — if I understand Hannah Arendt correctly.²⁸ The first implies an appreciation of the diversity of human beings and the need for space to live and think and debate. This is what the Constitution recognises and protects

²⁶ See eg some of the sources referred to in n 14 above.

²⁷ Eg *S v Dodo* 2001 3 SA 382 (CC) para 7; *Doctors for Life International v Speaker of the National Assembly & Others* 2006 6 SA 416 (CC) paras 36 & 244.

²⁸ H Arendt *The human condition* (1958); H Arendt *The origins of totalitarianism* (1966).

and courts have to be aware of it.²⁹ Politics is a much narrower concept with instrumentalist connotations.

A practical approach may simply be to recognise that all law deals with people and therefore has 'political' dimensions, and to further recognise that judges are human beings and the products of their class, education and ideological and other preferences. Judges must then try to the best of their intellectual, moral and emotional ability to take decisions according to the Constitution and its values, and the law, as their oath of office demands from them. The values and detailed contents of our Constitution could go a long way to guide us. We do not have to seek for evasive guiding principles in natural law or elsewhere, or argue whether to interpret a centuries-old constitution in the light of the original intent behind it or prevailing circumstances. We will always have differences of opinion even on the interpretation of the wording of the Constitution; that is why there are 11 judges on the Constitutional Court and why diversity on the bench is important.

It is clear that in a constitutional democracy entrenching the separation of powers, courts should not become sites for struggle in the area of politics.³⁰ This is important because, with a government enjoying a very large majority in the legislature, it is to be expected that opposition parties and perhaps factions within the majority party would try to utilise constitutional litigation to achieve their aims.

Constitutional Court judgments have been subjected to academic criticism for being too minimalist as far as the active protection and promotion of rights are concerned, for avoiding issues on which judicial guidance would be welcomed, and for being outcome-based. It has been suggested that the Court's strict direct access jurisprudence has failed the poor and even that not enough cases are taken, compared to, for example, the US Supreme Court. Much of the criticism may certainly have merit and must be taken into account.

The world of the judge is, however, not always the world of the scholar, philosopher or artist, no matter how much some of us — including myself — would like it to be a little more open than it is. Philosophers (to use a broad term) have to ask questions. Judges have to provide answers to questions brought before them by litigants. No matter how much I as a judge may hope that, for example, certain socio-economic issues be brought to court, we cannot go and look for them.

In deciding whether to set applications down for hearing, it is asked whether a constitutional issue is involved, whether there are prospects of success and whether it would be in the interests of justice to hear

²⁹ See J Barnard 'Totalitarianism, (same-sex) marriage and democratic politics in post-apartheid South Africa' (2007) 23 *South African Journal on Human Rights* 500 on Constitutional Court decisions to this effect.

³⁰ See eg the judgment of Skweiyia J in *Merafong Demarcation Forum & Others v President of the Republic of South Africa & Others* 2008 5 SA 171 (CC) para 306.

a matter. Sometimes the objective importance of the issues raised demands that the matter be heard. However, it may not be right to use an applicant whose specific application bears no prospects of success as a vehicle for the Court to make *obiter* statements on important issues or write a homily at the cost of the financial means and emotions of applicants and their families.

Whereas it is tempting and sometimes justified to grant direct access in many more cases, it is not necessarily fair or productive to hear cases that have not gone through the other courts, for a number of reasons, including the following two: Our judicial system is an integrated one. For other courts to hear a matter before it comes to the Constitutional Court is necessary not only because the Constitutional Court can benefit from their views, but because we cannot afford a perpetuation of the discredited perception that constitutional issues are for politicians in the Constitutional Court while other courts busy themselves with hard law. Furthermore, it is not in the interest of justice for the Constitutional Court to hear a case on papers which do not reasonably define the issues at stake, or which may contain serious factual disputes. The Court does not hear live evidence or make credibility findings. In such cases the constitutionally important issues are often drowned by the muddy mess around it. The Court has on occasion requested law clinics or professional bodies to assist litigants in cases of this nature.

