**Moving Litigation from Dispute Resolution to Conflict Management, Problem Solving and Building Organisation**

# Chapter 1: Overview of thesis

## 1.1 Introduction

'In every society there is a wide range of alternatives for coping with the conflict stirred by personal disputes. Litigation is only one choice among many possibilities, ranging from avoidance to violence. The varieties of disputes settlement, and the socially sanctioned choices in any culture, communicate the ideals people cherish, their perceptions of themselves, and the quality of their relationships with others. They indicate whether people wished to avoid or encourage conflict, supress it, or resolve it amicably. Ultimately the most basic values of society are revealed in its dispute settlement procedures'

Jerold S Auerbach *Justice Without Law - Resolving Disputes Without Lawyers*[1]

In this thesis I investigate what is to be done to shift litigation beyond dispute resolution to problem solving and conflict management. Resolving disputes which are subsets of conflict, seldom solves problems. Despite being a 'rich slice of social life' legal process is off the radar for most people.[2] I explore how legal process dovetails dialectically with substantive law. I started out thinking that something has to be done to change the form of litigation. I changed my mind. While the Constitution of the Republic of South Africa, 1996 is the engine for transformation in an egalitarian direction, people control the levers of transformative constitutionalism.[3] People must change. Hence, my research

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[1] Auerbach J S 'Justice Without Law? Resolving Disputes Without Lawyers' (1984) at 4; see also Julia Ann Gold 'ADR through a Cultural Lens: How Cultural Values Shape Our Disputing Processes' 2005 J. Disp. Resol. (2005).

[2] Allan Hutchinson *Is eating people Wrong – Great legal cases and how they shaped the world'* at 2.

[3] Karl Klare, 'Legal Culture and Transformative Constitutionalism' (1998) 14 *SAJHR* 146 at 150. I adopt Klare's definition of transformative constitutionalism to mean 'not a neutral concept' but one'frankly intended to carry a positive valence, to connote a social good. That is, … large-scale, egalitarian social transformation.' Marius Pieterse elaborates in 'What do we mean when we talk about transformative constitutionalism? (2005) 20 SAPR/PL. I also accept Sanele Sibanda's understanding that 'constitutionalism is *not so much* about delivering a preordained form or state than it is an expression of choices made by those collectively responsible for establishing a particular system of constitutionalism', in 'Not Purpose-made! Transformative Constitutionalism, Post-Independence Constitutionalism, And the Struggle to eradicate

turns the spotlight on the quality and quantity of participation of the legal actors[4] and litigants in building litigation as a social institution indispensable to maintaining social order.

My thesis is that for litigation to flourish, at least two interconnected conditions must be cultivated. One, synergy must link the process of litigation to the substantive outcomes. Two, building litigation as a social institution must proceed in tandem with building organisation of people. Neither can thrive without the other. However, my emphasis is on process. To the extent that I discuss the substance of topics, like affirmative action, I do so mainly to show how process impacts on substance. In this way I avoid delving into the merits of substantive outcomes. Not expressing a preference for particular outcomes saves me from disqualifying myself as an adjudicator.

I will show why the conditions above are imperative. Briefly, the dialectic between process and substance[5] and between litigation and society[6] compels my study of both simultaneously to develop an effective response to lawfare.[7] Litigation should not be a terrain for political battles. But it inevitably is when politics fail. Reluctant as judges may be to do the work of other agencies, they are ever more frequently called upon to do just that. How institutions and organisation can be built will emerge from an historical account of the tactic of OCMS (organise, mobilise, conscientise in struggle) used in the struggle against apartheid.

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Poverty' in *Law and Poverty* eds. Sandra Liebenberg and Geo Quinot at 42. I appreciate his analysis that transformative constitutionalism faces headwinds in a liberal democratic paradigm (at 48). Sibanda correctly, in my view, identifies the risk of entrusting the task of interpretation to lawyers. Furthermore, as Klare observes (in his 'Concluding Reflections' in *Law and Poverty* at 431), the Constitution is not a self-defined text; it is sufficiently open textured to allow constitutional interpretation as 'an expression of choice'. That choice can exceed the mediocre offerings of liberalism, collapse the constitutional project into judicial supervision (Sibanda at 54) or juristocracy (which I discuss in Chapter 3 under 'What if we do not care about litigation?'). Amongst these options lie a plethora of possibilities. Who can imagine what these possibilities are if not the people affected? Hence my thesis targets not only the judges and other lawyers but also the litigants and communities who are meant to benefit from the Constitution.

[4] Judges and legal representatives.

[5] Duncan Kennedy 'Form and Substance in Private Law Adjudication', *Harv. L. R.* (1976) 89:1685-1778.

[6] Klarman *Rethinking the History of American Freedom;* see also Rosenberg Gerald N. Rosenberg *Hollow Hope* Second Edition, (2008).

[7] Michelle Le Roux and Dennis Davis in *Lawfare – Judging Politics in South Africa* (2019) define 'Lawfare' which I discuss in Chapter 4.

Necessarily, my approach is multi-disciplinary, spanning the fields of law, politics, economics and a hint of history. The explanation for my choice of five interactive theories – critical legal realism, agonism and jurisgenerative constitutionalism, experimentalism, and positive (as opposed to normative) approaches to critique – will crystalise after an analysis of the objective and subjective conditions under which litigation is practiced.[8] Just as no absolute legal principle exists to resolve all disputes, no single theory offers a complete answer to the constraints bedevilling litigation. The mercurial flexibility of these theories fit my purpose of using law and OCMS to engineer transformative constitutionalism.

My methodology is primarily desk-bound research. Responses from a random sample of anti-apartheid activists to two questions[9] provide not data. Instead, they record history through the authentic voices of those at the centre of political struggles. Many such voices have been lost already. Quoting them extensively avoids not only misrepresenting them but also elevates the historical value and authenticity of this 'evidence'. Little is known or has been written about OCMS. The respondents paint a picture of the methodology or tactics developed and used in broad brush-strokes. This historical matrix is all I require to prove the precedent in practice. Linking the South African experience to South America and Vietnam, fortifies the 'evidence'. OCMS is not something imagined, but praxis.

OCMS informs my recommendations. So do my own insights as an adjudicator and conflict manager. These insights are common experiences shared by practitioners involved in conflict management. By recommending OCMS I offer a process through which legal actors and litigants can develop for their circumstances, prevailing best practices for litigation. An effective DSD (dispute systems design) will create the procedural milieu in which facilitation can flourish whenever conflict arises.

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[8] Chapter 2 Part A.
[9] They were: 1. What is OCMS? and 2. How was is practiced?

By injecting my personal experience of adjudication,[10] I seek to encourage other adjudicators to acknowledge their own dispositions. Opening myself for constructive criticism levels me with my colleagues whose judgments I critique. It affirms that none of us are above scrutiny. I aim to provoke dialogue in and about litigation to advance best practices in adjudication amongst readers concerned about constitutional transformation. For this, the truest account of what actually goes on in litigation is required. A realist approach to solution seeking must be built on solid facts. My style must be accessible to a readership beyond academia. Avowedly, my aim is not to develop any theories of litigation but to search for strategic interventions to recalibrate litigation to achieve durable transformative constitutionalism.

My concern for litigation as a tool for engineering transformative constitutionalism originates from my personal history. My epistemology is rooted in my political activism from the late seventies into the early nineties. In organising and mobilising communities to boycott rent and rate hikes, to litigate against water fines, and in defending political activists criminally charged for public violence or treason, in campaigning for the release of political detainees and prisoners, and their right of access to education, literature and family, and in enforcing the right to fair labour practices, litigation was only one pillar in the overall strategy to force political change. OCMS, which sloganized the strategy during the struggle for democracy remains the lexicon of politicians today.[11] The long-term goal of OCMS was to build organisation by empowering people

[10] In a case like *Nahour and Another v Minister of Justice and Constitutional Development* (6057/2007) [2018] ZAKZPHC 65 (3 August 2018).

[11] Address by ANC Deputy President Cyril Ramaphosa at Freedom Charter Forum 29 September 2015, Pietermaritzburg City Hall: 'As cadres of the broad democratic movement, as students and as progressive citizens, we need to use this 60th anniversary to reflect, think, organise, mobilise and conscientize.' http://www.anc.org.za/show.php?id=11658 (accessed 11/01/2016); Comrade Malusi Gigaba is a member of the ANC NEC and Former President of the ANC Youth League; Repositioning The ANCYL For The Future: A Strategic Perspective Towards the ANCYL National Congress (accessed 11/01/2016); Voices of Resistance: Vish Suparsad: 'During this period he embarked on the OCMS program [Organisation, Consciousness-building and Mobilisation] in Tongaat. He helped form the Tongaat Youth Club which became active during the Soweto Uprisings of 1976 and thereafter. During this period relationships with the Black township of Hambanati was forged through the establishment of a joint civic structure called JORAC- all of which culminated in the formation of the UDF (United Democratic Front) component of the Tongaat area.' http://scnc.ukzn.ac.za/doc/Audio/VOR/SuWVISH/SuwVishBackground.htm (accessed11/01/2016).

to participate constructively in decision-making in all matters that affected them. Political litigation was conducted in ways that reinforced that strategy. The right to a hearing and to reasons for adverse decisions became a bulwark against state action, thus creating space for political action for social change. Today the Constitution *is* the space.

In this chapter, I track the evolution of litigation through a brief review of the literature on litigation theory. Then I outline the need for process reform for substantive transformation. I spotlight choice as the means through which factors extraneous to the legal materials enter the decisional equation. I conclude with an outline of the chapters following this one.

### 1.2 Legal process literature overview

Lon Fuller triggered my curiosity about legal process theory. His seminal *Forms and limits* inspired many others to innovate legal process. Fuller's theory and those of others whom he inspired preface my own ideas about litigating in a constitutional democracy with a transformative agenda. The plan of my thesis builds on Fuller's themes of social ordering, common aims and reciprocity, complexity, precedent, polycentricity, deference, and the nature of the judicial function.

Fuller's attempt to define litigation (or adjudication before a judge) began by recognising it as 'a form of social ordering'. He claimed that 'the essence' of 'true adjudication' defies definition because 'it never fully exists'.[12] However, by unpacking the complexity of litigation in *Forms and limits*, Fuller generated a working definition, at least for purposes of distinguishing it from other decision making social institutions and procedures.[13] Litigation is a process of presenting proofs and arguments to an independent and impartial judge who renders a reasoned decision.[14] Remarkably 'prescient'[15] in forecasting litigation

[12] Lon L. Fuller and Kenneth I. Winston 'The Forms and Limits of Adjudication' (1978) 92 *Harv. L. R.* 353 at 356.
[13] Fuller 'Forms and Limits' (1978) 92 *Harv. L. R.* at 357.
[14] Fuller 'Forms and Limits' (1978) 92 *Harv. L. R.* at 353.
[15] Richard A. Posner 'Reflections on Judging' (2013) at 59.

as complex, Fuller also addressed questions of morality[16] and society. His answer to the conflict between a judge having to apply bad or immoral law, such as the laws of the Nazi regime or objectionable precedents set by a superior court, and her fidelity to law, was to make law 'what it ought to be'.[17] His view that the 'moral obligation of fidelity to law'[18] centralised purpose, structure and context to resolve problems of interpretation,[19] disavowed the notion of fidelity to law as static. Fuller also recognised a mutuality of 'action and reaction' in the relationship between law and society.[20] Law has a social purpose and value.

Famously spearheading the debate in *Forms and Limits of Adjudication,* Fuller acknowledged the limits of litigation for certain types of disputes [21] Underpinning Fuller's form of adjudication was his emphasis on participation of all the role players in the decision-making as an exercise in democracy itself. The form and quality of participation through the presentation of proofs and arguments either heightens or destroys the integrity of the adjudication. To bolster the structural integrity of adjudication through participation, Fuller identified the following essentials: the adversarial nature of the process, the role of lawyers, and the rationality of decisions. *Forms and Limits of Adjudication* triggered a spate of academic reactions. None disavow these essentials.

Fiercely critical of *Forms and Limits of Adjudication*, Owen Fiss in *The Forms of Justice*[22] defined adjudication as the 'the social process by which judges give meaning to our public values.'[23] Fiss's definition is restricted to a particular type of litigation: the structural suit,[24] a process through which a judge does not merely resolve disputes but gives meaning to public values on constitutional issues. [25] It involves an encounter between the judiciary and state

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[16] Lon L. Fuller 'The Morality of Law' (rev. ed. 1969) at 55-56; Lon L Fuller 'Positivism and Fidelity to Law: A Reply to Professor Hart' (1958) 71 *Harv. L. R.* 630.
[17] Fuller 'Positivism and Fidelity to Law' (1958) *Harv. L. R.* at 647.
[18] Fuller 'Positivism and Fidelity to Law' (1958) *Harv. L. R.* at 656.
[19] Fuller 'Positivism and Fidelity to Law' (1958) *Harv. L. R.* at 670.
[20] Lon L. Fuller 'American Legal Realism' (1934) 82 *U. Pa. L. Rev.* 429 at 453.
[21] Fuller 'Forms and Limits' (1978) *Harv. L. Rev.* at 353.
[22] Owen M. Fiss 'The Forms of Justice' (1979) 93 *Harv. L. R.* 1 at 39-44.
[23] Fiss 'Forms of Justice' (1979) 93 *Harv. L. R.* at 36.
[24] Fiss 'Forms of Justice' (1979) 93 *Harv. L. R.* at 17.
[25] Fiss 'Forms of Justice' (1979) 93 *Harv. L. R.* at 14.

bureaucracies. In contrast to Fuller's generic definition based on his sociological segmentation of the organisation of society by common aims and reciprocity, Fiss's innovation to legal theory emerged from the historical event of the school desegregation cases. Desegregation cases revised the party structure of adjudication, with the addition of *amici*, special masters and class actions. It also introduced new norms for judicial conduct. It re-examined the relationship between rights and remedies.[26] Fiss looks beyond the 'evidentiary inquiry' into incidents of discrimination to 'a social condition that threatens important constitutional values and organisational dynamic that creates and perpetuates that condition.'[27] Importantly, with no road map to follow, the quest for racial equality inspired procedural innovation.[28] In other words, procedure became dependent upon the desired substantive result.[29] The ends justified the means. Consequentialism gained traction. The structural suit jelled into an entirely new conception of adjudication, specially adapted for constitutional litigation against state bureaucracies. In Fiss's view what changed was not the function, but the form of adjudication occasioned by changes in the social structure that, post-World War Two came to be dominated by large-scale organizations.[30] Fiss's segmentation of rights from remedies was the primary point of departure between Fuller and Fiss.[31]

Drawing on Fuller and Fiss, Abram Chayes distinguished between the classical form of litigation typically suited to breach of commercial contracts[32] and public law litigation.[33] As remedies directed at government, quasi government or corporate policies, their impact extends beyond the immediate parties to the lawsuit. Instead of a passive neutral umpire the judge actively assumes large responsibilities for both organising the case and supervising the implementation

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[26] Fiss 'Forms of Justice' (1979) 93 *Harv. L. R.* at 3.
[27] Fiss 'Forms of Justice' (1979) 93 *Harv. L. R.* at 18.
[28] Fiss 'Forms of Justice' (1979) 93 *Harv. L. R.* at 3.
[29] Fiss 'Forms of Justice' (1979) 93 *Harv. L. R.* at 3.
[30] Fiss 'Forms of Justice' (1979) 93 *Harv. L. R.* at 36.
[31] Brian Ray 'Extending the Shadow of the Law: Using Hybrid Mechanisms to Develop Constitutional Norms in Socioeconomic Rights Cases' (2009) 3 *Utah Law Review* 797at 809.
[32] Abram Chayes 'The Supreme Court, 1981 Term: Foreword: Public Law Litigation and The Burger Court' (1982) 96 *Harv. L. R.* 4. at 5; see also Abram Chayes 'The Role of the Judge in Public Law Litigation' (1976) 89 *Harv. L. R.* 1281-1316.
[33] Chayes 'Public Law Litigation' (1982) 96 *Harv. L. R.* at 4.

of remedies.[34] Chayes describes public law litigation as rooted in contemporary 'legal consciousness', by which he means our ways of thinking about law and the legal system which in turn is grafted from the social, political and cultural environment.[35] He acknowledges that fundamental transformation depends on transforming the underlying political and legal culture. That is a goal to which the courts can only contribute, but which they cannot accomplish on their own.[36] The choice of granting or refusing remedies is a policy choice.[37] Thus judges taking 'comfort' from deference is 'a sort of legerdemain.'[38] Procedural choices like denying standing also have substantive consequences.[39] Chayes commends the role of courts as institutions exercising oversight of challenged bureaucratic action. Oversight should not be seen to be in conflict with the legislature or the executive branch affected. The political branches also struggle to get the bureaucracy to behave.[40]

Melvin Aron Eisenberg offered 'strong responsiveness' as an independent value that emerges from the congruence of decisions with the proofs and arguments adduced by the parties. In his view strong responsiveness, which is vital when adjudication performs its dispute resolution function, may conflict with adjudication's rule-making function.[41] He offers various forms of consultation to suit the situation when strong responsiveness is a problem.[42] Consultation allows the decision maker to make decisions that are not congruent with the parties' proofs and arguments. Participation is not compromised.[43] The outcome is not strongly responsive.[44] He suggests that the norm of strong responsiveness should apply with varying force, depending on the nature of the enquiry and the parties' participation.[45]

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[34] Chayes 'Public Law Litigation' (1982) 96 *Harv. L. R.* at 5.
[35] Chayes 'Public Law Litigation' (1982) 96 *Harv. L. R.* at 8.
[36] Chayes 'Public Law Litigation' (1982) 96 *Harv. L. R.* at 8.
[37] Chayes 'Public Law Litigation' (1982) 96 *Harv. L. R.* at 59.
[38] Chayes 'Public Law Litigation' (1982) 96 *Harv. L. R.* at 59.
[39] Chayes 'Public Law Litigation t' (1982) 96 *Harv. L. R.* at 59.
[40] Chayes 'Public Law Litigation' (1982) 96 *Harv. L. R.* at 60.
[41] Melvin Aron Eisenberg 'Participation, Responsiveness, and the Consultative Process: An Essay for Lon Fuller' (1978) 92 *Harv. L. Rev.* 410 at 413.
[42] Eisenberg 'Participation' (1978) *Harv. L. R.* at 416.
[43] Eisenberg 'Participation' (1978) *Harv. L. R.* at 426.
[44] Eisenberg 'Participation' (1978) *Harv. L. R.* at 426.
[45] Eisenberg 'Participation' (1978) *Harv. L. R.* at 413.

Contemporary theorists and commentators on Fuller and Fiss, including Susan P. Sturm (1990-1991),[46] Susan Sturm and Howard Gadlin (2007)[47] and Brian Ray (2008-2009)[48] also acknowledge the limits of adjudication. These theorists firstly contribute towards developing new forms of remedies through alternate dispute resolution processes such as negotiation and mediation. Secondly, they endorse the dichotomy theory that distinguishes dispute resolution from public interest litigation, and rights determination from remedies.

Robert G. Bone (1995) sets out to debunk firstly, the view that Fuller was a dispute resolution theorist and secondly, the dichotomy debate, which has moved beyond the polar view of litigation.[49] More subtly, the debate turns on a '… particular kind of norms and the type of public goods the institution should create'.[50] Like Fuller, Bone is concerned about how to 'allocate substantive decisions' to decision-making institutions, about 'institutional theory' as a prerequisite for 'sound institutional design'[51] and the implications of process and rules on social life, with all its complexity and dynamism.[52] Conversely, 'institutional practice'[53] had to acknowledge the complexity and interaction of 'procedural rules and the importance of institutional theory'.[54] For Bone, adjudication was about applying moral principles and determining the rights of parties. If rights are to trump or limit aggregate welfare, then the fairness of the procedural distributional system should also be scrutinised.[55]

Charles F. Sabel and William H. Simon (2003) demonstrate the interdependence theoretically and practically between rights declaration and

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[46] Susan Sturm 'A Normative Theory of Public Law Remedies' (1991) 79 *Geo. L.J.* 1355 at 1990-1991.
[47] Susan P Sturm and Howard Gadlin 'Conflict Resolution and Systemic Change' (2007) 1 *J. Disp. Resol*.1.
[48]Ray 'Extending the Shadow of the Law' (2009) *Utah Law Review* at 797; see also Brian Ray 'Occupiers of 51 Olivia Road v City of Johannesburg: Enforcing the Right to Adequate Housing through 'Engagement'' (2008) 8 *Hum. Rts. L. Rev*. 703 at 703.
[49] Robert G. Bone 'Lon Fuller's Theory of Adjudication and the False Dichotomy between Dispute Resolution and Public Law Models of Litigation' (1995) 75 *Boston U. L.J.*1272 at 1283.
[50] Bone 'Fuller's Theory' (1995) *Boston U. L.J.* at 1276.
[51] Bone 'Fuller's Theory' (1995) *Boston U. L.J.* at 1275.
[52] Bone 'Fuller's Theory' (1995) *Boston U. L.J.* at 1275-7 and 1322.
[53] Bone 'Fuller's Theory' (1995) *Boston U. L.J.* at 1320.
[54] Bone 'Fuller's Theory' (1995) *Boston U. L.J.* at 1320.
[55] Bone 'Fuller's Theory' (1995) *Boston U. L.J.* at 1324.

remedy formulation in public law litigation. They distinguish between polycentricity, precedent and disputes that ramify and simple fact-based dispute resolution, between public law and private law litigation, and between 'command-and-control injunctions' and 'experimentalist interventions' [56] (or what Sturm referred to as the '"catalyst approach"').[57]

'Experimentalist regulation' is more flexible as it combines

> '… provisional norms with procedures for ongoing stakeholder participation and measured accountability'.[58]

Public institutions that 'chronically' fail to fulfil their obligations and insulate themselves from political accountability are susceptible to claimants exercising 'destabilization rights' to 'unsettle and open' them up to judicial scrutiny. This enables courts at the outset to intervene to unsettle litigants' expectations and to facilitate 'experimentalist collaboration'. [59]

Experimentalist remedies are less threatening and invoke greater civic participation,[60] accountability[61] and goalsetting. Effectively,

> '… the remedy institutionalizes a process of ongoing learning and reconstruction'. [62]

The role of the court diminishes once the norm setting that defines compliance shifts from the judiciary to 'the actors who live by them'. [63] Continuous collaborative processes reduce dependence on judicial management, 'the risk to its political legitimacy'[64] and 'hence mitigate separation-of-powers concerns about structural remedies'.[65]

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[56] Charles F Sabel and Willliam H Simson 'Destabilization Right: How Public Law Litigation Succeeds' (2004) 117 *Harv. L. Rev.* 1016 at 1019.
[57] Susan Sturm 'Resolving the Remedial Dilemma: Strategies of Judicial Intervention in Prisons' (1990) 138 *U. Pa. L. Rev*. 805 at 856-59. Cited in Sabel and Simon 'Destabilization Rights' (2004) 117 *Harv. L. Rev.* at 1036.
[58] Sabel and Simon 'Destabilization Rights' (2004) 117 *Harv. L. R.* at 1019.
[59] Sabel and Simon 'Destabilization Rights' (2004) 117 *Harv. L. R.* at 1021.
[60] Sabel and Simon 'Destabilization Rights' (2004) 117*Harv. L. R.* '' at 1015.
[61] Sabel and Simon 'Destabilization Rights' (2004) 117 *Harv. L. R.* 'at 1027.
[62] Sabel and Simon 'Destabilization Rights' (2004) 117 *Harv. L. R.* at 1019.
[63] Sabel and Simon 'Destabilization Rights' (2004) 117 *Harv. L. R.* at 1020.
[64] Sabel and Simon 'Destabilization Rights' (2004) 117 *Harv. L. R.* at 1020.
[65] Sabel and Simon 'Destabilization Rights' (2004) 117 *Harv. L. R.* at 1091.