On the issue of avoidance or minimalism, the temptation is often there to answer not only the question concretely calling for an answer, but the next question, as well as others that would follow. But the (perhaps unintended) consequences are not irrelevant. Processes of investigation by the Law Commission, or debates in parliament may, for example, be pre-empted and complex nuanced questions may be finally determined without the benefit of having proper thoughtful argument. Counsel often focus quite narrowly on aspects that serve the immediate interests of their clients.

Other aspects of the responsibility of judges that follow from the independence of courts would include the need to communicate as clearly as possible and not to use legal language as a shield against criticism or a tool of professional self-preservation and to try to make courts accessible.

Judges have to act legally and morally above reproach, bearing in mind that they cannot easily be removed from office.

And, last but not least, as was once said, it would be good if judges also know a little law.

5 Government

The legislature and the executive shape public policy and control public resources. No other body therefore has a greater contribution to make to the legal system. Section 165(4) of the Constitution provides

that organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of courts. This provision reflects the fact that no one else can provide the primary support to the courts necessary to make their procedures and orders operate. Without personnel and infrastructure, the courts cannot work.

This is nowhere clearer than in the criminal justice system, where the ability of courts to enforce criminal justice depends critically on the police, prosecution and legal aid systems. This was recognised by the Constitutional Court in *S v Jaipal*, which also noted the duty of the officials conducting trials — judges, magistrates and prosecutors — to take ‘responsible and creative’ measures to make the best of available resources.³¹ *Jaipal* arose because a shortage of office space meant that in a murder trial, assessors shared an office with the prosecutor, who from time to time had discussions with state witnesses and the investigating officer. While it did not render the trial unfair in the particular case, this state of affairs understandably looks suspicious to members of the public, and thereby weakens the integrity of the courts.

Our constitutional structure, which obliges the state to act in accordance with a range of obligations which are enforceable in the courts, means that organs of state are frequently before the courts. It has resulted in a number of important matters being decided against the state. In *Grootboom* and *TAC*, the courts invalidated conduct based on aspects of the existing government policy on the vital issues of housing and the treatment of HIV/AIDS.³² The Court has twice ruled against the government on the charged issue of prisoners’ voting rights.³³

The Court has also ruled that the government failed to comply with other provisions of the Constitution. In *Modderklip Boerdery* it was held that, when the government had not taken the necessary steps to enforce an order of court and remove occupiers from the land of a farmer who had followed all the correct legal procedures, this represented a violation of its duty to take reasonable steps to uphold the rule of law.³⁴ In *Doctors for Life, Matetiele* and *Merafong*, the Court considered the obligation of legislatures to facilitate public participation in the democratic process, ruling in favour of the provincial legislatures of

³¹ *S v Jaipal* 2005 4 SA 581 (CC) paras 54-57.

³² *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC); *Minister of Health v Treatment Action Campaign (2)* 2002 5 SA 721 (CC).

³³ *August & Another v Electoral Commission & Others* 1999 3 SA 1 (CC) paras 3-5 22-23. In *August*, the court held that if the government wished to take away the right of prisoners to vote, it had to do so explicitly in a law of general application because of the importance of the right. This was followed six years later by another ruling that the state had not properly justified the breadth of the law it had then passed. See *Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders (NICRO) & Others* 2005 3 SA 280 (CC) paras 66-67.