In a related article Michael C. Dorf and Charles F Sabel[66] introduce the idea of democratic experimentalism as a form of government. Power, and with it, participation, is devolved to enable citizens to tailor solutions using local knowledge. Coupled with information sharing and mutual monitoring, democratic experimentalism protects constitutional values better than separation of powers doctrine.

### 1.3 Process reform for substantive transformation

In this phase of South Africa's development, implementing experimentalism or other processes to advance transformative constitutionalism is challenging. In the American experience the lower courts issued structural remedies more actively than the Supreme Court was willing to endorse.[67] The opposite might be true in South Africa with the Constitutional Court leading the change, for instance, in claims for housing.[68] Is there a third way beyond or additional to command-and-control practices and experimentalism that would infuse the entire practice of law with a transformative agenda?

Structurally, in litigation, congruence between the proofs, the arguments and the reasoned decision is an internal constraint that assures the integrity of the process and counteracts the unelected rule-maker or counter-majoritarian argument. Litigation remains the pre-eminent decision-making process for not only enforcing law but also making common law. However, despite being grounded in participation, rationality, independence, impartiality and integrity, litigation is vulnerable both as a process and the substance of its outcomes. This dialectic between process and substance underpins my thesis.

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[66] Michael C Dorf and Charles F Sabel 'A Constitution of Democratic Experimentalism' (1998) *Vol 98 No 2 Col.L.R*.

[67] Sabel and Simon 'Destabilization Rights' (2004) 117 *Harv. L. R*. at 1018.

[68] *Government of the Republic of South Africa & others v Grootboom & others* 2001 (1) SA 46 (CC) (*Grootboom)*; *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC); and *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg & others* 2008 (3) SA 208 (CC).

What does it mean to resolve a dispute? Adjudication has evolved over centuries as a necessary and valuable social institution in which the adjudicator receives a dispute between contestants about questions of law, fact or both.[69] The adjudicator considers the facts and the law independently, impartially and with integrity. Applying such energies as she can, in the time and resources available to her, the adjudicator delivers a reasoned decision to settle the dispute. An adjudicated decision settles a dispute. The adjudicator's duty is done. Theoretically and ostensibly, the dispute is 'resolved' in the sense that the constitutional right of access to a court or other forum is recognised for the stated but limited purpose of resolving a dispute.[70] Does resolving a dispute necessarily solve the problem, eliminate or manage the causes and sources constitutive of conflict, or even the emotion that ensues from win-lose outcomes? Conflict refers to deeper layers of disagreement.

The reasons, the decision or both may displease one or all the litigants and others. Some may act to reverse the decision while others may reconcile with the result. Contestants who do not reconcile with the result and can do nothing to reverse it by litigating further, may mobilise and organise to seek other avenues to express their discontent, grievances and frustrations. Then it can be said that although the adjudicator resolved the dispute, she did not solve the problem by eliminating or managing the conflict. In fact, the adjudication might have created new disputes and sparked more conflict. Can litigation move beyond resolving disputes to remedying and managing deeper layers of conflict? Are there more sophisticated tools than traditional litigation to reach into deeper layers of conflict in order to solve problems substantively?

Sources, causes and manifestations of conflict form a thread that precedes the articulation of disputes for litigation. For instance, the source of conflict could be economic or ideological; the cause of the conflict could be low wages historically structured on the basis of apartheid's job reservation tactic; the

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[69] William C. Jones 'An Inquiry Into The History of the Adjudication of Mercantile Disputes In Great Britain and the United States' https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=3089&context=uclrev (accessed 16 November 2018).

[70] Section 34 of the Constitution.

manifestation of the conflict could take the form of strikes and protests, or it could be articulated as a dispute to fit the format of adjudication. If the dispute is framed as a claim for a wage increase, the adjudicator's decision could resolve the dispute by awarding or refusing to award an increase. However, granting a wage increase is an inadequate remedy to manage the conflict arising from racially structured pay policies; then the cause of conflict would persist, stoked by its economic and ideological sources. If, however, the dispute is framed as a claim arising from discrimination, adjudicators have more effective reach into the sources and causes of the conflict than the superficiality of a claim for higher wages. Litigating in order to reach into the depths of layers of conflict begins with the legal representatives and, before them, the litigants. However, to shift practice from dispute resolution to conflict management and problem solving, the legal actors and the litigants must appreciate the difference between superficial claims for higher wages and fundamentally transformative demands for equality and its accompanying reinforcements of human dignity and economic freedom.

Persistent conflict resulting in violent protests and damage spiral into new causes and manifestations of conflict. Typically, this was the pattern of resistance in the labour movement in the eighties when labour laws were inadequate to remedy structural defects in an apartheid economy. Under our constitutional democracy, the pattern replicates itself in claims for service delivery of livelihood rights and other essential services. Notwithstanding the comprehensive constitutional recognition of human rights, the gap in implementing them widens at a scary speed. Irrespective of differences in the prevailing laws, common to pre-democracy and post-apartheid are the contradictions spawned by the conception of politics as predominantly nationalist and the economy as fundamentally capitalist. Where do poor South Africans and the escalating number of others who live in it fit? Fitting demands for livelihood rights into the forms and limits of litigation tends not to address fundamental questions about the nature of our political economy. From a constitutional perspective, where should the pendulum fall in the range from communist, socialist, social-democratic, liberal and conservative?

From a process perspective, South Africa's state-sponsored dispute system design (DSD)[71] remains skewed in favour of litigation. Lost is the culture of consensus seeking that heralded our peaceful revolution in 1994. The switch from an apartheid state to a constitutional democracy was peaceful; the long patient queues at the polls on election day evidenced this. It was also revolutionary, at least in form. Substantively, 'colonial sovereignty' continues to ravage prospects for fundamental constitutional transformation.[72] In this milieu of 'constitutional irresolution',[73] litigation tends to fulfil the constitutional mandate of settling disputes, but resolving conflicts giving rise to disputes tends to be out of its reach. Protest actions and proliferating appeals from decisions of lower courts to the Constitutional Court (CC) support this observation.

Although the adversarial system of litigation is quintessential for testing the merits and validity of any law, culturally, litigation as the principal process for resolving conflict (a) projects society as aggressive, belligerent, competitive and uncaring of the other; (b) undermines trust and a sense of community and (c) promotes adversarialism, all of which are antithetical to ubuntu or the communitarian values of the Constitution. Inequality and a failure of politics compound the inappropriateness of litigation to resolve conflict, solve societal problems and build organization.[74]

As litigation is the primary process for resolving all disputes[75] publicly and non-violently it follows that even those disputes better suited to consensus-seeking

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[71] DSD involves the creation of a set of dispute resolution processes to help an organization, institution, nation-state, or other individuals to better manage a particular conflict and a continuous stream or series of conflicts. *Dispute Systems Design* https://en.wikipedia.org/wiki/Dispute_Systems_Design (accessed 30/09/2015). DSD is the process of identifying, designing, employing, and evaluating an effective means of resolving conflicts within an organization. In order to be effective, dispute systems must be thoroughly thought out and carefully constructed: http://www.pon.harvard.edu/tag/dispute-system-design/ (accessed 30/09/2015).

[72] Joel M Modiri 'Race, history, irresolution: Reflections on *City of Tshwane Metropolitan Municipality v Afriforum* and the limits of "post"-apartheid constitutionalism' De Jure 2019 at 27.

[73] Emilios Christodoulidis "Constitutional Irresolution: Law and the Framing of Civil Society" 2003 European LJ 401 at 31, cited by Modiri above.

[74] By 'organisation' I mean groups of people working together to achieve common objectives that they would not achieve individually.

[75] By 'disputes' I mean conflicts that have been processed into identifiable, articulated demands.

processes (e.g. negotiation, mediation) and power play (e.g. strikes, demonstrations, boycotts) have to be litigated. Accepting that process and outcomes are symbiotically connected,[76] it is reasonable to assume that a significant number of disputes subjected to the traditional form of litigation result in outcomes that do not acknowledge, address or remedy the causes or sources of conflict satisfactorily or at all. Instead, they result in frustrating win-lose outcomes.

Another consequence of the breadth of its scope is that litigation's reach is stretched way beyond its traditional limits into terrains usually reserved for decision-making by some public authority. Necessarily, therefore, the tension between deference and judicial discretion as they aggregate in the separation of powers principle intensifies. This principle, which implicates substance, must also evolve if litigation as a social institution is to remain relevant and responsive.

The traditional form of litigation described above is unsuitable for resolving all problems. Hence, compelled by the demands of the context, its forms and functions have evolved in various ways. The literature overview above shows that to adapt to increasing demands, litigation has evolved from a 'command and control' bipolar format, functioning to elaborate and enforce norms through top-down regulation, to context sensitive, participation enhanced bespoke processes such as experimentalism in which the court functions as a catalyst when governance fails.[77] Furthermore, agonism and jurisgenerative styles of dialogue have better prospects of delivering enduring substantive outcomes than deliberative dialogue, which does not centralise contradictions, '"passions" and collective forms of identifications in the field of politics.'[78] Agonism embraces conflict as a component of disputes.[79] Jurisgenerative dialogue

[76]See also Sally Engel Merry 'Disputing Without Culture' (1987)100 *Harv. L. R.* 2057 at 2059; Gold 'ADR through a Cultural Lens' 2005 J. Disp. Resol. (2005).
[77] Joanne Scott and Susan Sturm 'Courts as Catalysts: Rethinking the Judicial Role in New Governance' Columbia Journal of European Law (2006) Vol. 13 565 at 566-567.
[78] These legal theories are discussed in Chapter 2 Part A. Chantal Mouffe 'Deliberative Democracy or Agonistic Pluralism' (2000).
[79] Mouffe 'Deliberative Democracy or Agonistic Pluralism' at 14 fn32.

acknowledges otherness.[80] Both fit better with my critical legal realist approach.[81]

Remarkably, the incremental evolution in the forms and functions of litigation has been organic and legitimised by judge made law and practice. Legal actors were not acting in a vacuum, but responding to major societal upheavals such as the world wars, campaigns for the desegregation of schools in the USA and the end of the Cold War, which heralded the age of neo-constitutions.[82] More recently in South Africa, escalating claims for implementing socioeconomic rights imported a duty to engage meaningfully in demands for housing.[83] In contrast, flagrant breaches of the Constitution simply invoked the application of elementary principles of the rule of law in litigation against the Office of the Public Protector.[84] The failure of governance and politics and the lack of an effective DSD to respond to societal changes induced the appointment of a special master to oversee land reform.[85] Thus evolves litigation in an ad hoc, haphazard way, with the judiciary filling in when the other arms of government fall short on process and substance. In South Africa, such evolution is constitutionally sanctioned by the mandate to the judiciary to adopt fair procedures and issue just and equitable remedies to achieve fundamental constitutional transformation through law.[86]

Therefore, in projecting what the next phase holds for the evolution of litigation the aim should be not only to use litigation to serve society better, but also to simultaneously fix societal failures so that our social and political institutions

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[80] Paul Schiff Berman 'Jurisgenerative Constitutionalism: Procedural Principles for Managing Global Legal Pluralis' 20 IND. J. GLOBAL LEGAL STUD. 1 (2013).
[81] Dennis M. Davis and Karl Klare 'Legal realism and CLS - Critical legal realism in a nutshell' Emilios Christodoulidis, Ruth Dukes & Marco Goldoni, eds., Research Handbook on Critical Legal Theory, Edward Elgar, Cheltenham, UK & Northampton, Mass., US, forthcoming.
[82] Mark A Graber, Sanford Levinson and Mark Tushnet eds. 'Constitutional Democracy in Crisis? Introduction' (2018) 1-12.
[83] Ray 'Extending the Shadow of the Law: (2009) Utah *Law Review* at 797; see also Ray '*Occupiers*' (2008) 8 *Hum. Rts. L. Rev.* 703 at 703.
[84] *Public Protector v South African Reserve Bank* [2019] *ZACC* 29; *Gordhan v Public Protector and Others* (48521-19) [2019] ZAGPPHC 311 (29 July 2019).
[85] *Mwelase and Others v Director-General for the Department of Rural Development and Land Reform and Another* [2019] ZACC 30 (*Mwelase*).
[86] Section 172 (1)(b) of the Constitution; Karl Klare 'Self-Realization, Human Rights and the Separation of Powers: A Democracy-Seeking Approach (2015) 3 *Stell LR* 465 at 466; Dennis M Davis, 'Separation of Powers: Juristocracy or Democracy' (2015) at 14.

function optimally. Furthermore, law enforcement agencies must be willing and able to enforce court orders. Society must be receptive to complying with them. Given the symbiosis between litigation and society, any interventions to transform the one must lead to developing the other in tandem. So transformative constitutional litigation is not only about *what* one litigates, but also about *how* and *with whom* one litigates to solve problems and build organisation.

### 1.4 Choice

Substantively, choice renders litigation vulnerable to extraneous influences and all the imperfections and idiosyncrasies of human endeavour. Choice is a point of entry for extraneous influences. Choice of facts, inferences, rights, rules and reasoned outcomes draws from sources not limited to the legal materials. Having regard to the definition above of litigation, choice is exercised first by the litigants when they decide to declare a dispute, then to litigate, and then by their lawyers in defining what and how they will litigate, and what rules they will invoke. Finally, judges are confronted with those choices in the form of the legal materials before them. What informs choice? When faced with hard choices are legal actors free to make whatever decision that accords with their worldview? If that view is to 'retreat into models of adjudication that are based on earlier traditions of legal practice',[87] whither the promise of our constitutional transformation? If 'convinc[ing] lawyers that law is deeply imbricated with the political and economic processes of society is a very difficult task'[88] how then can we ensure that litigation is imbued with a transformative agenda?

### 1.5 Overview

Chapter Two is split into parts A and B to connect closely the theoretical milieu detailed in Part A with how that plays out practically in Part B. In Part A, I identify objective and subjective factors influencing choice. Objective factors

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[87] Dennis M Davis, 'Socioeconomic rights: Do they deliver the goods?' (2008) 6 (3-4) *Int. J. Constitutional Law* 687 at 687.
[88] Davis 'Socioeconomic rights' (2008) *Int. J. Constitutional Law* at 687.

include the political economy of South Africa about which legal actors and litigants have little control. Subjective factors include legal and political consciousness and culture, which they do control. Evolving organically from this analysis are the five flexible theories mentioned in my introductory remarks above. Using the headstones of ideology, binaries, the nature of the judicial function and human factors, I show through the literature and case law how articulated and unarticulated influences, extraneous to the legal materials, render both procedural and substantive outcomes unpredictable in Part A. This theoretical foundation, supported by socio-economic rights and discrimination cases, with particular emphasis on marital status as a ground, foreshadows the diagnosis in Part B. The subjective factors at play are teased out in Barnard,[89] a single affirmative action case processed through four tiers of the judiciary. Whereas judges are the usual target of criticisms, traversing the transcript of the record in Barnard exposes the conduct and consciousness of legal representatives and litigants who make preliminary choices about what later constitute the legal materials before judges. My aim is not to advise but to hold up the transcripts to legal representatives for their self-reflection.

In Chapter 3 I ask: 'Why should we be concerned with litigation?' Ten reasons spring to mind. Like elections of political office bearers, decision-making in litigation is another field in which democracy is practiced. Dialogue between the court and litigants helps to navigate complex issues, the principles of precedent and separation of powers, and the polycentric impact of judgments. Cumulatively they implicate communities beyond the litigants. Participation by communities so implicated is imperative not only for resolving conflict, but importantly, for building organisations grounded in rational dialogue about constitutional transformation and cultivating supportive public emotion for

[89] *South African Police Service* v *Solidarity obo Barnard* (Police and Prisons Civil Rights Union as amicus curiae) 2014 (10) BCLR 1195 (CC) (*Barnard* (CC)); *Solidarity obo Barnard* v *South African Police Service* (*Vereniging van Regslui vir Afrikaans* as amicus curiae) [2014] 1 All SA 319 ([2013] 1198 ZASCA 177; 2014 (2) SA 1) (SCA) (*Barnard* (SCA)); *South African Police Services* v *Solidarity obo Barnard* 2013 (3) BCLR 320 ([2012] ZALAC 31) (LAC) (*Barnard* (LAC); *Solidarity obo Barnard* v *South African Police Services* 2010 (10) BCLR 1094 ([2010] ZALC 10) (LC) (*Barnard* (LC)) Unless I specify a court, I refer to *Barnard* generally.

shared goals.[90] For this purpose, I introduce the practice of OCMS developed during the anti-apartheid struggle.

Pre-democracy, the liberation movements were part of *us*; now in litigation they are often *them*, as government and the bureaucracy. We must retrieve 'two basic forms of social ordering: organization by common aims and organization by reciprocity. Without one or the other of these nothing resembling a society can exist.'[91] Rebuilding institutions, of which litigation is but one, so that they do the work they are meant to, is in the national interest. OCMS moves beyond experimentalism and the limited mobilising impact of social movements to embrace agonism and jurisgenerative forms of dialogue.

In Chapter 4, I recommend three angles for reform: Implementing OCMS, redesigning the DSD and facilitation as a process option tagged to litigation. The latter two draw on my experience as a panellist of the erstwhile Independent Mediation Services of South Africa (IMSSA), which laid the foundation for the Commission for Conciliation Mediation and Arbitration under the Labour Relations Act.[92] My recommendations pitch at all the actors in litigation, at society and state institutions to cultivate common aims and reciprocity.

Undoubtedly, a plethora of institutional and other reforms are necessary to shift society towards egalitarian common aims and reciprocity. Bolstering how Parliament functions, what quality and quantity of education, health, housing and other services are agreed upon or determined for distribution, how civic, religious, sporting and other organisations participate in shaping democracy, are some of the institutions that must participate in transformative constitutionalism. However, my skill sets confine my recommendations to two interconnected reforms I take up in Chapter 4:

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[90] Martha C. Nussbaum 'Political Emotions – Why Love Matters for Justice' (2013).
[91] Fuller 'Forms and Limits' (1978) *Harv. L. R.* at 357.
[92] Labour Relations Act, 56 of 1995.

1. Education and reskilling of legal actors to develop, recognise and apply DSD theory using dialogical process tools like facilitation in order to bolster the integrity and effectiveness of litigation as a platform for conflict management.
2. Capacity building through OCMS to deepen democracy. In as much as the electorate should hold the executive and the legislature accountable, so too must they, as litigants and members of communities affected by judgments, hold the legal actors accountable. Participation was central to Fuller's thesis in *Forms and Limits of Adjudication*:[93] his 'bottom up' approach contrasts with Fiss's 'top down' conception of adjudication in which the judge is in control. Fiss conceives the role of a judge as being actively engaged in steering the process instead of one who adopts a supine, passive role.[94] In my view, transformative constitutional litigation requires active, attentive participation by all the actors having an interest in the litigation.[95]
Cumulatively, these recommendations are aimed at creating the ecosystem or environment in which litigation as a social institution can be left to do the work it is meant to, and to live up to its definition.

The works of Paulo Freire, Antoni Gramsci and Frans Fanon informed OCMS, practised in the liberation struggle against apartheid. A few remaining members of the mass democratic movement in which I participated before my appointment to the Bench, have generously emailed to me their understandings of OCMS. Sen and Nussbaum's capabilities, freedom and development theories prove useful.[96]

In Chapter 5, I reflect on the intellectual transformation I experienced journeying through this project. Critique of judgments tends to leave one with the overwhelming impression that fault lies with judges or that litigation has to be rejigged as a process. Both observations have merit. However, without factoring the participation of the litigants and their representatives, no analysis

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[93] Fuller 'Forms and Limits' (1978) 92 *Harv. L. R.* 353 at 356.
[94] Owen M. Fiss 'The Forms of Justice' (1979) 93 *Harv. L. R.* 1 at 41.
[95] See Chapter 1 fn 3; Klare 'Legal Culture and Transformative Constitutionalism' (1998) 14 *SAJHR* 146 at 150.
[96] Martha C. Nussbaum 'Capabilities and Human Right', 66 Fordham L. Rev. 273 (1997) and her references to Sen at 274 fn 7.

of litigation theory is complete. Legal and political culture, consciousness and education of individual actors in public decision-making spaces like litigation contributes to or impedes transformative constitutionalism.

# Chapter 2: *Barnard*: Who's Constitution is it anyway?

'Litigation is the pursuit of practical ends, not a game of chess.'

Felix Frankfurter[1]

## 2.1 Introduction

Part A of this chapter is a conceptual curtain raiser to Part B in which I show how the theory plays out in practice in Barnard. In Part A, I acknowledge the need for predictability but accept the fact of unpredictability. Therein lies the paradox of litigation. Consciousness of what conduces to unpredictability will help litigants and legal actors to anticipate, perhaps to avoid, some unarticulated premises that might ground the reasons for judgments, to manage litigation to best effect. Causes of unpredictability stem from the legal actors and litigants exercising choice. Choice is informed not only by the legal materials but also by a confluence factors extraneous to them. Ideology, binaries, and the forms, substance and limits of litigation amongst other identifiable, unidentifiable but usually unarticulated factors influencing litigation. Dialogue through an effective DSD would be a means to mitigate unpredictability. Failing to engage dialogically causes more harm than merely exacerbating unpredictability. Anticipating influences extraneous to the legal materials as possible causes of unpredictable outcomes in Barnard, I delve deeper into them. What conduced to the seven judgments generated over four tiers of the judiciary?

In Part B, Barnard shows that outcomes are unpredictable in litigation even when the legitimacy, validity and morality of the legal materials are, or at least seem to be, uncontested. What the ostensible causes of conflict were and how they manifested are answered easily. The causes of the conflict were the non-

[1] https://www.brainyquote.com/quotes/felix_frankfurter_162642?src=t_litigation.

appointment of Ms Barnard for the reasons given by the National Commissioner. These causes manifested in litigation, framed as a dispute about the SAPS discriminating against her on the grounds of her race and colour. Intriguingly, she did not press gender as a ground. Much harder is the preliminary question: What were the sources of conflict? Were they ideological or something else? What were the points of departure? How did the ideological or other sources manifest or influence the outcomes? Deep excavations are needed into the transcript of the evidence, arguments and judgments in Barnard to find answers to these questions. However, my expeditions in Part B shore up not definitive answers but suggestions and sheer speculation. Pinning down sources and causes of conflict to, say, ideology or discrimination is difficult as a desktop diagnosis; interviewing the litigants and their representatives would generate a more precise diagnosis. However, it is not precision that I seek but dialogue about the possibilities of exposing layered realities often obscured or avoided in litigation.