³⁴ *President of the Republic of South Africa & Another v Modderklip Boerdery (Pty) Ltd (Agri SA & Others, Amicus Curiae)* 2005 5 SA 3 (CC) paras 42-43.

the Eastern Cape and Gauteng and ruling against the provincial legislature of KwaZulu-Natal and the national parliament.³⁵

In the overwhelming majority of cases, the government has accepted the findings. It is extremely important that state institutions comply with court orders and directions. Generally this happens, as far as the Constitutional Court is concerned. There have been a few exceptions. During the *TAC* litigation, the Minister of Health made comments interpreted as stating that she would not comply with the Constitutional Court's order, but this impression was swiftly corrected following intervention by the Minister of Justice.³⁶ Government non-compliance was also at issue in several cases arising out of the blanket cancellation of welfare grants in the Eastern Cape.³⁷ Similar failures were the subject of the recent *Nyathi* case.³⁸ The government failed to comply with a court order to pay damages to a man in a critical state of health, who died during the course of the litigation. An affidavit the state was ordered to file following the *Nyathi* litigation states that hundreds of judgments stood unsatisfied and indicates the urgent steps that would be taken to expedite payment of these amounts.

However, as the Court has noted, some of these problems can be traced to incompetence or inadequate training or procedures.³⁹ The effect is damaging or unacceptable, and one would not know whether disrespect for the law or for courts may be underlying, but in general

³⁵ *Doctors for Life International* (n 27 above); *Matatielle Municipality & Others v President of the Republic of South Africa & Others (2)* 2007 6 SA 477 (CC); *Merafong Demarcation Forum & Others v President of the Republic of South Africa & Others* [2008] ZACC 10, as yet unreported judgment handed down 13 June 2008.

³⁶ See 'More damage control after Manto says "No"' *Independent on Saturday* 25 March 2002 and Ministry of Health Press Release dated 27 March 2002 <http://www.doh.gov.za/docs/pr-f.html> (accessed 4 September 2008). Compliance with the order followed, with some enforcement efforts by the Treatment Action Campaign, including the launch of contempt of court proceedings in respect of the roll-out in Mpumalanga. See *Treatment Action Campaign v MEC for Health, Mpumalanga* unreported Case 35272/02 and M Heywood 'Preventing mother-to-child HIV transmission in South Africa: Background, strategies and outcomes of the Treatment Action Campaign case against the Minister of Health' (2003) 19 *South African Journal on Human Rights* 278.

³⁷ See *Permanent Secretary, Department of Welfare, Eastern Cape & Another v Nguzuza & Others* 2001 4 SA 1184 (SCA) para 15; *Jayiya v Member of the Executive Council for Welfare, Eastern Cape & Another* 2004 2 SA 611 (SCA) paras 2 17-18 and *Njongi v Member of the Executive Council, Department of Welfare, Eastern Cape* 2008 4 SA 237 (CC) paras 16-22; and the High Court cases considered in those judgments.

³⁸ *Dingaen Hendrik Nyathi v Member of the Executive Council for the Department of Health, Gauteng & Others* [2008] ZACC 8, as yet unreported judgment handed down 2 June 2008.

³⁹ *Nyathi* (n 38 above) paras 64-78 (see also para 129 of the judgment of Nkabinde J, dissenting in part); *South African Liquor Traders Association & Others v Chairperson, Gauteng Liquor Board & Others* 2006 8 BCLR 901 (CC) paras 50-54.

the commitment of government to respect the courts has not been seriously questioned.⁴⁰

6 The legal profession

I wish to put forward a few loose thoughts in regard to the legal profession.⁴¹

Lawyers must act in the best interests of the clients they represent. However, they have also over a long period of time been recognised as officers of the court. Therefore they are responsible to the courts and to the administration of justice, including the Constitution.

In order to represent their clients and assist the court, lawyers need to have a sound knowledge and possess appropriate skills. The argument presented by counsel often has a huge influence on judgments and written heads of argument sometimes feature centrally in a judgment. The contribution of lawyers who participated in litigation before the Constitutional Court in the building of our constitutional jurisprudence has been enormous. Many seas in the constitutional litigation are still uncharted, though, and numerous questions have not been answered, or even asked. A proper understanding of the structure and contents of the Constitution is thus surely needed for lawyers to assist the Court.

Earlier I mentioned the cynical instrumentalist approach to law that was understandable in pre-constitutional South Africa. Working within a legal system with questionable legitimacy, the law was often seen as a mere tool to gain tactical and other advantages. Not only apartheid is responsible for this. Our adversarial system also fosters notions of litigation as a game, or even a battle, and of lawyers as gladiators or soldiers. There are advantages to this approach. However, at the risk of sounding idealistic or naïve, I wish to stress the need for commitment to values of the Constitution and plead that lawyers do not view themselves simply as mercenaries or hired guns, but as a small and privileged group within society with the knowledge and skills to either protect and enhance our democratic legal order, or to undermine and loot it.

One of our biggest problems is access to justice for the poor. *Pro bono* work could go a long way to alleviate the situation.

Outside the confines of litigation, the organised legal profession has a huge role to play in the presentation and promotion of our

⁴⁰ Controversial planned constitutional amendments were withdrawn from parliament before the second reading in 2006. See C Albertyn 'Judicial independence and Constitution Fourteenth Amendment Bill' (2006) 22 *South African Journal on Human Rights* 126.

⁴¹ My colleague, Judge Kate O'Regan, recently presented an excellent keynote address at the launch of the Routledge-Modise Law School in Johannesburg on 'Lawyering in our new constitutional order', on 10 September 2008, with which I not only concur, but which I recommend for reading.

constitutional order, *inter alia* by educating people and by speaking out against threats to that order. Upon leaving the Pretoria High Court bench, Judge Kees van Dijkhorst said to the Pretoria Bar at a function that it had to be admitted that not enough had been done in the past by the profession in this city to speak out against injustice and called upon his audience not to let it happen again. I wish to echo his call, while acknowledging that much good has been done in this regard, especially by the attorneys' profession.

Lastly, realising that gossiping — about everything, including each other and especially courts and judges — may be a valuable stress reliever and a time-honoured tradition for legal practitioners, I plead that it not be done to undermine a system on which we all depend.

7 Academic institutions

Universities and other academic institutions have a unique role to play in a constitutional democracy. Law faculties educate students and must foster a proper understanding of the Constitution, including its structure, contents, values and the significance for law and for democracy, in addition to attempting to produce knowledgeable and skilled lawyers.⁴²

Even before reaching the Constitution and the law, though, the task of academic institutions is — through education and research — to improve the standard of living of our people. By contributing to the eradication of poverty and the improvement of nutrition, health and literacy, they could actively help to achieve the realisation of not only socio-economic rights, but the rights to dignity and equality and in the process create an environment in which the Constitution could be understood, respected and complied with.

Law clinics and similar institutions that support litigation or make submissions to courts as *amici curiae* enhance access to justice and contribute to our jurisprudence.

Universities must in campus life and in their administration promote the values of the Constitution and respect for the rights enshrined in it. This would include to prevent and act against racism, sexism, homophobia, discrimination against the disabled and abusive conduct in general.

A very important aspect of academic and student life is obviously to allow for and cultivate free expression, including freedom to receive or impart information and ideas, academic freedom and freedom of scientific research, as well as freedom of artistic creativity.⁴³ Tension

⁴² Shortly after presenting this paper, I was fortunate to have sight of the inaugural lecture by Prof Drucilla Cornell on 'uBuntu, pluralism and the responsibility of legal academics to the new South Africa', recently delivered at the University of Cape Town, which contains valuable insights.

⁴³ Sec 16.

may arise between respect for the Constitution and the law and a free exchange of ideas. Freedom in this regard must include the freedom to criticise everything, including the Constitution or constitutional order itself, and to advocate change – in my view even radical or revolutionary change. Constitutional democracy is supposed to facilitate change, not stultify or petrify human development. Amongst the many arguments about the limits of free expression in a democracy, I put forward only two simple points. Our democratic constitutional order offers possibilities for change, including legal and constitutional amendments. These could be utilised, but as long as the Constitution and laws are in place, compliance is morally and practically required. And, of course, free expression should not be used to destroy the rights protected by the democratic constitutional order.