Recognising the thread between sources, causes and manifestations of conflict and distinguishing them is vital for diagnosing problems and prescribing process and substantive remedies to solve them. Not all sources and causes of conflict fit comfortably in the format of traditional litigation, the efficacy of which depends on strict compliance with formulaic procedures and rule interpretation and application. Its strictures take no account of feelings and other factors that inform human behaviour. In affirmative action complaints, processes can assuage or exacerbate feelings. Legal actors incognisant of the thread, who undertake no diagnosis, risk prescribing inappropriate process and substantive remedies. When the chosen process is litigation, the substantive remedies are vulnerable to all the phenomena identified above. Cognisant legal actors who undertake a diagnosis, make the effort to match the sources and causes of conflict to processes and, if necessary, design bespoke processes, to show a sort of ‘horses for courses’ appreciation of conflict resolution and management. Recognising that the choice of process influences the outcomes, requires legal actors to acquire diagnostic and process skills to channel conflict appropriately.

In Barnard, was the litigation used for one of its prime purposes namely, of clarifying or establishing a rule of public importance? Was the litigation the default option when no other process was available? Or, was the adversarial nature of litigation the prime attraction for resolving the dispute, a respectable proxy for a battle in another war in which judges were simultaneously generals and peacekeepers? [2] What purpose did the litigation achieve ultimately?

## 2.2 Paradox of predictability

Litigation's rule-setting role is effective when it is predictable. Kennedy sums up that predictability

'is valued for its effect on the citizenry: if private actors can know in advance the incidence of official intervention, they will adjust their activities in advance to take account of them.'[3]

Davis and Klare re-enforce that without predictability in most cases, 'law practice as we know it would be impossible'.[4]

But 'judicial mentality' would be uninteresting if:

'judges did nothing more than apply clear rules of law created by legislators, administrative agencies, the framers of constitutions … to facts that judges … determined without bias or preconceptions. Then judges would be well on the road to being superseded by digitized artificial intelligence programmes.'[5]

The European Convention on Human Rights obliges the UK to 'ensure certainty and predictability.' Notwithstanding, Pannick's entertaining collection of 'the unusual, the unexpected, and simply the incredible happily demonstrate that

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[2] Samantha Vice 'Dignity and Equality in *Barnard*' CCR VII (2015) *https://www.constitutionalcourtreview.co.za/wp-content/uploads/2018/10/Dignity-and-Equality-CCR-VII-2015.pdf* (accessed 13 December 2018) offers interesting perspectives of the reaction of whites to *Barnard* which confirms the under-currents of racial tension arising from different expectations of the peaceful democratic revolution in South Africa. Litigants fail to use litigation as a platform to ventilate such expectations in order that they constitute a part of the legal materials upon which judges make reasoned decisions.

[3] Duncan Kennedy 'Form and Substance in Private Law Adjudication' (1976) 89 *HLR* 1685 at 1688.

[4] D M Davis and K Klare 'Legal realism and CLS – Critical legal realism in a nutshell' Emilios Christodoulidis, Ruth Dukes & Marco Goldoni, eds., 'Research Handbook on Critical Legal Theory', Edward Elgar, Cheltenham, UK & Northampton, Mass., US, (forthcoming 2019) at 29.

[5] Richard A. Posner *How Judges Think* (2008) at 5.

such a goal remains well out of reach'.[6]

Notwithstanding 'fruitful synergy between law and AI', law is multimodal, has an explicit style of reasoning, involves specialised knowledge drawn from cases and rules, is self-aware and self-critical, and generates answers that are matters of degree rather than a clear-cut yes or no. Legal reasoning ranges from using 'common sense to specialised legal knowledge, and varies greatly in structure, character, and use.'[7]

Judgments are not generated like algorithms.[8] Turning to metaphors from mathematics, Kennedy explains that applying 'some neutral calculus' would not maximally satisfy valid human needs and wants.[9] Anyone who thinks that legal argument is comparable to the geometrical precision of the techniques that surveyors use in constructing bridges is seriously mistaken.[10] To emphasize the inability to know in advance how a case will turn out, Kennedy uses another metaphor, that of navigating a boat through water. The surface is visible but not what lies beneath it, even though 'lots and lots of signs on the surface indicate what is beneath'.[11] He attributes the uncertainty to deep divisions 'among ourselves and also within ourselves, between irreconcilable visions of humanity and society, and between radically different aspirations for our common future'.[12] They infuse both the 'rhetorical modes lawyers use' and how judges respond to them.[13] Predictability in litigation is elusive when 'a different, even conflicting outcome can also be justified within the stated premises and analytical framework'.[14]

By predictable I do not suggest that the result is guaranteed. Axiomatically, if litigation yielded guaranteed results, why would anyone bother to litigate?

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[6] David Pannick *I have to Move My Car – Tales of Unpersuasive Advocates and Injudicious Judges* at 3.
[7] Edwina L Rissland 'Artificial Intelligence and Law: Stepping Stones To...,' 99 Yale L.J. 1957 at 2-3.
[8] Davis and Klare 'Critical legal realism in a nutshell' at 28.
[9] Kennedy 'Form and Substance' (1976) 89 *HLR* (1976) 1685 at 1685.
[10] Duncan Kennedy 'Freedom and Constraint in Adjudication: A Critical Phenomenology' (1986) *Journal of Legal Education* 518 at 547.
[11] Kennedy 'Phenomenology' (1986) 36 *Journal of Legal Education* 518 at 545.
[12] Kennedy 'Form and Substance' (1976) 89 *HLR* at 1685.
[13] Kennedy 'Form and Substance' (1976) 89 *HLR* at 1685.
[14] Davis and Klare 'Critical legal realism in a nutshell' at 28.

Disputants would simply accept and implement the guaranteed result, unless there was some resistance to enforcement, in which case a court order would be necessary. What I mean by predictable is that the result falls within an anticipated range of reasonably probable outcomes. If 'legal reasoning on the basis of the relevant legal materials is sufficiently determinate', then 'claims of legal necessity' would be justified; therefore, results would be predictable.[15] Even when the range of possible results, especially binaries (guilty/not guilty; granted/refused), has a degree of predictability, the reasons for the decision may still differ.

By unpredictable I mean the opposite, that category of unforeseen and unforeseeable, 'we did not see that coming' kind of results. Identifying what renders results unpredictable is far more complex, posing more questions than offering definitive answers. What qualifies legal materials as 'sufficiently determinate'? Which legal materials from a range are relevant for the decision? These are some of the conundrums of litigation – 'an objective reality'[16] – that practice shores up. Litigation offers no guarantees about how decisions will come out. Choice of facts and law render results that may or may not fall within the anticipated range of reasonably probable outcomes. That is, legal actors make the choices that contribute to determining the predictability or unpredictability of the result. By legal actors I mean both judges and the lawyers representing the litigants. Harking back to the definition of litigation, it is what legal materials the lawyers do or do not choose to put into litigation that traditionally constrain (or liberate[17]) judges to deliberate and deliver as judgments. So, litigants and their lawyers make choices long before the judges do. Their very first choice is one of process – to litigate.

Unpredictability should be welcomed when gaps in the materials create the space for innovation and renovation through law and appropriate processes. Differences and dissents resulting in unpredictability are preferable to

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[15] Duncan Kennedy 'A Social Psychological Interpretation of the Hermeneutic of Suspicion in Contemporary American Legal Thought' in 'Searching for contemporary Legal Thought' Justin Desautels-Stein and Christopher Tomlins eds. 365 at 369.

[16] C.W. Maris Van Sandelingenambacht, Legal Postism and the End of European Private Law - Duncan Kennedy's Critique of Adjudication, 10 Eur. Rev. Private L. 111 (2002) at 124.

[17] For instance, when litigants such as the SAPS in *Barnard* fail to lead evidence, judges are free to draw inferences from available materials to fill the gaps.

predictability founded on questionable, regressive 'rule sets' [18] and 'arid syllogisms'[19] that get set in stone for generations.[20] Unpredictability is tolerable if it leaves open room for improvement the next time. Recognising and acting on phenomena[21] that influence choices, findings, reasons and decisions in litigation would be a deliberate effort at managing unpredictability with the aim of progressively achieving constitutionally compliant egalitarian ends.

### 2.3 Choices inducing unpredictability

What informs the choices of legal actors? Ideology, advances Kennedy, lies at the root of differences in legal reasoning.[22] Ideology,[23] less controversially referred to as worldview, is one of several identifiable, but unarticulated factors extraneous to the facts and legal arguments that I will show influences the choices that judicial actors make. Political, constitutional and legal culture, and consciousness are subsets constitutive of ideology. Cumulatively, they conduce to unarticulated reasons for decisions. Other factors range from corruption,[24] to human frailty, to carving out more leisure time for family or golf, to maintaining a work-life balance. Logistical, physical, physiological, practical and like factors also impact on the performance of the judicial function. These influences exist external to the legal materials.[25] Nevertheless, using tools of deduction their presence is detectable; identifying and labelling them is, at best, informed guesswork and curiosity-inspired speculation.

Legal actors are human; they participate in society, keep in touch with social and political developments and have opinions about these matters. Intellectual legal actors develop ideological dispositions. Practicing law does not denude them of their dispositions. Instead, it may encourage them to practice law in

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[18] Davis and Klare 'Critical legal realism in a nutshell' at 35.
[19] Karl Klare 'Legal subsidiarity & constitutional rights: A reply to AJ van der Walt' (2008) 1 *CCR* 129 at 130.
[20] E.g. *Brown v Board of Education of Topeka*, 347 U.S. 483 (1954).
[21] Ideology, culture, unarticulated premises, binaries and the nature of the judicial function.
[22] Kennedy 'Hermeneutic of Suspicion' 365-384.
[23] Defined and discussed in Part A.
[24] Duncan Kennedy 'Critique of Adjudication – fin de siècle' (1988).
[25] I distinguish between the evidence, the arguments and the legal materials to emphasise that lawyers and litigants working with the evidence and the arguments make the first choices about what must serve as the legal materials before judges.

ways that advance their preferred ideologies. For instance, lawyers representing the state department of housing are unlikely to act for non-governmental organisations representing homeless people. Isolating legal culture and consciousness identifies two of many other sources from which ideology develops. Ideology is woven into the fabric of choices the legal actors make in litigation. Recognising this reality bolsters the integrity of litigation. Denying it degenerates to the opposite.

Identifying binaries draws attention to the administration of justice and the structure of litigation, which, together, constitute 'the system' that drives legal actors inexorably towards binaries. Case flow management and pre-trial conferences are geared to this end. These aspects of binaries and the judicial function, reinforce a style of thinking, of arriving at a destination without navigating the journey carefully, unmindful of alternative, possibly more rewarding routes.[26]

These unarticulated influences – there could be others – intersect imperceptibly to render decision-making flexible and malleable, albeit within the structure, forms and limits of litigation. Individually or in some combination together, they trigger choices that conduce to results that ultimately qualify as predictable or unpredictable. Predictability and unpredictability, like art and pornography, is in the opinion of the beholders. For, ideology and other unarticulated premises do not start and end with the legal actors; they include the litigants and beholders in the academy and elsewhere. Whether choices, decisions and opinions are predictable or unpredictable is also relative to the reasons that underpin them. I use this description for the convenience of initiating consciousness and discourse about factors that cause unarticulated phenomena to contribute to the malleability and unpredictability of decisions.

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[26] Karin van Marle in 'Law's time, particularity and slowness' (2003) 19 *SAJHR* 239, laments 'the limits inherent in any legal process.' (at 253). 'It shows that for justice we shall have to wait, that the search and concern with justice needs a slowness, an approach of attentiveness.' (at 243) She suggests 'other ways of or attitudes to legal reading and interpretation, always keeping the limits and the violence of the law in mind.' (at 242). Comparing law to photography, she quotes Auggie Wren: '"If you don't take time to look, you'll never manage to see anything".' at 247.

## 2.4 Form and substance

But there is another influential phenomenon: the institutional structure, forms and limits of litigation itself. Kennedy elaborates that 'formal and substantive dichotomies are in fact aspects of a single conflict, rooted [in] moral, economic and political dispute.' [27] By 'form' and 'formal' I refer not only to the 'jurisprudence of rules [as] the body of legal thought that deals explicitly with the question of legal form' but also to the processes to which the rules apply. 'Substance' and 'substantive' issues or outcomes are a consequence of what the rules respond to.[28] Along the way, the ideology of legal actors and other factors shape the outcomes through their choice (or non-choice) of rules, facts, inferences and binaries.

Process strictures in litigation clash with the relative flexibility of the unarticulated phenomena that constitute its substance. For me, form dovetails with substance. But a formalist would opt for the opposite. That is, formalism is an end rather than a means to a substantive end. There! This is a typical ideological choice. It is a choice critical to distinguishing litigation as delivering substantive, problem solving remedies from formalistic solutions that serve the limited purpose of resolving disputes. As a social institution, the structure, forms and limits of litigation contribute not only to unpredictable jurisprudence, but also to the capacity of litigation as a process to settle disputes, solve problems and manage conflict.

Irrespective of its constraints and ironically because of them, what is certain about litigation is that it generates reasoned judgment(s). They record or pronounce what the law is, and enable enforcement of it, all of which fortifies litigation's usefulness as a social institution. Litigation remains the pre-eminent tool for peaceful contestation. It is another site for non-violent struggle for changes to existing socio-economic and political systems entrenching class,

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[27] Duncan Kennedy 'Form and Substance in Private Law Adjudication' (1976) 89 *Harv. L. R.* 1685-1778 at 1.
[28] Kennedy 'Form and Substance' (1976) 89 *Harv. L. R.* at 2.

race and gender hierarchy.[29] Without litigation, the alternative of self-help, of taking the law in one's own hands would slide us into lawlessness and anarchy. Instead, recognising the role of unarticulated phenomena as causes of the malleability of choice resulting in unpredictability, and how, why and when they intersect in litigation, would enable legal actors and litigants to collaborate towards sculpting the process, reasoning and outcomes to best effect.[30] By this I mean outcomes that most closely reflect our constitutional aspirations, public benefit and mutual satisfaction. Although I pitch constitutionalism as a standard, as I must, it is a generalisation that is itself open to contestation. Good! This is what jurisgenerative and agonistic politics is all about.[31] However, contestation pitched as a game of chess, devoid of any altruism, common purpose, mutuality and reciprocity, is an individualistic battle to win at any cost, rather than to find practical solutions to solve problems.

As with all human social projects, litigation has its imperfections; it is vulnerable to abuse.[32] Law breakers, like corrupt politicians[33] and bureaucrats[34] have discoloured litigation with a pejorative connotation. Dysfunctionality in other institutions turns litigants in ever increasing numbers to the courts for remedies.[35] 'Cottage industries' within the legal profession to compel basic government

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[29] Dennis Davis 'Duncan Kennedy's a Critique of Adjudication: A Challenge to the Business as Usual Approach of South African Lawyers' 117 S. African L.J. 697 (2000) at 709.

[30] Van Sandelingenambacht 'Legal Postism' 10 Eur. Rev. Private L. 111 (2002) at 131 According to Kennedy: '"If we changed the rules by making the choices different from the ones the judges have made, maybe we could achieve greater distributive justice among groups without the dire consequences that we fear from measures like revolution or gigantic tax-and-spend programs".'

[31] I summarised these concepts in Chapter 1; a fuller explanation follows in Part A of this Chapter.

[32] Maris van Sandelingenambacht 'Legal Postism'10 Eur. Rev. Private L. 111 (2002) at 131 '[L]egal institutions have been misused to legitimize social hierarchies that oppress weaker groups, also by judges who interpret the lacunas and ambiguities in the legal material to further group interests. … [O]ppression is not inherent to the rule of law as such.'

[33] *Black Sash Trust v Minister of Social Development and Others (Freedom Under Law NPC Intervening)* [2017] ZACC 8; 2017 (5) BCLR 543 (CC) (*SASSA*); *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* [2016] ZACC 11 BCLR 618 (CC); 2016 (3) SA 580 (CC) (*Nkandla*).

[34] *South African Broadcasting Corporation Soc Ltd and Others v Democratic Alliance and Others* [2015] ZASCA 156; [2015] 4 All SA 719 (SCA); 2016 (2) SA 522 (SCA) (*SABC*).
*Ntlemeza v Helen Suzman Foundation and Another* [2017] ZASCA 93; [2017] 3 All SA 589 (SCA); 2017 (5) SA 402 (SCA) (*Ntlemeza*).

[35] *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute* [2014] ZACC 6, 2014 (3) SA 481 (CC), 2014 (5) BCLR 547 (CC)('*Kirland*'); *SASSA.*
Leo Boonzaier Good Reviews, Bad Actors: The Constitutional Court's Procedural Drama https://constitutionalcourtreview.co.za/wp-content/uploads/2018/10/Good-Reviews-bad-

services like paying social grants, issuing passports, providing medical records in malpractice suits, considering applications by foreign nationals for refugee and residence status, fill the motion court rolls in the High Court, KwaZulu-Natal where I sit. Members of the public have little choice but to seek the courts' help. Dysfunctionality and inefficiencies in state institutions, of which the SAPS is one, gradually contaminate the courts, causing them to falter under the sheer overload of work and the under-resourcing of services.

For reasons of diminishing resources, expanding demand for court services, and the misfit of some disputes into litigation that does not remedy the sources and causes of conflict in order to solve problems, especially of the socio-economic and political kind, traditional litigation must be recalibrated. Recalibration should aim to preserve the best in traditional litigation to enable it to perform its rule-making and enforcement functions efficiently. Simultaneously, it must enable new forms of processes, techniques and interventions to reach substantively into complexities bedevilling society.

My aim is to create awareness and raise consciousness amongst legal actors and litigants about what goes on in litigation. Beyond the ostensible form of litigation, extraneous influences are at play. Unarticulated phenomena influence litigation. Legal actors and litigants inject the phenomena into litigation in perceptible and imperceptible ways. Awareness of what the phenomena are would enable the legal actors and litigants to manage them in order to exercise better control of their litigation. Furthermore, they also need to recognise that some conflicts formulated to fit into the mould of disputes are incapable of yielding durable, problem solving solutions through litigation. Non-traditional forms of litigation and appropriate conflict resolution and management processes have better showings for problem solving in such circumstances.

Non-traditional forms of litigation would include suspending the litigation by agreement or by directive of the court to enable the litigants to use other

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reviews-CCR-VII-2015.pdf. (accessed 12 December 2018).

appropriate process options – mediation, facilitation, mass meetings, fact-finding, even criminal prosecution. Litigation can resume on those issues, if any, that still remain in dispute. Meaningful engagement and experimentalism are process examples of recalibrating litigation to generate durable transformative constitutionalism.[36] But none of these strategic innovative interventions would fly without consciousness of transformative constitutionalism under the wings of the legal actors and litigants.

Shifting the consciousness of lawyers, whose livelihoods thrive on maximising disputes, is a hard ask. But practising law does not have to feed off the troubles of others. Proactive lawyering and prioritising constitutional transformation are both morally and economically rewarding, not just for the lawyers and their litigants but for society. Expending energies and resources to fix dysfunctional state institutions would altruistically benefit society far more than depleting state coffers to satisfy individualistic claims arising from malpractices. Can our constitutional order survive without recalibrating litigation and reengineering an efficient DSD?

My aim is not to develop any theories of litigation. Instead, I suggest strategic interventions to recalibrate litigation as one of many appropriate conflict resolution processes to achieve durable transformative constitutionalism. Decidedly, I also seek not to offend or embarrass the actors I mention, but to use their performances for purposes of illustration, learning and development. Like it or not, all of us as actors in public spaces are vulnerable to public scrutiny. This is as it should be. For, this is what it means to be accountable and transparent.

### 2.5 Why *Barnard*?

*Barnard*[37] was a discrimination claim under the Employment Equity Act

[36] Klare 'Legal Culture and Transformative Constitutionalism' (1998) 14 *SAJHR* 146 at 147.
[37] I use *Barnard* generically, unless I distinguish the decisions of the courts and the judges.

(EEA).[38] The facts were not in dispute.[39] In 2005 and 2006 Renate Barnard, then a captain in the South African Police Services (SAPS) applied for promotion to the post of superintendent.[40] Despite scoring the highest points on both occasions SAPS did not promote her. Nor did it promote any of the African males who had also been shortlisted. Aggrieved, she turned to litigation to enforce her right to equality and the right not to be discriminated against on the grounds of her colour and race.[41]

The legal materials from which the rules, rights and remedies derived were also not disputed.[42] The rules were that everyone has the right to equality[43] and affirmative measures may be designed to promote equality.[44] The SAPS

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[38] Act 55 of 1998.

[39] Ms Barnard's Heads of Argument in LAC para 3: 'Every fact set out by the [Labour Court] was common cause or supported by documentary evidence.'

[40] *Barnard* (CC).

[41] *Barnard* (Moseneke ACJ) para 18.

[42] See Frank I. Michelman 'Reflection' 82 Tex. L. Rev. 1737 2003-2004 at 1739. Despite the contestation about racial affirmative action, whether its effects are good or bad, what it means is settled. It is widely understood, as it was in *Barnard*, to be instances when '(a) a law or governmental act is challenged on the ground that it distributes relatively advantageous, and correlatively disadvantageous, forms of treatment to persons depending on their memberships in racially defined groups, and (b) the challenged law or act is defended on the ground that it serves one or both of two constitutionally appropriate objectives: erasing the social legacy of group-based oppression in the past and advancing the fortunes and the standings of members of a historically oppressed or subordinated group or groups. … (c) no one doubts that the claimed objectives supply the true motivation for the questioned law or act, and (d) no one denies the existence of a robust, instrumentally rational connection between the law or act in question and its claimed objective.'

[43] S 9(1) of the Constitution of the Republic of South Africa, 1996: '(1) Everyone is equal before the law and has the right to equal protection and benefit of the
law. …
(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.'
S 6(1) of the EEA: '(1) No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth.'.

[44] S 9(2) of the Constitution: 'Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.'
S 6(2) of the EEA: '(2) It is not unfair discrimination to-

intended its Employment Equity Plan (EEP) to be implemented as an affirmative measure when appointing officers in order to achieve equitable, demographic representation[45] in the police services.[46] At superintendent post level 9, the appointment of four instead of one white female officer had already over-represented that population group. Even though the EEP targeted one coloured woman for appointment, none held the position at level 9. Its target of 14 African males also fell short by as many as eight.[47]

These 'numerical norms' in the EEP were adopted after the SAPS followed an elaborate process of consulting representative trade unions, of which Solidarity, Ms Barnard's union, was not one.[48] Justifiably, therefore, the rules were aimed at attenuating the right to equality and equal benefit under the law of over-represented groups, precisely for the purposes of enabling the exercise of this very right and benefit by under-represented groups.[49]

Complying with the rules to give effect to the right practically and predictably meant that the remedy in the context had to be to appoint a coloured woman or an African male to fill the vacancy. Appointing Ms Barnard, a white woman, would not have remedied under-representation and consequent inequality of black people. This, the National Commissioner concluded[50] would have

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(a) take affirmative action measures consistent with the purpose of this Act.

[45] S 42 of the Employment Equity Act, 55 of 1998 (EEA): In implementing employment equity a designated employer must take 'all' of the following into account:
(a) 'The extent to which suitably qualified people from and amongst the different designated groups are equitably represented within each occupational category and level in that employer's workforce in relation to the-
(i) demographic profile of the national and regional economically active population;
(ii) pool of suitably qualified people from designated groups from which the employer may reasonably be expected to promote or appoint employees;'
Code of good practice: Preparation, implementation and monitoring of employment equity plans No. R. 1394 23 November 1999: '8.4 Numerical goals:8.4.1 Numerical goals should be developed for the appointment and promotion of people from designated groups. The purpose of these goals would be to increase the representation of people from designated groups in each occupational category and level in the employer's workforce, where under-representation has been identified and to make the workforce reflective of the relevant demographics as provided for in form EEA 8.'

[46] See Chapter III of the EEA (Affirmative Action) and s 20 for requirements for EEPs.

[47] *Barnard* (SCA) para 34; SAPS Heads of Argument (CC) para 22.

[48] S 20 of the EEA; *Barnard* (Moseneke ACJ) para 44 fn 40.

[49] Carole Cooper 'The Boundaries of the Employment Equity Act' 2003 Vol 24 ILJ 1307-1314 at 1308.

[50] For the distinction between information, conclusions, reasons and decisions see *Nkondo and others v Minister of Law and Order and another; Gumede and others v Minister of Law and*

exacerbated the over-representation of white women at that level. Consequently, he declined to appoint her. Ms Barnard, assisted by Solidarity, challenged his decision.

Why then did this apparently routine filling of a promotion post escalate to 'difficult, if not emotive, questions of equality, race and equity at the workplace'?[51] Polarising conflict evolved over more than seven years from the Labour Court (LC), to the Labour Appeal Court (LAC), to the Supreme Court of Appeal (SCA), all the way to the Constitutional Court (CC). Traditional litigation, theoretically defined as a process in which litigants adduce evidence and present arguments before an independent and impartial judge, who then issues a reasoned decision to settle the dispute,[52] anticipates that if the process is followed methodically with meticulous fidelity to law applied to the facts, the results should be predictable.

I use *Barnard* as the main substratum for my explorations into the unpredictability of judicial decisions. My study is not primarily a critique about balancing the right to equality with affirmative measures to prevent discrimination. Others have done so ably.[53] None have commended *Barnard*

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*Order and another; Minister of Law and Order v Gumede and others* [1986] ZASCA 20; 1986 (2) SA 756 (A) at 772I–773B (*Nkondo*).

[51] *Barnard* (Moseneke J) para 1.

[52] Fuller 'Forms and Limits' (1978) 92 *Harv. L. R*. 353.

[53] E.g. Chris McConnachie 'Affirmative Action and Intensity of Review: *South African Police Service v Solidarity obo Barnard*' http://www.saflii.org/za/journals/CCR/2018/8.pdf (accessed 12 December 2018); Catherine H Albertyn 'Adjudicating affirmative action within a normative framework of substantive equality and the Employment Equity Act — An opportunity missed? *South African Police Service v Solidarity obo Barnard'* 2015 SALJ 711; Chris McConnachie 'Human Dignity, Unfair Discrimination and Guidance' Oxford Journal of Legal Studies, Vol. 34, No. 3 (2014), pp. 609–629 doi:10.1093/ojls/gqu002 Published Advance Access February 11, 2014; Andrew Wheelhouse 'A House Divided: Grappling with affirmative action in South Africa' (OxHRH Blog, 3 October 2014), http://humanrights.dev3.oneltd.eu/?p=13772 (accessed 5 October 2017); AM Louw 'The Employment Equity Act, 1998 (And Other Myths About The Pursuit Of "Equality", "Equity" And "Dignity" In Post-Apartheid South Africa) Part 2' www.saflii.org/za/journals/PER/2015/29.rtf;
*Serjeant at the Bar* 'Justices fail to give a legal test for implementing equity fairly' 17 Oct 2014 00:00; Duncan Kennedy 'A Cultural Pluralist Case for Affirmative Action in Legal Academia' 1990 Duke L.J. 705 (1990) at 743. However, the response of Vice to *Barnard* in 'Dignity and Equality in *Barnard*' CCR VII (2015) from the angle of white people to the judgment and her take on equality-dignity being mutually exclusive, triggers a dialogue about an issue as sensitive as ideology.

*(CC)* so far.[54] I add my sentiments to theirs, but from different perspectives. My critique is from the perspective of litigation as a manifestation of the causes of conflict, the sources of which are often unarticulated; this in turn impedes effective conflict diagnosis and resolution. In litigation, the divergent views or ideological dispositions of the litigants and their representatives, as the sources of conflict, intersect with the ideological dispositions of the judges to yield divergent judgments. Crucially, this intersection and its ramifications intrigues me. It distinguishes ideology from other factors extraneous to the legal materials that also influence decision-making. Notwithstanding, ideology as the fulcrum on which decisions of legal actors and litigants turn, remains unarticulated in *Barnard*. Bar a few exceptions, ideology remains subterranean in most litigation, despite its influence on decision-making. This lack of transparency is a technique of conflict avoidance. But it is also a mechanism to escape from accountability. Whatever its usefulness elsewhere,[55] I argue that avoidance and unaccountability impugn the integrity of litigation and yield outcomes that miss their target of resolving conflict, solving problems effectively and, in some instances, of even covering up corruption.[56]

My purpose is also not to review the case for doctrinal understanding of substantive constitutional law. Although this is inevitable, even in a study of how external objective conditions, personal internal ideological dispositions, and other extraneous and structural phenomena implicate jurisprudence, it is incidental and illustrative of my primary purpose of developing not a theory, but rather strategies for litigation for problem solving.

I choose *Barnard*, because it is a delta at which law clashes head-on with politics in a sea of ideological differences. *Barnard* poses some hard, legal and ideological questions. For instance, in litigating to vindicate a discrimination claim in the context of the application of affirmative action, are the choices for

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[54] Even though the judgment favoured the advancement of black people through affirmative action, I was unable to find a single critique from a black person about *Barnard.*

[55] DSD pyramids locate avoidance at the apex or the baseline as a process most effective for resolving particular disputes. It is used as a conflict modifier. Avoidance as the failure to account, especially of public office-bearers, is a conflict aggravator.

[56] Ziyad Motala 'Something is rotten in the state of Durban' Legalbrief Monday 21 January 2019.

determining the dispute questions of law, facts, both or none of the above? My emphasis is not on interpreting the rules and assessing the facts, but rather on discovering what rules and facts were chosen, how the rules were applied, and what inferences were drawn from the facts. Here and there I find clues as to why they were chosen. While the litigants would naturally have predetermined their preferred outcomes when they chose to litigate, Kennedy's 'hermeneutic of suspicion'[57] inspires me to ask whether the judges would also have had in mind at the beginning of the case what, in the end, would be their best outcome for a litigated dispute about affirmative action.

As for politics and ideology, in an affirmative action discrimination case in the context of employment and fair labour practices, they would be right up there. In tracking the evolution of affirmative action jurisprudence in the USA, Tushnet shows how politics and culture responded to race in the Supreme Court. Race was central for the Warren Court, important for the Burger Court and a non-issue for the Rehnquist Court.[58] In *Barnard*, across racial lines, was consensus genuine about constitutionalising affirmative action to remedy the political and socio-economic ravages of apartheid, and about fostering a non-racial democratic country based on the values of dignity, equality and freedom? Or was it a façade, a temporary retreat to fight another day? Ideologically, was there antagonism against white people using the Constitution to enforce rights when, under apartheid, they fought against the establishment of a constitutional democracy? Was *Barnard* intended to turn the Constitution as weapon of choice against black people, calling the constitutional bluff of non-racialism, so to say? Whose Constitution is it anyway?

What unarticulated premises influenced the litigants and legal actors? Were binary forms of adjudication conducive to problem solving? In all the ramifications of this intensely emotional conflict, would 'the bridge' of (re)conciliation[59] have mediated the tensions? Is the final outcome a gain for

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[57] Kennedy 'Hermeneutic of Suspicion' at 369.
[58] Mark Tushnet *A Court Divided* at 223-248.
[59] Etienne Mureinik 'A Bridge to Where - Introducing the Interim Bill of Rights' 10 S. Afr. J. on Hum. Rts. 31 (1994).

individualism or altruism, for retaining the status quo or for transformation, for rule-centricity or substance, or some permutation in between these binaries?

I make two disclaimers: First, as an intense case about the politics of equality and implementing affirmative action to promote the achievement of equality, studying *Barnard* tests my own views about these crucial questions of public and private importance. As an activist for transformation under apartheid and now under the Constitution, I have a leftist ideological disposition that manifests immediately in my very choice of *Barnard* for a case study. My biases will also show in the headings I select for my analysis of *Barnard* and the disclosures I make about my political, constitutional and legal consciousness and culture. Anyone who believes that judges are stripped of their ideology and biases once they don their robes is dangerously in denial. I distinguish ideology as constitutive of a person's identity, as styles or patterns of thinking, whereas bias is partiality or preference. Distinguishing them in practice is difficult. They overlap at times. Managing bias is par for the course for a judge. Acknowledging ideology triggers discourse, invites reflection, perhaps personal development, and hopefully durable constitutional transformation.

Second, I do not profess any expertise in the sociological, psychological or behavioural aspects that often arise in diagnosing causes of conflict and designing remedies to fix them. I am mindful that these competencies are material to a live conflict. For now, my contribution is from the narrow perspective of my training and experience as an appropriate dispute resolution practitioner rendering arbitration, mediation, facilitation and dispute system design services, predominantly in the field of labour and employment. Whatever diagnostic skills I acquired in my practice I apply to studying *Barnard.*

### 2.6 Structure

In Part A I identify the political and economic system as two of the main external, objective conditions followed by subjective conditions – constitutional, political and legal culture and consciousness – that constitute the milieu in which litigation occurs in South Africa. These conditions import four legal

theories that underpin my analyses. Recognising that unarticulated premises influence adjudication prefaces my case study of how marital status remained an unarticulated ground of discrimination. Thereafter, the discussion centres on ideology. Then binaries show how ideology plays out practically. This discussion on extraneous, non-law factors puts on the agenda other practical and human conditions impacting on the judicial function. Implicitly, these factors intersect amongst one another and many more that fall beyond the scope of my research. Testing that they are not unique to *Barnard* is a journey through other cases before I reach *Barnard*.

In Part B I turn the spotlight on *Barnard* to unravel what the unarticulated ideological source(s) of conflict might have existed amongst the litigants. From how conflict manifested through the litigation I strive to deduce its cause, and what (unarticulated) influences the judges brought into the mix to yield judgments for and against Ms Barnard. I diagnose from the transcript of the evidence of the trial, the judgments and the performance of the legal actors how the factors combined over the four tiers of the judiciary to influence jurisprudence. In the CC, the form versus substance tension was unexpectedly added to the mix when, apparently, a new cause of action arose. I use the inefficiencies in the SAPS, its avoidance of all prescribed consensus-seeking processes, Ms Barnard's evidence and the National Commissioner's decision not to appoint Ms Barnard, as the raw materials or data to illustrate how the ideological ambivalence about affirmative action amongst the legal actors and especially the litigants fed into the judgments.[60] How suitable was the structure, forms and limits of litigation for dispute resolution, problem solving and conflict management in *Barnard*?

[60] Vice 'Dignity and Equality in *Barnard*' CCR VII (2015).

## 2.7 Part A: Possibilities for predictability?

'Democracy is only a system for processing conflicts without killing one another; it is a system in which there are differences. ...'[61]

Part A of Chapter 2 of my thesis has 5 sections. Section 1 is a diagnosis of the objective and subjective conditions under which litigation is conducted. 'Objective conditions' splits into two parts. The first analyses the state of politics and the constitutional project; the second describes the foundations of the economy. 'Subjective conditions' analyses the state of legal, constitutional and political culture and consciousness that inform litigation. Four subsections cover distinctions and interconnections between culture and consciousness; legal culture and consciousness; consciousness, culture and unarticulated phenomena; political culture and constitutional culture. Section 2 contextualises my thesis within the framework of four legal theories, namely, Critical Legal Realism (CLR); agonism and jurisgenerative constitutionalism; experimentalism and lastly, positive and normative approaches to studying judiciaries. Cumulatively, the preceding sections form the theoretical backdrop for 'Unarticulated influences, phenomena and premises', the title of the section 3. In the first subsection I unearth three cases in which the court articulated the influence of the unarticulated phenomena. The second subsection analyses discrimination cases with particular reference to marital status as the ground. After 'proving' that unarticulated phenomena are at play in adjudication, I show in section 5 how four factors – ideology, defaulting to binaries, the nature of the judicial function and judges as humans – cause unarticulated premises to influence decision making. For completeness, in section 5 I Judicial Analytics

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[61] D Moseneke citing A Przeworski *Reflections On South African Constitutional Democracy – Transition And Transformation* Keynote address at the Mistra-Tmali-Unisa Conference *20 Years of South African Democracy: So Where To Now?*, University of South Africa (12 November 2014) at 19. http://www.mistra.org.za/Library/ConferencePaper/Documents/Moseneke%20Keynote%20Address%20at%20the%2020%20Years%20of%20Democracy%20Conference%2012%20-%2013%20November%202014.pdf (accessed 14 September 2019).

as an emerging technological tool to predict how judges are likely to decide cases.

Investigating and exposing what lies beneath the surface of litigation is the overarching theme of this chapter. Litigation is the manifestation of causes of conflict; but the sources of conflict lie beneath the surface. For as long as they remain there, unexposed and unresolved, conflict would continue to simmer, finding new ways of expression.

In this part I identify phenomena most likely to influence decision-making. However, attributing particular phenomena to judges and judgments is sheer speculation, inspired by the latitude of academia.

### 2.7.1 Objective and subjective influences on litigation

Litigation struggles with the diversity of morality and the complexity of issues to achieve social ordering. Ineluctably, the search for strategies to move litigation beyond dispute resolution to problem solving and conflict management reaches past law into moral, political, economic and other complexities, which are often the very sources of conflict. Therefore, some assessment of the objective and subjective conditions in which my study is located must preface my analysis of the state of litigation under our constitutional democracy generally, and in which *Barnard* germinated. In an affirmative action case, tensions between laissez faire free market policies are bound to clash with the redistributive aims of transformative constitutionalism. The singular ground of discrimination prioritised Race in the consciousness everyone involved in the litigation. These objective and subjective condition are sources of ideological contestation. They cause tensions beneath the surface of litigation, unarticulated in the pleadings, evidence and arguments. By objective conditions I mean those circumstances that individuals cannot control. Subjective conditions mean the opposite. Both coexist in dynamic relation to each other to influence litigation in perceptible and imperceptible ways. They are not canvassed exhaustively in Part A but suggestively for the purposes of the analysis of *Barnard* in Part B. More broadly, they are indispensable for analysing litigation as lawfare, a consequence of sub-optimal conditions charactised by the failure of politics.

Under these conditions, can litigation stave off a constitutional crisis? Or will its meagre offerings in redistribution claims for livelihood rights untether the beasts of poverty and inequality?

#### 2.7.1.1 Objective conditions

##### 2.7.1.1.1 State of politics and the constitutional project

Twenty years after the cold war and the resurgence of constitutionalism, the 2008 international financial debt crisis unmasked capitalism's siege as banks traditionally epitomised as paragons of commercial virtue had to be bailed out by sovereign states.[62] Economic inequalities and the struggle for scarce resources intensifies alongside threats to the environment. In order to recalibrate itself to new social and environmental threats, capitalism treadles between corporate social investment, philanthropy, sustainability and more recently, creating shared value.[63] Technological innovation triggered by the Internet sees an explosion of social media platforms that pose as much hope for mass mobilisation for benevolent, altruistic transformation as they do for malevolent, individualistic devastation. Paradoxically, social media heralds both prospects and problems for resolving new forms, causes and sources of conflict. Simultaneously, as technology broadens the scope for law and justice, the risks is real of small groups, or even individuals, like software hackers, havoc-reeking. Under these conditions, litigation is a toothless enforcement tool against unidentifiable, untraceable deviants. Traditional forms of litigation and conflict management have to catch up to be effective. Processes must not only resolve disputes but also manage, prevent and avoid conflict. Deficiencies in traditional ways of governance and regulation of society in the age of the fourth revolution have turned innovators in the private and public sector to look to behavioural sciences for solutions to encourage intuitively appropriate

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[62] Andrew Ross Sorkin *Too Big To Fail: The Inside Story of How Wall Street and Washington Fought to Save the Financial System--and Themselves* (2010).

[63] Michael E Porter and Mark R Kramer 'Creating Shared Value' (January-February 2011) *Harvard Business Review* https://hbr.org/2011/01/the-big-idea-creating-shared-value (accessed 03/10/2015).

behaviour.[64] Litigants and legal actors too must recalibrate their search for new solutions to social disorder.

Internationally, the balance of forces in nascent constitutional democracies are hurtling towards crises. Post-cold war idealism about liberal democracy is imploding.[65] This is not to say constitutionalism is in crisis in the sense that constitutions are in imminent danger of failing at their central task of keeping 'disagreement within the boundaries of ordinary politics rather than breaking down into anarchy, violence or civil war'.[66] Constitutions protect civil liberties; they distribute and restrain power; they keep the peace; and they compel people to struggle within rather than outside politics.[67] Although not in crisis yet, 'constitutional democracies appear in trouble throughout the world'.[68] For now, constitutions buffer capitalism against anarchy, but they are porous.

Economic globalisation evidences a correlation between increased foreign ownership and declining voter turnouts in developed countries.[69] Politics is transactional internationally.[70] Vote buying and rigging are commonplace. Partisan gerrymandering to limit voting by poorer people and minorities in places like the USA, Poland and Catalonia compromises not only electoral

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[64] Richard H. Thaler and Cass R. Sunstein *Nudge: Improving Decisions About Health, Wealth, and Happiness* (2008); M Gladwell *Blink: The Power of Thinking Without Thinking* (2005).
[65] Graber et al eds. *Constitutional Democracy in Crisis?* 'Introduction' at 1-9; Chris Bateman 'Socialism behind SA's sorry state, not State Capture – Chris Hattingh' (12 December 2018) https://www.biznews.com/thought-leaders/2018/12/12/socialism-state-capture-eskom (accessed 12 December 2018).
[66] Jack M. Balkin 'Constitutional Crisis and Constitutional Rot' in *Constitutional Democracy in Crisis?* Graber et al eds at 14.
[67] Balkin 'Constitutional Crisis and Constitutional Rot' in *Constitutional Democracy in Crisis?* Graber et al eds. at 14.
[68] Graber et al *Constitutional Democracy in Crisis?* 'Introduction' at 1-9.
[69] David Schneiderman 'Disabling Constitutional Capacity' in *Constitutional Democracy in Crisis?* Graber et al (eds) at 554-555.
[70] Maxim Mironov and Ekaterina Zhuravskaya 'Corruption in Procurement and the Political Cycle in Tunnelling: Evidence from Financial Transactions Data' *American Economic Journal: Economic Policy 2016, 8(2): 287–321 http://dx.doi.org/10.1257/pol.20140188*; Allan Smith 'Deutsche Bank employees reportedly flagged suspicious transactions involving Trump and Kushner' https://www.nbcnews.com/politics/donald-trump/deutsche-bank-employees-reportedly-flagged-suspicious-transactions-involving-trump-kushner-n1007501; Amil Umraw 'Reserve Bank reveals how Guptas stole millions' https://www.timeslive.co.za/politics/2019-06-10-reserve-bank-reveals-how-guptas-stole-millions/ Pravin Gordhan's testimony at the Zondo Commission https://www.news24.com/Video/SouthAfrica/News/watch-live-pravin-gordhan-continues-testimony-at-statecaptureinquiry-20181120 (accessed 14 September 2019).

quality but also 'practical participation in legislative and [other] debates'. [71] So majoritarian politics is no longer a reliable default option for decision-making. Left unchecked, decision-making by voting may well share the same criticisms levelled against judicial review, i.e. that they are decisions by the 'unelected and unaccountable.'

Threats to democracy are far more intransigent than voter apathy.[72] The very design of our electoral system that entrusts political parties instead of the electorate to choose their legislators creates ideal conditions for the 'unelected and unaccountable' to flourish. Blind trust in presidents acting in the national interests exposes flaws in constitutions that bestow upon them expansive powers to appoint, unappoint and even disappoint ministers and heads of key institutions. Over the past decade, an uneasy sense of crisis envelops South Africa's constitutional order.[73] Service non-delivery protests escalate. So does their accompanying ills of poverty and inequality. The erstwhile Public Protector, Thuli Madonsela sharpened discontent with her 'State of Capture' Report in late 2016. That report spawned the Zondo Commission into State Capture (Zondo Commission). Together with the Nugent Commission into the South African Revenue Services (Nugent Commission) and the Mpati Commission into the Public Investment Corporation (Mpati Commission) responsible for investing more than R3 trillion of pension funds, they expose shocking details of the depth of the rot. Racist rhetoric, protests and sporadic threats of disruption from weaker political parties peppered the National and Provincial Elections in 2019 (NPE19).[74]

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[71] Tom Ginsburg and A Z Huq 'Defining and Tracking the Trajectory of Liberal Constitutional Democracy' in *Constitutional Democracy in Crisis?* Graber et al eds. at 37; Mark A Graber 'What's in Crisis? The Postwar Constitutional Paradigm, Transformative Constitutionalism, and the Fate of Democracy' in *Constitutional Democracy in Crisis?* Graber et al eds. at 674.

[72] Statistics extracted from Electoral Commission's records and results system show that in South Africa, voter participation in national and provincial elections dropped from almost 89% in 1999 to 66% in 2019.

[73] Heinz Klug 'State Capture or Institutional Resilience – Is there a Crisis of Constitutional Democracy in South Africa?' in *Constitutional Democracy in Crisis?* Graber et al eds. at 295.