Academic scholars from this and other South African universities have a proud tradition of advancing our legal system by teaching and writing. I earlier referred to the work of constitutional scholars. One of the areas that continues to require attention, in my view, is the link between the Constitution and the common law, or Roman Dutch law, or African customary law. The Constitution is the supreme law and our legal order and legal culture were fundamentally changed in 1994. However, there is room for a position between the extremes of regarding the common law as self-standing, proven over time and sufficient for most disputes, and the Constitution as something separate, political and not really law, which is clearly wrong, and regarding old order common law as simply a remnant of the by-gone era and the Constitution as the sole source of answers for all legal issues. It is often tempting to invalidate or develop the common law in accordance with the Constitution, but one can only do so meaningfully if one is very well aware of what the existing common law position and its potential actually is. In my almost five years on the bench of the Constitutional Court, I have been struck by the number of cases that would not at first sight appear to be constitutional in nature that the Court has to deal with: contract; delict, family law, insurance, criminal law, building regulations, tender procedures, gambling. One is sometimes very aware of the possibility that in the process of seeking the answer to a constitutional question, one may act like a bull in a china shop as far as established private or commercial law is concerned – and perhaps some of you would say that that awareness has indeed not prevented damage to those areas of law.⁴⁴

Academic lawyers could therefore make an even bigger contribution than some have already done by developing an integrated approach.

⁴⁴ Also see the unpublished lecture on 'Transformative constitutionalism: Its implication for the law of contract' by Deputy Chief Justice Moseneke, delivered at the University of Stellenbosch on 22 October 2008.

8 The media

Independent courts and free independent media are essential ingredients of a democracy mutually dependent on each other to be able to fulfil their role properly. This is so not only because freedom of the press and other media and the freedom to give and receive information is a constitutionally guaranteed right, which the courts have to protect, but because the legitimacy of courts and the very constitutional order depends on reporting, comments and discussions in the media. The role the free media has played in building our democracy and human rights awareness cannot be underestimated and has to be applauded.

It is often said that the media has a huge educational task and function. I agree. It is also said that reporting on court decisions and other legal matters are often not up to standard. I again agree. I am not so naïve as to think that journalists report only objectively, without any subjective angle or slant to advance a cause, to please their readers, listeners or viewers, or for that matter to out-sensationalise competitors to gain a larger audience. In a democracy that provides for the right to gossip it is a reality. One cannot always expect detailed and comprehensive accounts which all would regard as correct and fair. In my view, the inevitability of sound bites and quotes that are sometimes regarded as 'out of context' has to be accepted.

But I am of the view that our constitutionally-protected right to receive information entitles us to expect at least a basic level of accuracy, understanding of the issues and procedures at stake, and fairness. Not striving to achieve this at all times is negligent, if not malicious, and in fact dangerous. I have often been amazed by news reports soon after hearing a case. The Constitutional Court recently heard argument in the case of *Mamba* on refugee camps. Obviously it is a matter with strong emotional connotations in view of the earlier violence against foreign nationals. It was brought to the Court on the basis of urgency. On a Friday, the judges of the Court met, decided to enrol the matter for hearing on the next Monday and issued directions, in which an undertaking by the government respondents regarding the camps was noted. Argument was heard the next week. However, on the Saturday morning, the front page of a newspaper told its readers in a bold headline that the Constitutional Court had ruled that the camps had to stay open. The Court's 'order' was specifically mentioned in the report. In reality, the only decision taken was to set the matter down. There was no order to keep the camps open. In fact, there was no order at all — the matter had not even been heard!

A report on a front page that the country's top court is 'in disarray', and without any '*esprit de corps*', mainly based on information such as 'whispers' allegedly received from sources that were 'well-placed ... in the legal profession', but nevertheless anonymous, including senior counsel who often appears before the Court, evokes a similar sense of amazement. (I may add that I have not experienced a better spirit in

any previous professional environment, and do not think one would easily be found in South Africa.)