[74] A Umraw 'Small parties threaten to 'call our masses' over election protest' (10 May 2019) https://www.timeslive.co.za/politics/2019-05-10-small-parties-threaten-to-call-our-masses-over-election-protest/ (accessed ?); Luyolo Mkentane 'Smaller parties protest about IEC processes, lack of media coverage' (9 May 2019) https://www.businesslive.co.za/bd/national/2019-05-09-smaller-parties-protests-about-iec-processes-lack-of-media-coverage/ (accessed 14 September 2019); R Davis 'SA's biggest electoral losers: Say goodbye to the minnows, outsiders, underdogs and chancers' (10 May

Unlike India, Ireland and Namibia, South Africa chose to recognise socio-economic rights as justiciable and not merely aspirational.[75] Thus, failure to deliver on education, housing, health and employment because budgets for these basics are diverted into corrupt hands of some ruling party politicians and their cronies, pushes constitutional politics to a tipping point. The International Labour Organisation (ILO) reported that South Africa's Gini coefficient for wage inequality of .63 is the highest in the world. A zero coefficient means perfect equality.[76] Add to this the depth to which corrupt networks have insidiously penetrated the State and undermined many institutions, ranging from the national intelligence, prosecutorial and revenue to local government services, South Africa is a democracy on the threshold of a crisis. When government and institutions are unable or unwilling to perform their constitutional functions, when the country is facing corruption on a grand scale, when lawfare undermines the capacity to govern,[77] when institutions embroiled in conflict become dysfunctional, when dysfunctionality impedes the delivery of basic services, then fertile grounds exist for explosive civil and political conflict.[78] The vigour of such political and social conflict could deplete opportunities for constructive, rational engagement. These conditions would bear the hallmarks of a constitutional crisis. Unless this is arrested, South Africa could hurtle faster into crisis - and the unipolar nature of South African politics since democracy could see a redistribution of political power with uncertain consequences for stability in government.

The Economist assesses South Africa to be 'a flawed democracy', that is, 'a country that holds free and fair elections, and where, even if there are problems, basic civil liberties are respected.' For now, South Africa has a functioning

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2019) https://www.dailymaverick.co.za/article/2019-05-10-sas-biggest-electoral-losers-say-goodbye-to-the-minnows-outsiders-underdogs-and-chancers/ (accessed 14 September 2019).

[75] Klug 'State Capture or Institutional Resilience' in *Constitutional Democracy in Crisis?* Graber et al eds. at 295-311.

[76] International Labour Organisation 'Global Wage Report 2018/19 What lies behind gender pay gaps' https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_650553.pdf (accessed 5 December 2018).

[77] Michelle Le Roux and Dennis Davis in *Lawfare – Judging Politics in South Africa* (2019) define 'Lawfare' which I discuss in Chapter 4.

[78] 'Protests in South Africa' https://en.wikipedia.org/wiki/Protests_in_South_Africa (accessed 26 November 2018).

government that holds periodic free and fair elections. This suggests that there is no constitutional crisis – yet.[79] However, a political party that gets the majority of votes in an election is not representative of the majority of people if those eligible to register and to vote exercise fail to exercise their franchise rights. Furthermore, participating in elections cannot imply that the electorate abandons its rights to participate politically between elections. What happens between elections to hold elected representatives to account matters.[80] Whether the strengthening institutions of democracy through civic participation in politics should be a factor in assessing the quality of democracy.[81]

#### 2.7.1.1.2 Foundations of the economy

The South African economy is built on the foundations of a capitalist mode of production and distribution of goods and services. Its constitutional commitment to socially inclusive human developmental goals is hit by a neoclassical approach to economic governance.[82] Economic policy is gradually relinquished in favour of institutional investors and peoples' access to basic services depends on their ability to pay. Good economic governance tends to mean 'economic management' and 'macro-economic stabilisation'. Economic performance is measured as 'economic growth, rather than human-centred development and equitable growth'.[83]

Representative of a compromise, the economic system is a particular balance to assuage demand for livelihood rights with hyper-nationalism whilst retaining free market principles of production and distribution.[84] Sibanda's understanding

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[79] Staff Writer 'Why South Africa is a flawed democracy' (11 January 2019) https://businesstech.co.za/news/government/293154/why-south-africa-is-a-flawed-democracy/ (accessed 13 January 2019).

[80] Henk Botha 'Representing the poor: Law, Poverty, and Democracy' in *Law and Poverty* Sandra Liebenberg and Geo Quinot eds. at 79 - 99.

[81] Botha 'Representing the poor: Law, Poverty, and Democracy' in *Law and Poverty* Sandra Liebenberg and Geo Quinot eds. at 82-83.

[82] Seeraj Mohamed 'The effect of a mainstream approach to economic and corporate governance on development in South Africa' 'Constructing a democratic developmental state in South Africa: potentials and challenges' (2010) Omano Edigheji ed.

[83] Omano Edigheji 'Constructing a democratic developmental state in South Africa: potentials and challenges' (2010) at 8-9.

[84] Joseph Sidney Werlin 'The Pathology of Hyper-Nationalism' *The Southwestern Social Science Quarterly* Vol. 20, No. 3 (December, 1939) at 300-31; Richard Pithouse 'South Africa must avoid authoritarian solutions'17 Jul 2019 11:16 https://mg.co.za/article/2019-07-17-south-africa-must-avoid-authoritarian-solutions; Daryl Glaser 'The new black/African racial

that 'constitutionalism is *not so much* about delivering a preordained form or state than it is an expression of choices made by those collectively responsible for establishing a particular system of constitutionalism', is apt.[85] Roughly segmented, optimists, of which there are a lamentable few, would describe South Africa's economy as social democratic.[86] Others, relieved that the foundations of a capitalist economy remain intact, continue to fly the flag for liberalism.[87] Diehard liberals and right-wingers, a small but economically powerful bloc, who deny that the Constitution authorises expropriation without compensation of land, have thus far staved of economic transformation of property rights and other incursions into their laager.[88]

Simultaneously, legal history fuels indeterminacy in both the form and substance of all law. Constitutional democracy in South Africa did not jettison its common law, which is Roman-Dutch, and the judicial precedents set under apartheid. Ambiguities arising from the common law are compounded by personal, conflicting, ideological attractions to individualism and altruism, and legal culture and consciousness. Such conflicts are rendered all the more poignant in competitions for procurement of goods and services,[89] in contestation about property rights and, unsurprisingly, affirmative action, with beneficiaries of apartheid, like Ms Barnard,[90] trying to distance themselves from

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nationalism in SA: towards a liberal-egalitarian critique daryl.glaser@wits.ac.za (accessed 24 October 2019).

[85] Sanele Sibanda 'Not Purpose-made! Transformative Constitutionalism, Post-Independence Constitutionalism, And the Struggle to eradicate Poverty' in *Law and Poverty* Sandra Liebenberg and Geo Quinot eds. at 42.

[86] Marius Pieterse elaborates in 'What do we mean when we talk about transformative constitutionalism? (2005) 20 SAPR/PL at 156; E.g. *Den Braven Sa (Pty) Ltd v Pillay and another* 2008 (6) SA 229 (D) para 33 – a restraint of trade case in which a debate plays out about whether the Constitution is social democratic or liberal.

[87] Imraan Buccus 'The EFF and the spectre of fascism' 03 November 2013 - 02:01 https://www.timeslive.co.za/sunday-times/lifestyle/2013-11-03-the-eff-and-the-spectre-of-fascism/ (accessed 24 October 2019); JM Vorster 'Neo-liberalism, social democracy or a social market system in South Africa? A Christian-ethical appraisal' STJ vol.5 n.1 Stellenbosch 2019.

[88] Moira Levy 'Land reform needs more than expropriation without compensation' 12 February 2019 https://www.dailymaverick.co.za/article/2019-02-12-land-reform-needs-more-than-expropriation-without-compensation/(accessed 24 October 2019).
'New land reform blackmail: Solidarity' https://www.iol.co.za/news/politics/new-land-reform-blackmail-solidarity-1410260 (accessed 24 October 2019).

[89] E.g. evidence in the Mpati and Zondo Commissions of Enquiry into fraud and corruption.

[90] Transcript: Extract A and B in Part B. e.g. '[Mr Mokari]: Why did you have to go to different colleges if you are one people in one country? [Ms Barnard]: I cannot explain that, I was not part of the system, I was a person as a member of this country, I cannot explain that. [Mr Mokari]: Will you agree with me that in a country like South Africa where black people

their inherited past, [91] and the new elite scrambling to reclaim their disinheritance,[92] elbowing out the poor in their rush.[93]

Recognising that politics, institutions and practices (including litigation) are both dialectically constitutive of and fashioned by the economic system is relevant for devising strategies for directing them cumulatively towards egalitarian ends. Furthermore, theories for change must recognise that the balance of forces amongst the constitutive elements is ever shifting. For instance, the spirit of altruism and public spiritedness that accompanied the euphoria of the first ten years of constitutional democracy degenerated to individualism as the balance of forces favour corruption and self-interest.[94]

Initially, post-apartheid reforms progressively, particularly through the Reconstruction and Development programme, skewed State budgeting in favour of poor, predominantly black peoples' livelihood rights – welfare, health,

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were excluded from opportunities before 1994 that there is a need for them to be given an opportunity to advance their careers? Do you agree with me? [Ms Barnard]: I definitely agree with that. But if I can add, not to the disadvantage of other people, two wrongs do not make a right, and therefore I cannot, I am not in a discussion with regard to politics.

[91] Quinton Mtyala 'Court dismisses AfriForum's bid to halt Parliament's land reform process' (30 November 2018) https://www.iol.co.za/news/politics/court-dismisses-afriforums-bid-to-halt-parliaments-land-reform-process-18328414 (accessed 20 July 2019).

[92] Tembeka Ngcukaitobi 'The land wars of 2019: Analysing the EFF and ANC manifestos' (7 February 2019) https://mg.co.za/article/2019-02-07-00-the-land-wars-of-2019-analysing-the-eff-and-anc-manifestos (accessed 20 July 2019).

[93] Ashleigh Furlong 'Land reform favours business, not the poor – researchers' (3 March 2017) https://mg.co.za/article/2017-03-03-00-land-reform-favours-business-not-the-poor-researchers (accessed 14 September 2019); Moira Levy 'Land reform needs more than expropriation without compensation' (12 February 2019) https://www.dailymaverick.co.za/article/2019-02-12-land-reform-needs-more-than-expropriation-without-compensation/ (accessed 20 July 2019); see also Andisiwe Makinana 'Land expropriation without compensation will end up in the courts, says PAC' (18 March 2019) https://www.timeslive.co.za/politics/2019-03-18-land-expropriation-without-compensation-will-end-up-in-the-courts-says-pac/ (accessed 20 July 2019) where the following was said: 'Beyond calling for "engagements" on land, it is not clear what else the PAC is offering to address land problems, which it describes as fundamental and a priority to the party; see further Karl von Holdt's description of the programme of the Economic Freedom Fighters (EFF) as 'militant nationalism and radical redistribution' in Alf G. Nilson 'South Africa's Violent Democracy: An Interview with Karl von Holdt' http://globaldialogue.isa-sociology.org/south-africas-violent-democracy-an-interview-with-karl-von-holdt/ (accessed 19 July 2019).

[94] Moseneke Keynote address at the Mistra-Tmali-Unisa Conference *20 Years of South African Democracy: So Where To Now?* http://www.mistra.org.za/Library/ConferencePaper/Documents/Moseneke%20Keynote%20Address%20at%20the%2020%20Years%20of%20Democracy%20Conference%2012%20-%2013%20November%202014.pdf (accessed 20 July 2019).

housing and education.[95] Legal enforcement of the constitutionally entrenched first generation right to equality yielded modest redistribution to mainly women, [96] spouses in same sex relationships, [97] new members of the democratic Parliament, [98] and foreign nationals resident in South Africa. [99] However, judicial enforcement of socio-economic rights continues to disappoint. [100] Affirmative action in the redistribution of livelihood rights continues to emphasise race, predictably, the African majority as the EEP in *Barnard* evidences, which currently also coincides with class – mostly. However, add to the economic mix, political and social capital - that is, what position one holds in government or political parties, and with whom one associates from the moneyed class - and the poor of all races are outflanked.

The shift in the balance of political and economic forces since 2009 exposed an escalation in corruption at all levels of government and in private corporations.[101] Public funding destined for redistribution to the poor in the form

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[95] The Reconstruction and Development Programme (RDP) https://omalley.nelsonmandela.org/omalley/index.php/site/q/03lv02039/04lv02103/05lv02120/06lv02126.htm (accessed 7 August 2019); The Presidency of the Republic of South Africa *Twenty Year Review - South Africa 1994-2014*; Neva Seidman Makgetla 'The Post-apartheid Economy' (2004) 31 *Review of African Political Economy* 263-281; Candice Hittler *Evolution Of Economic Policy In Post- Apartheid South Africa* (Unpublished honours project, Rhodes University) 2009.

[96] *Brink v Kitshoff NO* 1996 (4) SA 197, 1996 (6) BCLR 752 (CC) (*Brink*); *Bhe & others v Magistrate, Khayelitsha, & others (Commission for Gender Equality as Amicus Curiae); Shibi v Sithole & others; South African Human Rights Commission & another v President of Republic of South Africa & another* 2005 (1) SA 580; 2005 (1) BCLR 1 (CC) (Bhe); *Gumede v President of the Republic of South Africa & others- 2009 (3) SA 152 (CC)* (*Gumede*); *Van Der Merwe v Road Accident Fund & another (Women's Legal Centre Trust as Amicus Curiae)* 2006 (4) SA 230 (CC) (*Van der Merwe*).

[97] *National Coalition for Gay and Lesbian Equality & others v Minister of Home Affairs & others* 2000 (2) SA 1; 2000 (1) BCLR 39 (CC); *Minister of Home Affairs & another v Fourie & another (Doctors for Life International & others, Amici Curiae); Lesbian and Gay Equality Project & others v Minister of Home Affairs & others* 2006 (1) SA 524 (CC) (Fourie); *Satchwell v President of the Republic of South Africa & another* 2002 (6) SA 1; 2002 (9) BCLR 986 (CC); *Satchwell v President of the Republic of South Africa & another 2003 (4) SA 266 (CC); Du Toit & another v Minister of Welfare and Population Development & others (Lesbian and Gay Equality Project as Amicus Curiae)* 2003 (2) SA 198; 2002 (10) BCLR 1006 (CC).

[98] *Minister of Finance & another v Van Heerden* 2004 (6) SA 121 (CC) (Van Heerden).

[99] *Khosa & others v Minister of Social Development & others; Mahlaule & others v Minister of Social Development & others* 2004 (6) SA 505; 2004 (6) BCLR 569 (CC).

[100] E.g. https://doi.org/10.1093/icon/mon014.

[101] Nqobile Dludla 'Scandal-hit Steinhoff reports R5.5bn loss in first half' (12 July 2019) https://www.moneyweb.co.za/news/companies-and-deals/scandal-hit-steinhoff-reports-400m-loss-in-first-half/ (accessed 14 September 2019); Admire Moya 'Corruption-tainted EOH Mthombo to be shuttered' (18 July 2019) https://www.itweb.co.za/content/VgZeyqJARBPMdjX9 ((accessed 20 July 2019); Marc Hasenfuss 'Omnia U-turn rattles investors' (13 June 2019)

of basic goods and services were rediverted into the personal pockets of politically and economically powerful people. Many local governments at the coalface of service delivery of livelihood rights went bankrupt.[102]

Shifts in the balance of forces that favour institutional corruption and dysfunctionality tend to over-burden the structural constraints on litigation. Finding pragmatic remedies means straining the law and the separation of powers principle in the national interest. *SASSA*[103] is a case in point. After having declared unlawful and suspended the validity of the contract between the South African Social Security Agency (SASSA) and Cash Paymaster Services (Pty) Limited (CPS), the CC was forced to suspend its order further for 12 months.[104] SASSA is a horror story of malfeasance and unprecedented executive arrogance evidenced by 'broken promises' made to the CC,[105] and, to put it politely, 'disingenuous and incorrect' conduct by SASSA and its Minister.[106] The pressing concern was 'the very real threatened breach of the right of millions of people to social assistance in terms of section 27(1)(c) of the Constitution'. [107] The following two paragraphs from *SASSA* capture the predicament that dysfunctional institutions and malfeasance impose on litigation:

'[8] This Court and the country as a whole are now confronted with a situation where the executive arm of government admits that it is not able to fulfil its constitutional and statutory obligations to provide for the social assistance of its people. And, in the deepest and most shaming of ironies, it now seeks to rely on a private corporate entity,

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https://www.businesslive.co.za/fm/money-and-investing/2019-06-13-omnia-u-turn-rattles-investors/ (accessed 20 July 2019). Business Insider 'Tongaat Hulett's listing has been suspended - here's what we know about the crisis at the sugar giant' (10 June 2019) https://www.businessinsider.co.za/tongaat-hulett-jse-2019-6 (accessed 20 July 2019).

[102] Staff Writer 'Auditor-general reveals shocking state of South Africa's municipalities' (26 June 2019) https://businesstech.co.za/news/government/325671/auditor-general-reveals-shocking-state-of-south-africas-municipalities/ (accessed 7 July 2019); Sipho Masondo 'What happened at VBS Bank?' (1 July 2019) https://www.fin24.com/Companies/Financial-Services/what-happened-at-vbs-bank-20180701-2 (accessed 20 July 2019).

[103] *Black Sash Trust v Minister of Social Development & others (Freedom Under Law NPC as Intervening Party and Corruption Watch (NPC) RF & another as amici curiae)* [2017] ZACC 8; 2017 (5) BCLR 543 (CC) (*SASSA*).

[104] *SASSA* para 4 and 5 of the order.

[105] *SASSA* para 11.

[106] *SASSA* para 59.

[107] *SASSA* para 43.

with no discernible commitment to transformative empowerment in its own management structures, to get it out of this predicament.' (Footnote omitted.)

And

'[15] What needs to be understood, however, is that it is not this Court's standing or authority, for their own sakes, that are important. Judges hold office to serve the people, just as members of the executive and Legislature do. The underlying danger to us all is that when the institutions of government established under the Constitution are undermined, the fabric of our society comes under threat. A graphic illustration would be if social grants are not paid beyond 31 March 2017. It is to the practical avoidance of that potential catastrophe that we must now turn.' (My emphasis.)

I underline the clause in the quotation above to emphasise that it applies to litigation as one such institution. Lawfare in pursuit of indefensible claims will drain the lifeblood out of institutional reform. Anticipating further evidence of wilful malfeasance implicating the Minister personally, possibly for misleading Parliament, the CC called on her to show cause why she should not be joined in her personal capacity; and pay the costs of the application from her own pocket.[108] Subsequently, the CC ordered her to pay 20 per cent of the costs and directed the National Prosecuting Authority (NPA) to determine whether she should be prosecuted for perjury.[109] Notwithstanding, the culpable Minister was instated on the ANC's candidate list for the 2019 elections.[110] Subsequently she resigned, unapologetic for her mismanagement.[111] Dishearteningly, this degree of malfeasance which destroys our grand constitutional project implicates the very foundations of the economy. It would have been a mistake to assume that *SASSA* set the upper limit for judicial

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[108] *SASSA* para 72.

[109] Iavan Pijoos 'ConCourt rules that Bathabile Dlamini is liable for 20% of costs in SASSA debacle' (27 September 2018) https://www.news24.com/SouthAfrica/News/concourt-rules-that-bathabile-dlamini-is-liable-for-20-of-costs-in-sassa-debacle-20180927 (accessed 20 July 2019).

[110] Canny Maphanga '5 controversial ANC members who are heading to Parliament' (15 May 2019) https://www.news24.com/elections/news/5-controversial-anc-members-who-are-heading-to-parliament-20190515 (accessed 14 September 2019); Eyaaz Matwadia 'Bathabile Dlamini the latest to resign from Parliament' (11 June 2019) https://mg.co.za/article/2019-06-11-bathabile-dlamini-the-latest-to-resign-from-parliament (accessed 7 August 2019).

[111] Marianne Thamm 'Anatomy of a crisis: How Sassa's plan to take grants in-house was dead in the water' (14 November 2018) https://www.dailymaverick.co.za/article/2018-11-14-anatomy-of-a-crisis-how-sassas-plan-to-take-grants-in-house-was-dead-in-the-water/ (accessed *7* August 2019).

interference. Hardly two years later, the CC found itself confirming a Land Claims Court order for the appointment of a special master in *Mwelase,*[112] saying:

'Though outrageous and disturbing, the distinctive facts in *Black Sash I* did not quite match the sustained, large-scale systemic dysfunctionality and obduracy that is evidenced here.'[113]

In anticipation of the 2019 national and provincial elections, another shift started in 2018. Corruption could no longer be denied. Fiscal haemorrhage due to malfeasance threatened national security. Leakages in almost all state institutions far exceeded the national budget for health.[114] SAA and Eskom each needed a minimum of R5 billion to be rescued from bankruptcy, compared to R4.1 billion allocated to health.[115] Pro-poor programmes such as the National

[112] *Mwelase and Others v Director-General for the Department of Rural Development and Land Reform and Another* [2019] ZACC 30 para 39; *Director-General for the Department of Rural Development and Land Reform and Another v Mwelase and Others; Mwelase and Others v Director-General for the Department of Rural Development and Land Reform and Another* (306/17; 314/17) [2018] ZASCA 105; 2019 (2) SA 81 (SCA). *Mwelase and Others v Director-General for the Department of Rural Development and Land Reform and Others* (107/2013) [2016] ZALCC 23; 2017 (4) SA 422 (LCC).

[113] Discussion about this evolution of judicial powers, process and the common law induced to fix dysfunctional institutions, resumes in Chapter 3 under 'Context' and Chapter 4 'Facilitation'.

[114] Esther Rose 'South Africa: SAA Set for Another Bailout From Govt' (29 November 2018) https://allafrica.com/stories/201811290243.html (accessed 14 September 2019); Linda Ensor 'SAA seeks extra R5bn bail-out from state (25 April 2018) https://www.businesslive.co.za/bd/companies/transport-and-tourism/2018-04-25-saa-seeks-extra-r5bn-bailout-from-state/ (accessed 7 July 2019); Antoinette Slabbert 'Eskom needs a bailout' (29 November 2018) https://www.moneyweb.co.za/news/south-africa/eskom-needs-a-bailout/ (accessed 29 November 2018); Public Protector's State of Capture Report http://saflii.org/images/329756472-State-of-Capture.pdf (accessed 7 August 2019); Commission of enquiry into State Capture https://www.sastatecapture.org.za (accessed 7 August 2019).

[115] Staff Writer 'NHI 'on the back burner' as the health department moves money to fund Ramaphosa's stimulus plan' (1 November 2018). https://businesstech.co.za/news/government/281305/nhi-on-the-back-burner-as-the-health-department-moves-money-to-fund-ramaphosas-stimulus-plan/ (accessed 29 November 2018).

Health Insurance scheme with a budget of over R400bn per annum[116] were put on the backburner as spending was redirected to prioritise economic growth and inevitably to service the ballooning national debt. For the first time in democratic South Africa, expenditure exceeds revenue collection.[117] Prediction for conflict escalation and its implications for the ANC as the governing party were already on the wall for the forthcoming election year. Consequently, modest measures were implemented to plug the holes left by corruption in the previous ten years. Instead of prosecutions,[118] three commissions of enquiry into corruption helped the ANC to barely retain its majority in Parliament. What causes the political and economic balance of forces to shift to the right or left is a vital diagnostic for any intervention to rebalance society. Recognising that such shifts occur, is a starting point.

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[116] Lameez Omarjee 'NHI rollout could be delayed - Motsoaledi (1 November 2018); https://www.fin24.com/Companies/Health/nhi-rollout-could-be-delayed-motsoaledi-20181101 (accessed 14 September 2019); NEHAWU 'Aaron Motsoaledi's comments on possible NHI delay a concern – NEHAWU' (2 November 2018) https://www.politicsweb.co.za/politics/aaron-motsoeledis-comments-on-possible-nhi-delay-a (accessed ?); The John Maytham Show 'NHI Delays' (1 November 2018) http://www.capetalk.co.za/podcasts/144/the-john-maytham-show/124921/nhi-delays (accessed 14 September 2019); Staff Writer 'NHI 'on the back burner' as the health department moves money to fund Ramaphosa's stimulus plan' (1 November 2018) https://businesstech.co.za/news/government/281305/nhi-on-the-back-burner-as-the-health-department-moves-money-to-fund-ramaphosas-stimulus-plan/ (accessed 29 November 2018); Michael Settas 'The Eskom of healthcare' (20 February 2019) https://www.politicsweb.co.za/opinion/the-eskom-of-healthcare (accessed 20 July 2019).

[117] Natasha Marrian and Linda Ensor 'Revenue Collection: Dire cost of Sars's implosion' (21 February 2019) https://www.businesslive.co.za/fm/special-reports/2019-02-21-revenue-collection-dire-cost-of-sarss-implosion/ (accessed 7 August 2019); Financialmail 'Editorial: The fix will be long, and slow' (21 February 2019) https://www.businesslive.co.za/fm/opinion/editorial/2019-02-21-editorial-the-fix-will-be-long-and-slow/ (accessed 7 August 2019).

[118] Marianne Thamm 'Nugent Commission final report recommends criminal prosecution and far reaching changes to restore SARS' (14 December 2018) https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&cad=rja&uact=8&ved=2ahUKEwjUoYXk8sDjAhXxtHEKHWyJC2UQFjABegQIDBAF&url=https%3A%2F%2Fwww.dailymaverick.co.za%2Farticle%2F2018-12-14-nugent-commission-final-report-recommends-criminal-prosecution-and-far-reaching-changes-to-restore-sars%2F&usg=AOvVaw0gehe4qIAaD8kQJpM5m_u8 (accessed 7 August 2019); Commission of Inquiry into Tax Administration and Governance by SARS Final Report 11 December 2018 https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=6&ved=2ahUKEwjUoYXk8sDjAhXxtHEKHWyJC2UQFjAFegQIBBAC&url=http%3A%2F%2Fwww.thepresidency.gov.za%2Fdownload%2Ffile%2Ffid%2F1466&usg=AOvVaw0za0RGFLHGrvlNsWAt8Vk6; Public Investment Corporation (PIC) Commission of Inquiry http://www.justice.gov.za/commissions/pic/index.html; Commission of Inquiry into Allegations of State Capture https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=14&cad=rja&uact=8&ved=2ahUKEwiNlL6X9MDjAhVHSBUIHWp7APcQFjANegQIARAB&url=https%3A%2F%2Fwww.sastatecapture.org.za%2F&usg=AOvVaw0QtjEWGfLqXHQOVOymf5bS. (accessed 7 August 2019).

Drawing on Ernst Mayr, a biologist, Chomsky suggests in *Hegemony or Survival*: *America's Quest for Global Dominance*, that the 'human form of intellectual organisation may not be favoured by [natural] selection'.[119] Beetles and bacteria, life forms less smart than humans, have superior prospects for survival. Throughout history, the human species has developed the capacity to self-destruct with escalating assaults on a life-sustaining environment and 'cold and calculated savagery, on each other as well'.[120] Controlling the population is a constant and dominant concern of 'power and privilege'. To confront one's responsibilities 'with a genuine commitment to democracy and freedom – and even to decent survival' – one should recognise the barriers which, in violent states, are 'not concealed' but in democracies are 'more subtle,' and therefore harder to identify and tackle. Methods 'differ sharply from more brutal to more free societies' but the aim is the same: 'to ensure that the "great beast," as Alexander Hamilton called the people, does not stray from its proper confines'. [121] Neoliberal constitutionalism tethers the 'great beast' to its confines.

### 2.7.2. Subjective conditions: legal, political and constitutional culture and consciousness.

Why should we be concerned with subjective conditions implicating litigation? Litigation is institutionalised in societies riddled with countless contradictions. Theoretically, only the evidence and arguments of the litigants presented to the judge should inform the judgment. If this were so, then in *Barnard* all the judgments of all the judges should have been the same. This would be the case in all instances in which the same legal materials present before different judges. But this is not reality. What induces the differences in choices, reasoning and decisions? Explanations for the differences must lie beyond the evidence and arguments. One source – the most obvious one – is the legal actors. First, the legal representatives choose what evidence and arguments – the raw materials for the production of a judgment – should go into the litigation.

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[119] Noam Chomsky 'Hegemony or Survival: America's Quest for Global Dominance' (2003) at 1-2.
[120] Chomsky 'Hegemony or Survival' (2003) at 1-2.
[121] Chomsky 'Hegemony or Survival' (2003) at 5.

It is they who cause the raw materials to mutate into legal materials. Then, it is the judges' turn to choose from the legal materials on what they would build their findings, reasons and decisions. What 'ingredients' do the legal representatives add to the facts and arguments to cause a mutation into legal materials? What ingredients do judges in turn add to the legal materials to result in judgments? Why do these legal actors choose particular ingredients, facts and rules, and not others? Irrespective of what causes these variances, they exist nevertheless, albeit outside of the evidence and arguments. For instance, emotion has no place in the definition of litigation. Yet legal actors do not strip off emotion when they robe for court. Unarticulated, extraneous phenomena pass through the legal actors into litigation. As their source is human, fallibility is always a risk.

Like it or not, research shows that these ingredients or phenomena extraneous to the evidence and arguments infuse with law to emerge as the choices, findings, reasoning and decisions of legal actors.[122] Given the exposition of the contradictions between the definition of litigation above and how it actually works, how should society, legal actors in particular, respond? Burying one's head in the sand like ostriches would not wish these phenomena away. Although the phenomena are interconnected, distinguishing them, if possible, helps to describe and recognise them in order to engage with and about them. The primary challenge then is to acknowledge the influence of extraneous unarticulated phenomena that the legal actors and the litigants inject into litigation. Then it is a matter of identifying and managing them. The very integrity of litigation depends on it. Furthermore, to respond to only the causes of conflict as manifest in the litigation without acknowledging their sources, be they ideological, economic or political, or to pretend that they do not exist, could subvert litigation's conflict management and problem-solving capabilities. Legal actors cognisant of the source–>cause –>manifestation thread of conflict know that they must articulate it in their pleadings, evidence and arguments for it to emerge ultimately in the judgments. Without such cognition, litigation would be

[122] E.g. Posner *How Judges Think* (2008); Albie Sachs *The Strange Alchemy of Life and Law* (2009); R F Canan, G E Mize and F H Weisberg eds. *Tough Cases* – Judges Tell the Stories of Some of the Hardest Decisions They've Ever Made (2018).

bogged down as a dispute resolution tool instead of serving the higher purpose of managing and remedying social conflicts.

Phenomena that influence litigation include legal culture, social, political and legal consciousness, ideology, binaries and the nature and performance of the judicial function.[123] What makes these phenomena good or bad, useful or destructive, progressive or regressive, constitutional or unconstitutional are terrains of enormous contestation. Some standards, some mediation of these extremes must be brought to bear for a semblance of a functioning society. Our nation has set its Constitution as that standard. Legal actors are obligated by their oath of office to uphold the Constitution. Predictably, what is constitutional is itself contested ground. Although the Constitution does not mean whatever one wants it to mean, the scope is wide, with a variety of tools to aid interpretation. Different tools yield different results. Choosing the tools activates the phenomena, individually or in combination. Variances within and amongst each phenomenon means that the choice of facts, arguments, rules, tools of interpretation and how they all coalesce in a single dispute or conflict submitted for litigation, shores up many more contradictions than the seeming simplicity of the definition of litigation. For instance, emotion influences both the form and substance of litigation. No less so in a race discrimination contestation like *Barnard*. Yet emotion is not only omitted from the definition of litigation but also avowedly deprecated as injudicious and unprofessional when manifested.[124] The more rooted opinions are in emotions, the harder they are to shift.[125] Thus, the apparent simplicity of the form of litigation belies its substantive complexity.[126] How does one bring constitutional standards to bear when a sea of such diverse emotions, amongst other phenomena, bear on litigation?

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[123] I discuss each of these under their headings.

[124] E.g. the Bangalore Principles of Judicial Conduct cautions judges against venting emotion when considering an application for recusal or sentencing an accused person. 'Doing so tends to diminish the essential qualities of the judicial office.' Commentary on the Bangalore Principles of Judicial Conduct paras 87 and 188) https://www.unodc.org/res/ji/import/international_standards/commentary_on_the_bangalore_principles_of_judicial_conduct/bangalore_principles_english.pdf (accessed 28 October 2019).

[125] Olivia Goldhill '150 years ago, a philosopher showed why it's pointless to start arguments on the internet' (2 January 2019) https://qz.com/1513176/john-stuart-mills-philosophy-shows-arguing-online-is-futile/ (accessed 3 January 2019).

[126] Explored further in Chapter 3 under 'Complexities'.

#### 2.7.2.2.1 Distinguishing Culture and Consciousness

Culture and consciousness originate from different sources. We are born into our culture. We do not choose what culture we start life with. Culture derives from where, when and how we are born, what we practice routinely to function in life, our eating habits and living arrangements.[127] We are socialized into our culture, but we also produce and reproduce it.[128] Consciousness is our sentient being, our state of awareness, what we think about things. We choose what we want to know. Both culture and consciousness mutate.

However, culture is more ingrained in our identity and therefore harder to shift than consciousness. It is 'that complex whole which includes knowledge, belief, arts, morals, law, custom and any other capabilities and habits acquired by man as a member of a society.'[129] Anti-apartheid activists did not abandon their individual cultural heritages when their consciousness awakened to the realities of discrimination. Hence, the ANC came to be referred to as 'the broad church' or 'the "broadest possible national liberation front"' based on a 'broad, minimum programme', home to all who shared its aims, irrespective of class, colour, origin, race or religion.[130] Bram Fischer was born in the heartland of Afrikaner culture and power; consciousness, triggered by a handshake with a black man, a 'real breakthrough', initiated his journey to becoming a founding member of the South African Communist Party.[131] Of the 'instinctive feeling of revulsion which he had to force himself to suppress', Fischer wrote:

'I can still sense the act of will that it required from one who had grown up on the farm with little Loel and Golokwaan as . . . playmates, but who in the space of a few years had drifted completely into the normal S. African attitude.'[132]

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[127] For a debate on the difference between religion and culture see *MEC for Education, Kwazulu-Natal & others v Pillay* [2007] ZACC 21; 2008 (1) SA 474; 2008 (2) BCLR 99 (CC).
[128] Stephen Chilton 'Defining Political Culture' (1988) 41(3) *The Western Political Quarterly* 419 at 419.
[129] Ana Micaela Alterio and Roberto Niembro 'Constitutional Culture and Democracy in Mexico' Graber et al eds. *Constitutional Democracy in Crisis?* (2018) at142.
[130] Luli Callinicos *Oliver Tambo – Beyond the Engeli Mountains* (2004) at 526-528. See also 'ANC policy remains the broad church for all South Africans' *ANC Today* (9-15 November 2018) https://www.anc1912.org.za/sites/default/files/ANC%20Today%20%289%20Nov%29.pdf (accessed 22 July 2019).
[131] Stephen Clingman Bram Fischer - Afrikaner Revolutionary (2013) at 47-48.
[132] Clingman *Bram Fischer* (2013) at 47-48.

Clingman continued, that the incident

'prompted a depth of self-inspection he had never before undertaken ... something was deeply wrong … he had begun to look inward … his unconscious response was deeply embedded in the world he inhabited. Therefore, in order to change that response, both for himself and for others, he would have to change the world that had engendered it.'[133]

Culture and consciousness co-exist but also compete for hegemony. The 'unintended consequences of institutions might alter the culture that created them'.[134] Apartheid's institutions triggered a backlash from another one of its progeny. For Reverend Beyers Naudé, the Sharpeville massacre in 1961 and the destruction of apartheid's migrant labour system stirred his consciousness to the point that he cut his cultural connections to the Broederbond, after 22 years of membership. Risking ostracisation from the Afrikaner community, he left the Dutch Reformed Church where he was a Minister to join a congregation in the black community of Alexandra.[135] These experiences, the ability to change consciousness more easily than culture, and consciousness that starts with changes in the hearts (emotion) and minds (rationality) of people, suggest that consciousness has stronger prospects of transforming culture rather than the other way around. In recent times, churches struggle with the tension between consciousness of equality and human dignity and differences in sexual orientation.[136] Politics and struggle are culturally antithetical to a religious consciousness that abhors resistance and violence. Churches associated with the South African Council of Churches disavowed violence, but nonetheless supported liberation movements that embraced the armed struggle.[137] Some

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[133] Clingman *Bram Fischer* (2013) at 47-48.
[134] Chilton 'Defining Political Culture' (1988) 41(3) *The Western Political Quarterly* 419 at 419.
[135] South African History Online 'Reverend Beyers Naudé (21 September 2011) https://www.sahistory.org.za/people/reverend-beyers-naude (accessed 5 April 2019).
[136] Andrew K. T. Yip 'Sexuality and the Church' https://journals.sagepub.com/doi/abs/10.1177/136346070300600100 7?journalCode=sexa (accessed 7 August 2019); 'Churches' response to human sexuality'(accessed 7 August 2019); https://www.oikoumene.org/en/resources/documents/assembly/2006-porto-alegre/3-preparatory-and-background-documents/churches-response-to-human-sexuality
[137] P O'Malley 'Violence: the Wider Picture' https://omalley.nelsonmandela.org/omalley/index.php/site/q/03lv02424/04lv03275/05lv03294/06lv03303/07lv03308.htm (accessed 7 August 2019); Dr Guy Lamb 'Peacebuilding in South Africa: A Brief Historical Overview'

cultural practices are more immutable than others. Patriarchy constrains transformation of consciousness far more than practices about what or how we eat or dress. Nevertheless, a dialectic between consciousness and culture cannot be denied. What then is the key to transforming consciousness?

#### 2.7.2.2.2 Legal Culture and Consciousness

In their article *Transformative constitutionalism and the common and customary law,*[138] Davis and Klare define legal culture to mean the way legal actors and society, collectively as a community think about law and the legal system, how they practice and use law, and how their shared values, attitudes, standards, opinions and beliefs, define them in relation to law.[139] And by 'legal consciousness' they mean 'the characteristic legal values, habits of mind, repertoire of arguments, and manners of expression shared by a group of lawyers at a given, historically situated time and place' that draw from their 'shared experiences of training and socialisation'.[140] Both definitions fit my purpose. I understand legal, constitutional, political, economic, psychological, sociological and like elements, to be constitutive of consciousness. Interacting dialectically and synergistically, consciousness externalises in culture. A legal consciousness that is devoid of any political or constitutional consciousness would, culturally, deliver outcomes diametrically different from a holistic consciousness. Together, consciousness and culture constitute the basic concepts on which legal actors organize their legal thought and practice, what methods they choose to solve legal problems and promote legal knowledge, whether and how they choose to link different fields of law and other disciplines conceptually to generate 'persuasive legal argument'.[141]

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https://www.saferspaces.org.za/understand/entry/peacebuilding-in-south-africa-a-historical-overview (accessed 7 August 2019).

[138] Davis and Klare 'Transformative constitutionalism and the common and customary law' (2010) 26 *SAJHR* 403 at 403.

[139] Klare developed the concept to mean our '. . . professional sensibilities, habits of mind, and intellectual reflexes … 'That is, what we consider to be persuasive, what we understand of politics, sociology and justice, and what ingrained cultural and historical experiences inform our outlook. See Klare 'Legal Culture and Transformative Constitutionalism' (1998) 14 *SAJHR* 146 at 166.

[140] Davis and Klare 'Common and customary law' (2010) 26 *SAJHR* 403.

[141] Davis and Klare 'Critical legal realism in a nutshell' at 28.

Citing Kennedy,[142] Davis and Klare argue that legal culture and consciousness are such that fidelity to law tends to imply isolation from politics and other considerations.[143] When more than one result is possible after applying accepted methods of reasoning, most South African jurists incline towards 'formalist error'. That is, they settle for a particular result generated by a norm or rule without exploring the range of possible results.[144] Formalist error stems from the belief in the neutrality of law, the capacity of rules to self-generate meaning, and the obligation of jurists to mine such meaning in the name of fidelity to law. Their reluctance to enquire into context, purpose and relevant questions also covered in other disciplines like politics, economics, psychology and sociology compound this tendency.[145] Davis and Klare question the 'ritual insistence on the "necessity" of legal outcomes', '"[m]echanical" rule application'[146] and the 'baneful outcomes' in the quest for predictability.[147] The reality of the practice of litigation shows that formalism and traditional ways of litigating offer incomplete, unsatisfactory answers to contradictions arising from multiple interactive phenomena. Formalism defaults to rules to explain outcomes.[148] Davis and Klare attribute this tendency towards formalism to the legal culture and consciousness of the legal actors. But reliance on rules alone does not explain, for instance, why legal actors choose particular rules and what they do with and to the chosen and rejected rules.[149]

A transformative legal culture and consciousness means more than the responses to the immediacy and parochial limits of a particular case to include the views and responses of legal actors collectively to all that implicates law and society cumulatively. Some scholarly judgments of the CC openly welcome

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[142] Duncan Kennedy 'Legal Formalism' in N Smelser & P Baltes (eds-in-chief) 13 *Encyclopedia of the Social & Behavioral Sciences* 8634, 8635 (2001); Duncan Kennedy *A Critique of Adjudication – Fin De Siecle* (1997) 105-7.
[143] Davis and Klare 'Common and customary law' (2010) 26 *SAJHR* 403 at 407.
[144] Davis and Klare 'Common and customary Law' (2010) 26 *SAJHR* 403 at 407.
[145] Davis and Klare 'Common and customary law' (2010) 26 *SAJHR* 403 at 408.
[146] Davis and Klare 'Critical legal realism in a nutshell' at 30.
[147] Davis and Klare 'Critical legal realism in a nutshell' at 28.
[148] D Kennedy 'Form and Substance' 89 *Harv. L.R.* 1685, 1778 (1976) at 1776.
[149] Joanne Conaghan 'Celebrating Duncan Kennedy's Scholarship: A 'Crit' Analysis of *DSD & NBV v Commissioner of Police for the Metropolis*' (2014) 5 *Transnational Legal Theory* 601at 601.

the critique of other legal actors, including the academy.[150] What judges and other key legal actors say and do, which political and ethical influences bear on their professional discourse, what they understand human possibility and social organization to be and what impact they, as actors, have on all of this, count towards legal culture and consciousness.

'Ambivalent' is how Davis and Klare characterise the approach of the CC to the common law.[151] Strong evidence for their assessment of legal culture being 'instinctively traditional'[152] emerges from the reluctance of the legal actors 'to interrogate and renovate the common and customary law so as to promote the values expressed in the Bill of Rights'. But this is not all that is forsaken. Nor is ambivalence confined to the CC. Deference, precedents and rule-centricity are tools applied to aid and abet ambivalence and inertia.

Contemporary legal culture insists that legal actors should jettison their ideological and other personal preferences when interpreting and applying law. Consequently, legal actors rarely articulate their ideological preferences or tendencies publicly, lest they disqualify themselves from participating in cases.[153] Observing this cultural constraint ironically frees them to succumb to their preferences, comforted that left unarticulated, their preferences will pass undetected. At least, for as long as a the hermeneutic of suspicion holds off.

Furthermore, the notion that the integrity of law depends on choices based exclusively on the evidence and arguments is deeply entrenched; and that courts 'should interpret written words, … using traditional legal tools, such as text, history, tradition, precedent, and particularly, purposes and related consequences, to help make the law effective'.[154] For this is what it means to be independent and impartial officers of the court. This exhortation is commendable for implementing the rule of law and promoting predictability.

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[150] *Du Plessis & others v De Klerk & another* [1996] ZACC 10; 1996 (3) SA 850; 1996 (5) BCLR 658 (CC) paras 39, 42, 48, 56, 121-122; *Laubscher NO v Duplan & others* [2016] ZACC 44; 2017 (2) SA 264; 2017 (4) BCLR 415 (CC) paras 80, 83-84; *Mwelase* para 50.
[151] Davis and Klare 'Common and customary law' (2010) 26 *SAJHR* 403 at 450.
[152] Davis and Klare 'Common and customary law' (2010) 26 *SAJHR* 403 at 467.
[153] E.g. *Den Braven Sa (Pty) Ltd v Pillay and another* 2008 (6) SA 229 (D) para 33.
[154] Stephen Breyer *Making Democracy Work: A Judge's View* (2010) at xiii-xiv, 88-105, 217.

However, *Barnard* and the dissents in many other cases unravel this notion of the practice of law; it is an incomplete account of judicial decision-making. There is another layer to probe. Which facts should prevail over others? Should precedent, purpose or consequence prevail, and if so, which precedent, purpose or consequence should that be?

I argue that culture, consciousness, ideology, defaulting to binaries, the nature of the judicial function and other unarticulated premises infuse perceptibly and imperceptibly the choices, reasons and decisions of legal actors. Like it or not, they exist as the intangible, ephemeral, extraneous influences in litigation. How should society, in particular, legal actors, respond to them?

Conceiving legal reasoning and the rules of the legal system as natural, necessary and neutral is a false consciousness,[155] a consciousness of convenience that encourages inertia. Law itself is the 'incoherent outcomes of ideological struggle' and 'modern societies' general political and ethical views on justice tend to be controversial.'[156] Whilst still adhering to laws' constraints, legal actors have a freer hand than assumed in choosing rules, interrogating their validity, corralling the facts to which they would apply their chosen rules, and distinguishing the 'core' from 'penumbra' to suit their own 'personal political preferences'.[157] They have more discretion and free choice than they care to confess.[158] They choose the rules that ultimately enforce or unravel how wealth and power is distributed in society. Hence, subjective consciousness either underpins or undermines objective socio-economic and political conditions. And choice, rooted in culture and consciousness, ranges from those rules that deliver the most to the least egalitarian results.[159]

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[155] Davis and Klare 'Common and customary law' (2010) 26 *SAJHR* 403 at 415.
[156] C W Maris van Sandelingenambacht 'Legal Postism and the End of European Private Law; Duncan Kennedy's A Critique of Adjudication' (2002) 10 *European Review of Private Law* 111 at 116.
[157] Compare with historical experience in USA – Van Sandelingenambacht 'Legal Postism' (2002) 10 *European Review of Private Law* 111 at 116.
[158] Kennedy 'Hermeneutic of Suspicion' in J Desautels-Stein and C Tomlin (eds) *Searching for Contemporary Legal Thought* (2017) at 18.
[159] Duncan Kennedy 'Are Lawyers Really Necessary?' (Interview), (1987) 14 *Barrister* 11.