After delivery of a judgment in which the Court ruled that anal penetration of a girl was rape, but refrained from extending the definition of rape to the penetration of male victims,⁴⁵ I was astounded to hear on the radio that the Court had decided that sodomy is not a crime! And I was amused to see myself on television delivering the Court's recent judgment in *Merafong*.⁴⁶ While the reporter tried to summarise the majority judgment, I was shown reading from the minority judgment of a colleague, while the subtitles on the screen indicated to the viewer that I was Judge Albie Sachs!

To lift out of a day-long hearing in the Constitutional Court one question or remark by one of 11 judges under a headline like 'Judges slam Minister' appears slightly mischievous. To report on a suspect in an inter-racial murder case in a small town in Limpopo being released on bail by creating the impression that he was indeed acquitted, is clearly dangerous.

9 Civil society

Whilst being aware of academic debates about the meaning and contents of the concept of civil society,⁴⁷ I use the term to loosely refer to religious groups, trade unions, political parties and other interest groups and social formations.

It speaks for itself that civil society could play a highly relevant role in giving life to our constitutional democracy, by using the Constitution and court decisions on it in the quest they pursue, and by discussing and debating them, subject to what is said about criticism below.

10 Analysis, comment, criticism

From the ideal of having a living Constitution and due to the vital role of courts in a constitutional democracy, the right and indeed the need to study, analyse, understand and comment on the Constitution and on judgments and the functioning of the courts follow by necessity.

⁴⁵ *Masiya v Director of Public Prosecutions, Pretoria & Another (Centre for Applied Legal Studies & Another, Amici Curiae)* 2007 5 SA 30 (CC); 2007 8 BCLR 827 (CC). It was in fact decided years earlier in *National Coalition for Gay and Lesbian Equality & Another v Minister of Justice & Others* 1999 1 SA 6 (CC); 1998 12 BCLR 1517 (CC) that the common law offence of sodomy was unconstitutional.

⁴⁶ n 30 above.

⁴⁷ See T Madlingozi 'Post-apartheid social movements and the quest for the elusive "new" South Africa' (2007) 34 *Journal of Law and Society* 77.

In a democracy, views will inevitably differ. Some will be critical. Therefore it could not possibly be said that judgments, the judiciary, courts and even the Constitution are above criticism.

Obvious truths, such as that court rulings must be respected and that criticism must be informed, thoughtful and fair have to be developed, though, to take us further in our attempt to understand and define the line between acceptable and unacceptable criticism. I do not have the answers and merely put forward a few possible guidelines. The essential difference — inelegantly and roughly stated — may well be between comments or criticism which serve to enhance and vitalise the constitutional democratic order, and those that undermine, corrode or threaten it and may cause its collapse.

One's view of what is fair and justifiable is sometimes understandably subjective, and not all of us can be expected to be equally thoughtful and well-informed. Could we expect the emotional litigant who walks out of a divorce court after having lost children and a home because of a judgment, not to harbour suspicions of bias or incompetence on the part of the judge? Could we blame the parents of a convicted child for continuing to believe in her innocence? Is it not understandable for a rape victim to distrust a court with detailed evidence of her ordeal; and do we require Mama Malindi or Oom Piet who hears over the car radio that a court has freed a murder suspect, or ruled that prisoners may vote, or that their church may not discriminate against gay people, to first study a lengthy written judgment before expressing disappointment or outrage to a fellow passenger?

I would suggest that the level of thoroughness, insight, thoughtfulness, fairness and responsibility to be expected from those who criticise depends on the position from which one criticises, the authority with which you claim to do so and the audience the comments are directed at.

A litigant who feels aggrieved by the decision of a court has the right to appeal and to fully state the grounds for doing so in the proper manner. Once a decision is final, it has to be accepted, which does not mean that one has to agree or pretend to agree with it.

Academics and other authoritative commentators do extremely important necessary work, in which they — like the judges who give judgments — have responsibilities, in addition to working hard and being thorough.