In *Barnard* and a host of discrimination claims discussed below, the tools in aid masked ideological preferences and other unarticulated premises. They obscured the source of the conflict, namely, the ideological contest between the co-existence of affirmative action and the quest for a non-racial society. As for ambivalence, it was ever present from start to end, from the advertisement of the post as 'non-designated' meaning that anyone who met the requirements could apply, to the final judgments. Avoiding the source of the conflict meant that the Labour Law and broader community were deprived of the answers they wanted to help them solve a persistent, pervasive social conundrum. However, to fortify my thesis about *Barnard*, I gradually build a body of 'evidence' to prove these characteristics of the prevailing legal culture and consciousness through other cases.

Ever prevalent, ambivalence about marital status met its nemesis in transformative constitutionalism in *Holomisa.*[160] But not before the SCA combined deference with formalist error to deliver 'baneful outcomes' in *Holomisa*. The substantive remedy that Mrs Holomisa sought was to access redistribution of her husband's assets on divorce. She contended that s 7(3) of the Divorce Act 70 of 1979 was unconstitutional in that it did not extend such redistribution to her and other vulnerable women married automatically with an ante-nuptial contract in terms of the Transkei Act. In contrast, s 22(6) of the Black Administration Act 38 of 1927 (the BAA) afforded such protection to women married under the BAA.

Unanimously, five judges in the SCA made short shrift of Mrs Holomisa's claim, giving three reasons:

1. '[N]o purpose will be achieved by referring the matter to trial. ...[161]
2. 'The constitutional argument must also fail: It was raised for the first time in this appeal and it was not traversed at all in the pleadings.'[162]

And regarding the substantive remedy sought:

3. '[T]he Transkei Act provided that parties who did not wish to marry out of community

[160] *Holomisa v Holomisa & another* [2018] ZACC 40; 2019 (2) BCLR 247.
[161] *Holomisa* para 7.
[162] *Holomisa* para 8.

of property could make a declaration to that effect, jointly before a magistrate or a marriage officer at any time before the solemnisation of the marriage or could conclude an ante-nuptial contract. The respondent did not make the election and there is no evidence to suggest that she wished to do so but was unable to. The court cannot make a new contract for the parties and is thus obliged to enforce the terms of their marriage contract. For those reasons the appeal must succeed.'[163] (Footnotes omitted.)

Mr Holomisa won this round.

Showing the lower courts how they should have approached the case was the CC's celebratory reversal in *Holomisa*. In stark contrast to the SCA, Froneman J, writing for a unanimous CC, prescribed a '"no-brainer"' remedy. Enabling one law to apply to all South Africans, irrespective of where they were married, was the obvious solution. Substantively, the impugned law failed the 'test of rationality'[164] and was 'indefensible'.[165] The CC judgment is celebratory for more reasons than its adoption of a transformative constitutional approach to litigation. *Holomisa* is a game changer for its vital contribution to recognising marital status as a ground of discrimination. But that is not all. Its critical realist approach to equality and discrimination analysis recognises the intersectionality of causes, grounds and impact of discrimination. The CC averted sending Mrs Holomisa home 'with a stone instead of bread'.[166]

*Holomisa* illustrates how the quality of the participation of the legal actors as judges and legal representatives make a difference to the outcomes. The issues in dispute were the same in the lower courts as they were in the CC. All that changed were the legal actors, not only the judges, but also the legal representatives. After unsuccessful attempts in the lower courts, Mrs Holomisa switched from engaging private counsel to legal aid. The CC concluded its judgment by recognizing that

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[163] *Holomisa* para 8.
[164] *Holomisa* para 24.
[165] *Holomisa* para 27.
[166] *Holomisa* para 32.

'. . .Legal Aid South Africa, [t]he applicant's Legal Aid representatives have done her, women in her position and our justice system a great service.'[167]

Capable legal representatives committed to transformation are indispensable to our constitutional project.

Davis and Klare identify 'bend points' as 'ports of entry for philosophical convictions, cultural sensibilities, unconscious assumptions or. . .simply "common sense"'. [168] Bend points do not necessarily coincide with race, gender, social standing, age or any physical characteristics. Instead, how consciousness – legal, constitutional and political – externalises judgments are better indicators of the legal culture underpinning some decisions. I illustrate this in the following comparison of two judgments of Langa CJ on the one hand, with Ngcobo and Nkabinde JJ on the other hand in *Bhe*[169] and *Masiya*.[170] Identifying the judgments by reference to the names of the scribing judges is for convenience and description; I recognise that other members of the court supported one or other judgment. However, I am not alone in distinguishing Langa CJ's philosophy as being revolutionary. Albertyn and Fredman applaud his equality jurisprudence as that of 'a jurist who was deeply committed to the constitutional project as inclusive and reconciliatory, and as entailing a "social and economic revolution"'.[171]

*Bhe*

In *Bhe,* the CC agreed unanimously that s 23 of the BAA discriminated without justification[172] on the grounds of race, colour and ethnic origin because it imposed a different system of intestate succession law on all Africans, unless they were exempted because they qualified to be 'Europeans'. It also agreed that the section discriminated against women on the grounds of sex, and

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[167] *Holomisa* para 34.
[168] Davis and Klare 'Critical legal realism in a nutshell' at 31.
[169] *Bhe* para 136.
[170] *Masiya v Director of Public Prosecutions Pretoria, & another (Centre for Applied Legal Studies & another, Amici Curiae)* 2007 (5) SA 30 (CC).
[171] C Albertyn and S Fredman 'Equality beyond dignity: Multi-dimensional equality and Justice Langa's judgments' (2015) *Acta Juridica* 430 at 454; F I Michelman 'Reasonable Umbrage: Race and Constitutional Antidiscrimination Law in the United States and South Africa' (2004) 117 *Harv. L. Rev.* 1378.
[172] *Bhe* paras 68-70, 136 and 241.

children on the grounds of birth, depending on whether they were conceived or born intra- or extramaritally. Children born extramaritally and women were occluded from inheriting intestate. Discrimination was direct and manifest. However, disagreement on the remedy exposed the bend points of the majority and minority.

For the majority, Langa CJ declared that the rule of male primogeniture applied in customary law to the inheritance of property, was inconsistent with the Constitution and invalid, to the extent that it excluded or hindered women and extramarital children from inheriting property.[173]

In dissent, Ngcobo J defaulted to deference. He attempted to balance respect for diversity and the right of communities to live and be governed by indigenous law, against the need to protect vulnerable members of the family.[174] He proposed instead, that the choice of law to govern the dissolution of the deceased's estate should be agreed amongst family members. If there was no agreement, the magistrate having jurisdiction must resolve disputes, for which Ngcobo J offered some guidelines.[175]

If Ngcobo J's remedy had prevailed, the indigenous law would have persisted in some form. Apartheid era structures, like the magistracy, would have been entrusted with oversight and enforcement. Sustaining the indigenous law meant that the general rule of primogeniture would have remained alive: only a male relative of the deceased would qualify as intestate heir.[176] It implied that women were not fit to own and administer property.[177] Insightfully, the trouble that Langa CJ anticipated in Ngcobo J's remedy was that, in a patriarchal society, powerful (male) members of the family would prevail. The prospects of agreements being reached freely and voluntarily with all the parties being fully informed of their rights to equality, was remote. Who should be party to agreements might itself have been controversial. He doubted whether the

[173] *Bhe* para 136.
[174] *Bhe* para 238.
[175] *Bhe* para 239.
[176] *Bhe* para 77.
[177] *Bhe* para 92; *Gumede* para 35.

women would have been allowed to represent themselves and their children. The patriarchal attitude of the deceased's father, who opposed the widow, demonstrated why Langa CJ's approach was progressive: Callously, the father was set on selling the deceased's home to defray funeral expenses, sparing no thought for the widow and her minor children, who would have been left homeless.

*Masiya*

Facts not in dispute in *Masiya* were that women were the primary victims of rape; males were also victims of rape and were vulnerable. Nkabinde J, writing for the majority, developed the common law definition of rape to include anal penetration of a female, but declined to extend the definition to males.[178] The majority exercised restraint. First, it found that the facts of the case did not require the CC to consider the rape of males.[179] Second, in its opinion, extending the definition of rape to include the rape of males also meant extending the definition of a crime, which a court should be slow to do as it would offend the principle of legality. Third, the extension would have required statutory amendments, a function best performed by the Legislature.[180] Fourth, rape remained a crime that systematically targeted women, not men.[181] For these reasons, the majority avoided a gender-neutral definition of rape.

Langa CJ, in the minority, reasoned first, that anal rape was as severe as vaginal penetration and that rape was equally a violation of the values of dignity, equality and freedom of male as it was of female survivors of rape. Consequently, the criminalisation of rape was about providing gender-neutral protection. Second, including males in the definition did not diminish the protection for females. Third, male survivors of rape were often young boys, prisoners and homosexuals who, like females, were equally vulnerable.[182]

Finding no reason to deny male victims of rape equal protection of the law, Langa CJ's gender-neutral definition of rape for achieving an inoffensive result

[178] *Masiya* para 45.
[179] *Masiya* paras 29; 81.
[180] *Masiya* paras 60-61; 81.
[181] *Masiya* paras 36; 81.
[182] *Masiya* paras 84-87.

principled on non- discrimination was preferable. Nkabinde J opted for deference. Accepting, for the sake of argument, that the first three reasons in Nkabinde J's judgment are important to the debate on judicial restraint, and the fourth reason is factually sound, none of the reasons singly or cumulatively justified restraint in the context that reinforced discrimination against male victims of anal rape.

Although the majority extended the definition of rape to develop the common law in order to be consistent with the spirit, purport and objects of the Bill of Rights, it had an equal obligation, not a mere discretion, to 'declare. . .any law or conduct that is inconsistent with the Constitution [to be] invalid to the extent of its inconsistency'.[183] Remedying one form of discrimination by creating and perpetuating another was not a constitutionally conscious decision, especially when discrimination could easily have been avoided altogether. Judicial interference could have produced a remedy that was utterly inoffensive to s 8 of the Constitution and vital for achieving substantive equality.

Because the Sexual Offences Bill (2003) had been before Parliament for as long as four years, and was in any event cast in neutral terms about the sex of the victim of rape, Langa CJ was justifiably convinced that *Masiya* was a proper case to exceed its narrow facts to include anal penetration of males. As he anticipated, the legislature ultimately adopted a gender-neutral definition of rape. Sections 3 and 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 defined 'rape' and 'compelled rape' to include all forms of sexual penetration without consent, irrespective of the gender of the perpetrator and victim.

A deferential legal culture and a rule-centric constitutional consciousness sacrificed two principles in *Masiya*. The first principle was that the Constitution should be applied to protect against and not to punish discrimination.[184] The second principle was that prejudice should not be tolerated; to that end,

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[183] S 172(1)*(a)* of the Constitution.
[184] *Pretoria City Council v Walker* 1998 (2) SA 363 (CC) para 41, 43.

eradicating discrimination should not be delayed. The net effect of these sacrifices was that male victims of rape remained unprotected against rape until legislation was passed.[185] Manifestly, the majority sacrificed foundational principles and values at the altar of a time-based technicality. Why?

Teaching law for achieving progressive aims awakens consciousness amongst some students. But legal education alone is not enough to change the consciousness of legal actors. After all, some lawyers depend for their bread and butter on the economically and politically powerful who have vested interests in things staying the same. High crime rates provide a steady income stream for lawyers specialising in criminal cases. Others hope to 'strike it lucky'[186] with contingency fees earned in medical malpractice suits,[187] unlawful arrests, detention and prosecutions, and other consequences of dysfunctional institutions. Conversely, without contingency fee agreements many victims of malpractices would go unaided and uncompensated. Litigation lawyers live off conflict. Some become judges. Nevertheless, legal education geared towards inspiring transformative social and political consciousness sometimes succeeds in planting a few seeds that grow into agents for progressive change in society.

Formal legal education is not the only source that triggers consciousness. Quite the opposite occurred when apartheid education inspired the 1976 and ensuing student protests that launched a new cadre of freedom fighters, who contributed to achieving our constitutional democracy. Neither are law schools the only source of education; hardships, injustice and the struggle for life itself are educating. Litigants from communities seeking transformative constitutionalism are a rich and ready source of education.[188]

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[185] *Masiya* para 29.
[186] An expression used by an advocate in a medical malpractice claim.
[187] Tamar Kahn 'Health department slow to help provinces with medical-negligence claims' (29 January 2019) https://www.businesslive.co.za/bd/national/health/2019-01-29-health-department-slow-to-help-provinces-with-medical-negligence-claims/ (accessed 8 August 2019).
[188] Discussed further in Chapter 4 under 'OCMS'.

#### 2.7.2.2.3 Consciousness, culture and unarticulated phenomena

Consciousness informs choices and decisions. Speculation runs riot when legal actors make choices, and issue findings, reasons and decisions that do not add up. We suspect something is missing and try to account for it by digging for the unarticulated premises. They are unarticulated either because the legal actors are unaware of them or because they know that they should not articulate them. For instance, articulating them would expose their sometimes privately held homophobic tendencies, religious fundamentalist opposition to atheists and communists, or quite simply, show that their pursuit of leisure time is all too compelling.[189] Left unarticulated, readers of such judgments resort to speculation about what the real premises might be.

The judgments of Justices Ngcobo and Nkabinde do not explain why the greater and immediate good that Langa CJ proposed had to be sacrificed for their mediocre offerings. They do not explain why vulnerable people should be left insecure for longer than necessary. Both judgments fortify the description of Langa CJ's consciousness and culture as revolutionary and constitutionally transformative. Far more interesting is the question whether ideology informed the judgments.

In *Bhe*, ideology was right up there, articulated and ventilated. The tension was between retaining the traditional, cultural system or some parts of it, and transforming to a universal system of one law for all. Although both were grounded in constitutional interpretation, Ngcobo J's emphasis on cultural rights trumped equality, to yield an ideological disposition that inclines towards conservativism. Langa CJ chose the opposite. He elevated equality as a right and value to avoid the risks associated with patriarchy embedded in cultural practices. His critical realist approach inclined him to the left as a social democrat. This deduction, speculative and over-simplistic as it might be, is possible because the ideological contestation is manifest in the way the cause

[189] Discussed further below under 'Judges are human.'

of conflict was framed for the litigation. As the source of the conflict, ideology had to be confronted head-on.

In stark contrast, the source of the conflict remained unarticulated in *Masiya*. What might it have been? As Nkabinde J reinforced discrimination against the rape of males, the majority, I speculate, inclined towards a conservative, less than liberal ideological disposition. Typically, Langa CJ's minority inclined to the radical transformative left. From these outcomes, the hermeneutic of suspicion suggests that the source of the conflict was ideological. The points of departure seemed to have been a difference between the majority's liberal formalist feminism and the minority's radical feminism. Now, if this ideological difference had been articulated and ventilated, would it have shifted the legal culture and consciousness of those who voted with the majority? Yes. That is, if they were ideologically disposed to accepting that transformative constitutionalism embraces fundamental changes rather than the superficial offerings of liberal feminism.

These cases fortify my view that legal consciousness and culture, and ideology influence transformation. Some unarticulated influences are far more imperceptible, varied and difficult to describe or identify than others. What induced the SCA to unanimously deny a remedy in circumstances that was a 'no brainer' for a unanimous CC? Ideology? Work overload? The quality of legal representation?

However, it would be a mistake to pigeonhole people into one or other ideology; most people are eclectic.[190] In her compelling dissent in *Legal Aid South Africa* Nkabinde J agreed with the majority that the dispute was moot, but found that 'the proposition that section 34 of the Constitution provides in at least certain cases for the right, to which Legal Aid is obliged to give effect, to legal representation before commissions of inquiry, … [had] no direct support in our

[190] James R. Hackney Jr. *Legal Intellectuals in Conversation: Reflections on the Construction of Contemporary American Legal Theory* (2012) Duncan Kennedy 'Critical Legal Studies': NYU Press Scholarship Online DOI:10.18574/nyu/9780814737071.003.0002 at 44.

jurisprudence.' However as 'its implications for Legal Aid and those who seek to benefit from its assistance [were] … potentially of great significance', the matter should be decided.[191] Precedent for hearing moot cases was set in the earliest discrimination case which had been settled before it reached the CC.[192]

No clues are necessary to distinguish the bend points of legal actors representing left from right wing political ideologies,[193] and large corporates from socially conscious legal aid and non-governmental organisations.[194] Despite their respective partisanship, their very clientele and choice of process – to litigate instead of engaging meaningfully – are explicit. In *Barnard*, private counsel represented both sides. Conciliation was an option. However, SAPS refused to conciliate, and Ms Barnard did not press the point, despite much encouragement from the judge in the LC. Manifestly, both sides wanted the courts to rule. Why? What was the game plan? Was it about law, politics or something else?

Choices do not begin and end with the judge; lawyers in the presentation of their evidence and arguments influence choice. In this way litigants and judges bring some constraints to bear on one another's personal preferences. Even within these limits, judges nevertheless encounter bend points and much more that is unarticulated.

Legal and constitutional culture and consciousness are rooted in politics. Choosing to disavow politics in adjudication is itself political. It also reflects a legal consciousness bereft of reality and a legal culture that has limited prospects of contributing to fundamental social transformation. A realistic evaluation of the potential of society to transform in an egalitarian direction would be incomplete, if not utterly unreliable, if it discounts ideology, and legal, constitutional and political culture and consciousness as key indicators.

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[191] *Legal Aid South Africa v Magidiwana and others* CCT188/14) {2015] ZACC 28; 2015 (6) SA 494 (CC); 2015 (11) BCLR 1346 (CC) (22 September 2015) para 31-32.
[192] *Brink v Kitshoff NO* (CCT15/95) [1996] ZACC 9; 1996 (4) SA 197; 1996 (6) BCLR 752 (15 May 1996).
[193] Le Roux and Davis in *Lawfare* at 44-45.
[194] *Holomisa.*

How can diversity of culture, consciousness and ideology of legal actors cohere in order to achieve constitutional standards? How can these contradictory and competing phenomena that are extraneous to the evidence and arguments, influence litigation without impugning the integrity of law? How can the contradictions between the simplicity of the form of litigation be reconciled with the complexities of its substance? For as long as the influence of the phenomena on litigation are denied, ignored and out of sync with one another and with the Constitution, the integrity of law will be at risk. The evidence, the arguments, the legal materials, the phenomena, the Constitution and the integrity of law must, as far as possible, be mutually inclusive on a single axis for litigation to be truly transformative. This is easier said than done. Human individuality and difference induce tensions between those determined to retain the status quo and others committed to egalitarian transformation. However, when coherence and common aims are elusive, then at least reciprocity should fill the gap. Without either, 'nothing resembling a society can exist.'[195]

Predominantly, legal consciousness, culture and everything about lawyering – from education to litigation to enforcement – is premised first and foremost, on legitimating and sustaining the prevailing economic system and all that props it up.[196] Kennedy characterized law school culture among students as being:

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[195] Lon L. Fuller and Kenneth I. Winston 'The Forms and Limits of Adjudication' (1978) 92 *Harv. L. Rev* 353 at 357.

[196] See Christopher Tomlins 'The Presence and Absence of Legal Mind: A Comment on Duncan Kennedy's Three Globalizations' (2015) 78 *Law & Contemp. Probs*. 1 at 7:
'"[E]conomic activity can[no]t be understood as something autonomous in relation to a set of passive institutional and legal conceptual constraints, as the term's framework and context suggests. Legal institutions have a dynamic, or dialectical, or constitutive relationship to economic activity." Even more firmly, they are constitutive not as a matter of relational theorizing, as is often the penchant of law-and-society scholarship, but in the nitty-gritty of day-to-day professional struggle. "[S]trong economic actors influence law making just as much as they are constrained by it," but it is lawyers who throw the switch: "lawyers for economic actors, lawyers working as legislators, judges and legal academics. . .have a professionally legitimated role to play, a role that parallels and overlaps that of the economic power-holders."' (Footnotes omitted).

'preoccupied with their careers, with getting a job, making money, getting married, deciding where to live - getting through law school as trade school, with no intellectual, political, cultural agenda of any kind for their legal education.'[197]

This description holds good today as it did in the sixties when he wrote about this. Pessimism about prospects for the development of legal theory then and now is justified because:

'there are very few younger profs for whom it's a big part of a life project to integrate a theoretical position with a doctrinal position or a political position.'[198]

and

'Today there's no peer pressure, and there's no authoritarian pressure for people to have positions in legal theory. Most people are just eclectic. That's not pluralism. Moreover, very few people, I think, believe it's worth it to engage in the task of defining, comparing, and critiquing the extant theories. . . . It seems more likely that the theory enterprise will be dormant for a while, and then it will come back in one form or another. . . .'[199]

As a class, legal actors fit the description of those who revel in the status quo. Their class interests seldom coincide with those of their litigant clients who demand redistribution and their livelihood rights. How then do litigants persuade their legal representatives to adopt the interests of litigants and their communities?[200]

Realistically, in any struggle, including the struggle against apartheid, only a few intellectuals emerge as agents of change. Most others indifferently or opportunistically sway with the balance of forces. Attempts to shift legal consciousness comes at a cost – intimidation, arrests, detention without trial and even assassinations during apartheid.[201] Critical Legal Studies (CLS), a

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[197] Kirstin Eidenbach 'Asked and Answered: Thoughts from the Works of Duncan Kennedy', 1 Crit 8 (2008); D Kennedy *Legal Education and the Reproduction of Hierarchy a Polemic against the System* (2004) at 5.

[198] Hackney Jr. 'In conversation with Duncan Kennedy 'Critical Legal Studies' NYU Press Scholarship (2012) at 45.

[199] Hackney 'In conversation with Duncan Kennedy 'Critical Legal Studies' NYU Press Scholarship (2012) at 44.

[200] Discussed in Chapter 4 under 'OCMS'.

[201] South African History Online 'Political assassinations 1974 – 1994' (3 April 2011) https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=13&cad=rja&uact=8&ve

small movement or theoretical grouping that challenged the notion of the necessity and neutrality of law, met its demise within fifteen years; its members were ostracized from jobs at universities and in law firms.[202] Packing the courts with centrists sceptical about transformation responds to mainstream antagonism to the agenda of CLS and its successor Critical Legal Realism (CLR). Theories that advocate for transforming legal and other institutions that prop up conventional economic systems are viewed with caution, suspicion and even as a threat. But even traditionalists have to yield to transformative theories when the baying of 'the beast' of popular insurrection gets too loud. What is to be done then? Inertia is not an option for the hungry and anyone committed to a 'new society, based on substantive equality' by redistributing power and resources with egalitarian aims.[203]

#### 2.7.2.2.4 Political Culture

Political culture, another phenomenon that influences litigation, is the confluence of many variables, including institutions and structures.[204] Political scientists conceive political culture in a 'purely psychological sense.' [205] Anthropologists adopting a 'phenomenological approach' view political culture as a subset of culture on political aspects; it is not a static set of givens but a process.[206] Historians now accept that 'culture has become the preeminent explanation of human behaviour.' [207] And postmodernists incline towards recognising that culture shapes consciousness. [208] An expanded definition of

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d=2ahUKEwiC1Zni08jjAhVMQxUIHcoFDjkQFjAMegQIChAB&url=https%3A%2F%2Fwww.sahistory.org.za%2Farticle%2Fpolitical-assassinations-1974-1994&usg=AOvVaw10LXxrvRUTPth32JElamtF (accessed 22 July 2019); B Naidoo *Death of an Idealist – In search of Neil Aggett* (2012).