One is to be realistic and appropriately modest about the perspective from which one comments or criticises. Following the revelation of Copernicus that one could never understand the movement of the sun, planets and stars as long as you fail to realise that the earth from which you observe not only turns but moves around the sun, Immanuel Kant revolutionised Western philosophy by stressing the importance of subjectivity and the impossibility of ever truly knowing from a limited observation point perspective.

It would be useful if commentators could spare a little thought for what they may not be able to see from their world into the world of a court producing judgments, and perhaps to be frank with their readers in order to help them to distinguish between fact, speculation and creative thinking.

I earlier mentioned some aspects and add only one or two more. Labelling, psychologists tell us, is a necessary human process. It helps us to understand and manage our environment. In order to be continuously confronted by questions requiring decisions, we attach labels to phenomena. The labels have evaluative components, for us to know what is good or bad, what I like and dislike, in advance. But we have to be able to look beyond the labels and accept that they may be wrong or outdated.

The labeling or categorising of judgments or judges, for example as conservative, liberal or progressive, as influential or as swing voters, or even as brilliant, good, or just there, could be useful for the purpose of stimulating interest in the Constitution, the law and the courts, and could help readers and students to understand. However, it must be kept in mind that in a constantly changing society, the categories themselves may overlap, change, evolve or disappear. Furthermore, the complexity of decision making in a collegial court of nine or 11 judges is not simple and one-dimensional. Following the hearing of argument, post-hearing notes are produced, conferences are held, comments and draft judgments are exchanged and joint read-throughs take place over a long period of time. In this process, colleagues criticise each other's views, assist one another and suggest or write contributions to judgments. Who would know who is always conservative or progressive or influential?

Community leaders have to be particularly responsible in their criticism as educators, role models and the shapers of ideas and personalities. Criticism which intimidates may amount to undue pressure on courts and to interference in their functioning to the extent of violating the constitutional imperative of independence. Attacks on the integrity of courts may serve to de-legitimise not only rulings against the attacker, but also rulings in his or her favour, and even the authority of courts as the judicial authority under the Constitution.

Naturally, one may distinguish between our courts as institutions and the judges staffing them as far as criticism is concerned. But the distinction is not always so easy to make. When a judge rules on a legal or procedural aspect, it is the court that acts. When one judge gives a judgment or, for that matter, makes a remark in court in a division with 30 judges, it is the court. Let us not undermine the courts with perhaps valid criticism against specific judges — a complaints mechanism is constitutionally available. This goes both ways, of course. Judges must realise that their professional conduct is viewed as the conduct of our courts.

Standards for criticism of the judiciary are different from criticism of the executive and legislative arms of our state and the politicians staffing those institutions. For this there are several reasons. The most obvious is that we have to evaluate and criticise our political representatives and leaders, because we must decide whether to re-elect them or elect others. If we do not do so, our democracy cannot function. Judges are not elected and serve for fixed non-renewable (and fortunately or unfortunately long) terms. They are not supposed to be pressurised by popularity demands.

Lastly, let us not forget the power of language. Words can be weapons to humiliate, hurt, injure, intimidate and destroy. Section 16(2) of the Constitution recognises this by disqualifying what is often referred to as 'hate speech' from constitutional free speech protection. Mindless and irrational vulgar name-calling and abuse is not criticism, has little to do with free speech and democracy and is slightly reminiscent of Hannah Arendt's use — in the context of Nazi-Germany — of the term 'the banality of evil', or perhaps 'the evil of banality'.

A democracy not only allows but requires free expression and criticism. But democracy is not necessarily the natural state of humankind. It has been hard-won, is precious and has often been easily lost. When it is destroyed, not only will there be no right to criticise the Constitution and the courts; there will be nothing left to criticise.

In order to end on a slightly more optimistic note, I wish to state my pride in our Constitution and the Court of which I am a member, to thank those with an interest in the well-being of our constitutional democracy and to express the hope that we will all work together on our great constitutional project.