[202] Kennedy 'Are Lawyers Really Necessary?' (Interview), (1987) 14 *Barrister* 11; Tor Krever, Carl Lisberger and Max Utzschneider 'A Conversation with Duncan Kennedy' (17 November 2015) http://criticallegalthinking.com/2015/11/17/a-conversation-with-duncan-kennedy/ (accessed 8 August 2019); Hackney Jr 'In conversation with Duncan Kennedy 'Critical Legal Studies' NYU Press Scholarship (2012).

[203] Langa 'Transformative constitutionalism' (2006) 3 *Stell LR* 351 at 352; Catherine Albertyn, Sandra Fredman 'Equality beyond Dignity: Multi-Dimensional Equality and Justice Langa's Judgments' 2015 Acta Juridica 430 (2015) at 453.

[204] Ronald P. Formisano 'The Concept of Political Culture' (2001) 31(3) *Journal of Interdisciplinary History* 393 at 403.

[205] Formisano 'Political Culture' *Journal of Interdisciplinary History* (2001) 31(3) 393 at 407.

[206] Formisano 'Political Culture' (2001) 31(3) *Journal of Interdisciplinary History* 393 at 408.

[207] Formisano 'Political Culture' (2001) 31(3) *Journal of Interdisciplinary History* 393 at 409.

[208] Formisano 'Political Culture' (2001) 31(3) *Journal of Interdisciplinary History* 393 at 409.

'political culture' would include all struggles for power, the struggles of women's movements, of labour unions, and for racial justice.[209] Defined generally, it refers to

'. . .the set of attitudes, beliefs, and sentiments which give order and meaning to a political process and which provide the underlying assumptions and rules that govern behaviour in the political system. It encompasses both the political ideals and the operating norms of a polity. Political culture is thus the manifestation in aggregate form of the psychological and subjective dimensions of politics. A political culture is the product of both the collective history of a political system and the life histories of the members of that system, and thus it is rooted equally in public events and private experiences.'[210]

The term 'political culture' gained traction in political science in 1956 when Gabriel Almond formulated it initially as political systems embedded in 'particular patterns of orientations to political action'. He subsequently revised it to mean the 'distribution of patterns of orientation' among the population.[211] This definition presupposes political cultural homogeneity in the population. How then does this definition explain the cultural differences of the Weimar Republic and the Third Reich, both emerging from the same German population?[212] Or, differences amongst South Africans as a nation that run deep and wide, pre- and post-apartheid, and between the Mandela-Mbeki era and Zuma era? Undeniably, culture must be a shared thing, 'a common framework of mutual orientation', not an individual preference, but what is expected and endorsed publicly.[213] A commitment to a 'public commonness' as

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[209] Formisano 'Political Culture' (2001) 31(3) *Journal of Interdisciplinary History* 393 at 416.
[210] Encyclopedia.com 'Political Culture' https://www.encyclopedia.com/social-sciences-and-law/sociology-and-social-reform/sociology-general-terms-and-concepts/political-culture (accessed 28 October 2019).
[211] Carlos Garcia-Rivero, Hennie Kotzé and Pierre Du Toit 'Political culture and democracy: The South African case' (2002) 29 *Politikon: South African Journal of Political Studies* 163 at 163; Formisano 'The Concept of Political Culture' (2001) 31(3) *Journal of Interdisciplinary History* 393at 396, both works referring to Gabriel A. Almond 'Comparative Political Systems' (1956) 18(3) *The Journal of Politics* 391; Chilton 'Defining Political Culture' (1988) 41(3) *The Western Political Quarterly* 419 at 419-420.
[212] Chilton 'Defining Political Culture' (1988) 41(3) *The Western Political Quarterly* 419 at 419-422.
[213] Chilton 'Defining Political Culture' (1988) 41(3) *The Western Political Quarterly* 419 at 419,422 and 430.

a way of relating defines who belongs to a culture.[214] Public commonness is both difficult to establish but, once established, it is also hard to change without some dramatic social upheaval.[215] Later, Almond proffered political culture as a solution to 'the classic problem of specifying how people affect their political system, and vice-versa'.[216] While this definition is a positive shift from the notion of populations being static, it assumes that political culture is necessarily a solution. A dominant elitist political culture will be disinclined to remedy inequality and class discrimination. However one defines political culture, as 'a suggestive rather than a scientific concept',[217] it is a powerful organizing and unifying concept and approach to political and social life.[218]

For political culture to induce stability and prosperity, 'it is necessary that the mind of all the citizens should be rallied and held together by certain predominant ideas.'[219] For instance, 'civic republicanism' is a form of political culture committed to democracy in which 'the political culture and political structure are congruent'[220] or interactive.[221] Civic culture thrives when confidence in leaders and institutions is high.[222] Monitoring the evolution of political culture as a way to assess democratic consolidation, researchers have used political tolerance and trust as indicators to study South Africa.[223] Their 2002 findings were:

'With tolerance, fair and periodic elections can be held and democratic governments can be appointed, but it will be very difficult to sustain democratic institutions if citizens

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[214] Chilton 'Defining Political Culture' (1988) 41(3) *The Western Political Quarterly* 419 at 429-430.
[215] Chilton 'Defining Political Culture' (1988) 41(3) *The Western Political Quarterly* 419 at 419 and 430.
[216] Chilton 'Defining Political Culture' (1988) 41(3) *The Western Political Quarterly* 419 at 419.
[217] Chilton 'Defining Political Culture' (1988) 41(3) *The Western Political Quarterly* 419 at 420.
[218] Formisano 'The Concept of Political Culture' (2001) 31(3) *Journal of Interdisciplinary History* 393 at 424; Chilton 'Defining Political Culture' (1988) 41(3) *The Western Political Quarterly* 419 at 419.
[219] Garcia-Rivero et al 'Political culture and democracy: The South African case' (2002) 29 *Politikon: South African Journal of Political Studies* 163 at 163 and 167 citing A De Tocqueville *Democracy in America Volume. II* (1969) at 8.
[220] Garcia-Rivero et al 'Political culture and democracy' (2002) 29 *Politikon: South African Journal of Political Studies* 163 at 167.
[221] Formisano 'The Concept of Political Culture' (2001) 31(3) *Journal of Interdisciplinary History* 393 at 402.
[222] Formisano 'The Concept of Political Culture' (2001) 31(3) *Journal of Interdisciplinary History* 393 at 401.
[223] Garcia-Rivero et al 'Political culture and democracy' (2002) 29 *Politikon: South African Journal of Political Studies* 163 at 163 and 167.

do not trust them. Without trust, free participation is imperilled particularly by minorities of one kind or another.'[224]

These researchers attribute the trust deficit amongst South Africans to our 'perception that political goods were not being delivered properly by government.'[225]

Vindicating the Constitution in the sense of defending any encroachment 'recognises that a constitution has as little or as much weight as the prevailing political culture affords it'.[226] The political actors – political parties, elected and appointed representatives, the electorate, the executive and the bureaucrats – are at the coalface of making decisions that define who we are as a nation, what values we uphold as 'non-negotiables', our level of tolerance for hardships and how we assert our political power. As members of this collective, legal actors are not immunised against political culture.

Historically, the ANC has determined the political culture and consciousness of the majority of South Africans. For many diehards, allegiance to the ANC is cultural, traditional and habitual. Consciously, some ANC members criticise the corrupt practices and lacklustre delivery of services of its deployed cadres. Nevertheless, forsaking the ANC is a cultural shift not easily executed. For instance, solidarity prevailed for former President Zuma to resist the oppositions' attempts at unseating him, despite serious allegations of malfeasance against him. Admittedly, political culture was not the only factor in a parliamentary system in which parliamentarians serve at the behest of the party, not the electorate. Abusing its political majority, the ANC trumped rationality and the integrity of Parliament as a constitutional institutional, sacrificed the electorate's grander interests of good governance, and exposed a political culture in which sworn allegiance to the Constitution carried little, if

[224] Garcia-Rivero et al 'Political culture and democracy' (2002) 29 *Politikon: South African Journal of Political Studies* 163 at 172.
[225] Garcia-Rivero et al 'Political culture and democracy' (2002) 29 *Politikon: South African Journal of Political Studies* 163 at 174.
[226] *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) para 96.

any, weight.[227]

Political and legal culture and consciousness may coincide with the world views, the philosophy and ideology of legal actors; but it would be a mistake to assume that culture and consciousness are homogeneous.[228] In *Barnard*, the litigation was culturally, consciously and ideologically loaded on both sides of the conflict from start to finish. Tensions between affirmative action and non-racialism intensified political contestation. Manifestly, the Constitution is not a switch that once flicked, causes everyone to sing Kumbaya in unison and with gusto.

And Love? What has love got to do with political culture and conflict? Nussbaum points to stable liberal democracies that on any day would experience a host of emotions ranging from anger to various forms of love. Intense public emotions impact on 'a nation's progress toward its goals.'[229] For instance, emotions accompanying the singing of the National Anthem after winning the Rugby World Cup 'can give the pursuit of those goals new vigour and depth'. Conversely, emotions evoked by xenophobic attacks and gender violence can 'derail that pursuit, introducing or reinforcing divisions, hierarchies, and forms of neglect or obtuseness.'[230] It would be a dangerous mistake to attribute intense emotions to fascist or aggressive societies because all nations need 'stability of their political culture' and 'the security of cherished values in times of stress.' How can political culture imbue compassion for loss, anger at injustice, inclusive sympathy instead of disgust and envy?[231] In intensely emotive conflicts about affirmative action, how and who manages public emotion?

Legal and political culture and consciousness would explain why transformative jurisprudence had better showings during the first ten years or so of democracy,

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[227] Three attempts to impeach President Zuma failed following the CC's finding that he had violated his constitutional obligations and oath of office. See Le Roux and Davis in *Lawfare* at 288.
[228] Davis and Klare 'Critical legal realism in a nutshell' at 29.
[229] Martha C. Nussbaum 'Political Emotions – Why Love Matters for Justice' (2013) at 2.
[230] Nussbaum *Political Emotions* (2013) at 2.
[231] Nussbaum *Political Emotions* (2013) at 2.

in contexts like legacy of apartheid challenges, than in later years. Propelled by euphoria, mustering solidarity against apartheid across colour and gender lines became easier, as legal, social and political culture and consciousness coincided in embracing egalitarian aims, unity and freedom and spurned the opposite, however varied the ideological sources were that induced shifts in political consciousness. Law tuned in to the mood of society and delivered on the latter's expectations – mostly.[232] But there are exceptions.

In South Africa, after the first 10 years or so of democracy, economic redistribution issues started to dominate the courts' agenda.[233] A gear change from rights to interest based litigation was slow in coming.[234] On the international front, conservatives and communists alike are stuck between the rock of escalating popular resistance, and the hard places induced by post-cold war economic and political developments. Instinctively, shifts towards liberal constitutionalism, independent judiciaries and centrist politics would be a (temporary) retreat to manage the clamour for redistribution. In this way capitalist economies would preserve their hegemony in the longer term. Additionally, the balance of forces in the judiciary also shifts. Constitutionalist judges are replaced.[235] Formalists gain ground over constitutionalists.[236] And the constitutional project is in trouble.

In *Barnard*, the CC failed to state what the much-awaited test would be to distinguish the implementation of affirmative action from discrimination. Instead, it found a procedural alley to avoid the hard work of devising a test.

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[232] Further discussion on how law responds to society in Chapter 3 under 'Context'.

[233] Katherine G. Young 'The Avoidance of Substance in Constitutional Rights' (2015) *Constitutional Court Review* 233 https://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=2057&context=lsfp (accessed 12 December 2018); see also D Brand 'The Proceduralisation of South African Socio-Economic Rights Jurisprudence, or 'What are Socio-Economic Rights For?'' H Botha, A van der Walt and J van der Walt eds. *Rights and Democracy in a Transformative Constitution* (2003) at 33; D Brand 'Judicial deference and democracy in socio-economic rights cases in South Africa' (2011) 22 *Stell LR* 614 at 616; Davis and Klare 'Common and customary Law' (2010) 26 *SAJHR* 403 at 414.

[234] I discuss the distinction between rights and interest litigation in Chapter 3 'Why care about litigation'.

[235] Davis and Klare 'Common and customary law' (201) 26 *SAJHR* 403 at 414.

[236] E.g. Cora Hoexter's 'two camps' theory in 'The enforcement of an official promise: Form, substance and the Constitutional Court (2015) 132 *SALJ* 207.

Why? Commentators have described the majority decision as an 'oddly formalistic side-step'[237] and that 'the overwhelming impression created by the majority judgment is of a Court searching for an easy way out of a difficult task'. [238] Even the formalists in the judiciary stoically stave off threats to democratic institutions, principally because the malfeasance and dysfunctionality of most state institutions are so egregious, that remedying them are either 'no-brainers', conceded, or both.[239] However, the political culture and consciousness must shift to higher ground amongst all the political actors. While puerile politicians squabble amongst themselves instead of using parliamentary resources to promote the public interest, the poor are taking to the streets to demand services. To whom can the disputants turn for solutions if not the courts? Given the courts' poor showing on socio-economic rights,[240] the judiciary stands as a porous boundary between constitutionalism and anarchy.[241] Yet there are those who disavow politics as being irrelevant to litigation. Like other institutions, litigation too faces challenges.

#### 2.7.2.2.5 Constitutional Culture

For 'constitutional culture' I adopt the definition in 'Constitutional Culture and Democracy in Mexico' [242] as 'the active popular process of learning, understanding, and interpreting the values, structures, and procedures

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[237] C H Albertyn 'Adjudicating affirmative action within a normative framework of substantive equality and the Employment Equity Act - An opportunity missed*? South African Police Service v Solidarity obo Barnard*' (2015) 132 *SALJ* 711 at 716.
[238] C McConnachie, 'Affirmative Action and Intensity of Review: *South African Police Service v Solidarity obo Barnard*' (2015) 7 *CCR* 163 at 179.
[239] *Economic Freedom Fighters v Speaker of the National Assembly & others; Democratic Alliance v Speaker of the National Assembly & others* [2016] ZACC 11, 2016 (5) BCLR 618 (CC); 2016 (3) SA 580 (CC) (*Nkandla*).
[240] Brand 'Livelihood Rights' Oscar Vilhena et al 2013 eds, 'Transformative constitutionalism: Comparing the apex courts of Brazil, India and South Africa', Sandra Liebenberg 'Towards an equality – promoting interpretation of socio–economic rights in South Africa: Insights from the egalitarian liberal tradition' 2015 (132) *SALJ* 411 at 411, Stuart Wilson and Jackie Dugard 'Taking Poverty Seriously: The South African Constitutional Court and Socio-Economic Rights' *Stell LR* 22(3), 664–682.
[241] Klug 'State Capture or Institutional Resilience – Is there a Crisis of Constitutional Democracy in South Africa?' Graber et al eds. *Constitutional Democracy in Crisis?* (2018) at 295-311.
[242] It is more recent and comprehensive than the earlier definition of Michelman who defined 'constitutional culture' for the limited purpose of his article 'Reflection' (2003-2004) 82 *Tex. L. Rev*. 1737 at 1741.

established in a constitution in a non-legalistic way, with the goal of forming a popular habit and custom of demanding justification of governmental acts by political participation.'[243] Without constitutional culture, using a constitution's processes and structures to advance popular political struggles would be impossible.[244] Relying on experts (lawyers) to advance popular causes would gradually erode peoples' ownership of their own causes. Critical self-reflection and discovery will be lost. Ultimately, democratic participation will be relinquished in favour of experts and the knowledgeable elite.[245] An 'ideology of constitutionalism' would inculcate a constitutional culture in which 'people live constitutionalism.'[246]

Three intersecting conditions invoke subjective responses about our constitutional culture: race, gender and class. While race and gender are usually articulated, class is subdued. So subdued that the Constitution does not list it as a ground of discrimination. Race and gender dominate the discourse on equality and discrimination, but the coincidence of all three is rarely recognised. The closest the Constitution comes to recognising class as a ground of discrimination is 'social origin'; but when linked to 'ethnic origin', ambiguity sets in. Social origin does not necessarily indicate the economic class of an individual. However, for the first time the CC recognised not only the unlisted grounds of geographic location and socio-economic status as discrimination but also their intersectionality in *Holomisa*.[247] The ambivalence about class plays out in the following accounts of the treatment of race and gender.

Drawing from Post, Michelman defines 'constitutional culture' as 'the beliefs and values of non-judicial actors' regarding 'the substance of the Constitution' through an on-going interaction between culture and constitutional

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[243] Alterio and Niembro 'Constitutional Culture and Democracy in Mexico' Graber eds. *Constitutional Democracy in Crisis?* (2018) at 141.
[244] Alterio and Niembro 'Constitutional Culture and Democracy in Mexico' Graber et al eds. *Constitutional Democracy in Crisis?* (2018) at 144.
[245] Discussed further in Chapter 4 under 'OCMS'.
[246] Alterio and Niembro 'Constitutional Culture and Democracy in Mexico' Graber et al eds. *Constitutional Democracy in Crisis?* (2018) at145.
[247] Holomisa v Holomisa & another [2018] ZACC 40 para 29.

adjudication.[248] For instance, the constitutional culture about affirmative action differs diametrically between the USA and South Africa, even though there is little contestation about what racial affirmative action means. American constitutional culture 'remains distinctly and categorically ill-disposed toward government action that identifies persons by race in deciding how they are to be treated'. [249] Whereas race classification is repugnant to American constitutionalists, it is instrumental for achieving equality in South Africa. Michelman attributes the Americans' repugnance for racial discrimination to their distinction between race as either 'classification' or 'maltreatment'. Americans contend that race classification 'always' fuses with maltreatment.[250] Hence, American constitutional culture resists race classification.[251] Ironically, this culture has its roots in *Brown* which struck down race as a qualifier for equal treatment.

Racial affirmative action in South Africa is distinguishable from and defined by the dominance in politics not of 'the historically advantaged racial group but rather the historically downtrodden group'. [252] South African constitutional culture about racial affirmative action is cultivated on the principle, right and value of dignity. Universally applicable, the dignity principle avoids the American 'dichotomizing doctrine' between classification and maltreatment'.[253] Michelman anticipated insightfully – considering that his diagnosis of the South African constitutional culture predated *Barnard, van Heerden,*[254] *Solidarity*[255] and *Coetzer*[256] – that dignity would hold the course in affirmative action

[248] F I Michelman 'Reflection' (2003-2004) 82 *Tex. L. Rev*. 1737 at 1741.
[249] Michelman 'Reflection' (2003-2004) 82 *Tex. L. Rev.* 1737 at 1742, 1744 and 1747; F I Michelman 'Reasonable Umbrage: Race and Constitutional Antidiscrimination Law in the United States and South Africa' (2004) 117 *HLR* 1378 AT 1382; see also Sandra Fredman *Discrimination Law* 2 ed (2011) at 118-125; Sandra Fredman *Comparative study of anti-discrimination and equality laws of the US, Canada, South Africa and India* (2012) at 64-65; Reva B. Siegel 'Equality Divided' (2013) 127 *HLR*; Sharon E. Rush 'Talking about Race and Equality' (2011) 22 *U. Fla. J.L. & Pub. Pol'y* 417.
[250] Michelman 'Reflection' (2003-2004) 82 *Tex. L. Rev.* 1737 at 1742 and 1745.
[251] Michelman 'Reflection' (2003-2004) 82 *Tex. L. Rev.* 1737 at 1742 and 1745.
[252] Michelman 'Reflection' (2003-2004) 82 *Tex. L. Rev.* 1737 at 1748.
[253] Michelman 'Reflection' (2003-2004) 82 *Tex. L. Rev.* 1737 at 1759.
[254] *Minister of Finance & another v Van Heerden* 2004 (6) SA 121; [2004] ZACC 3 (CC).
[255] *Solidarity & others v Department of Correctional Services & others* (2016) 37 ILJ 1995 (CC); 2016 (5) SA 594 (CC); [2016] 10 BLLR 959 (CC); 2016 (10) BCLR 1349 (CC).
[256] Coetzer & others v Minister of Safety and Security 2003 (3) SA 368 (LC).

cases.[257] He also predicted – almost accurately – that the quota system spurned in *Bakke*, might find favour in South Africa.[258] As it turns out, the EEA sanctions targets, but not quotas. Cameron J found that targets applied in *Barnard*.[259]

In any jurisdiction, affirmative action is a conscious measure aimed at redistributing resources and opportunities to promote collectively the rights and values of equality, dignity and freedom. A dominant political and constitutional culture that subsumes 'all equality harms under an idea of the impairment of dignity, as equal human worth, in different forms'[260] renders dignity as the scapegoat for avoiding substantive remedies to eliminate discrimination.[261] However, in the context of redistribution of socio-economic rights, dignity is sacrificed at the altar of deference.[262] Inspired by Justice Langa's equality judgments, Albertyn and Fredman offer a multi-dimensional approach 'in which dignity is one aspect of a more balanced and flexible evaluation of equality claims'.[263] They argue for an understanding of substantive equality within 'a

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[257] Arthur Chaskalson 'Dignity as a Constitutional Value: A South African Perspective' (2011) 26 *Am. U. Int'l L. Rev.* 1377; Arthur Chaskalson 'Human Dignity as a Constitutional Value' in David Kretzmer and Eckart Klein eds. *The Concept of Human Dignity in Human Rights Discourse* (2002) at 140. See also *National Coalition for Gay and Lesbian Equality & another v Minister of Justice & others* 1999 (1) SA 6 (CC) para 54; *Khosa & others v Minister of Social Development & others; Mahlaule & others v Minister of Social Development & others* 2006 (4) SA 505; 2004 (6) BCLR 569 (CC); See also Sandra Fredman 'Redistribution and recognition: Reconciling inequalities' (2007) 23 *SAJHR*. 214 at 230 where the following is said:
'The burden of proving such a justification should be decisively on the decision-maker. By contrast to the approach in the Supreme Court of Canada, it is not for the applicant to prove that the criteria have undermined her self-respect or failed to redress her disadvantage. This approach also makes it unnecessary to differentiate between different status-based claims in respect of the intensity of review. In the US, the most intense review, namely strict scrutiny, is reserved for blacks and aliens, while classifications on grounds of gender are subject to a less searching standard of intermediate review and other grounds of classification need only be shown to be rational.'
Albertyn and Fredman 'Equality beyond dignity: Multi-dimensional equality and Justice Langa's judgments' (2015) *Acta Juridica* 430 criticize the limitations of dignity and offer a multi-dimensional approach to equality.

[258] Michelman 'Reflection' (2003-2004) 82 *Tex. L. Rev.* 1737 at 1754.

[259] *Barnard* (CC) para 123.

[260] Albertyn and Fredman 'Equality beyond dignity: Multi-dimensional equality and Justice Langa's judgments' (2015) *Acta Juridica* at 453.

[261] McConnachie 'What Is Unfair Discrimination? -A Study of the South African Constitutional Court's Unfair Discrimination Jurisprudence' at 41, fn 48, 57-61 citing Laurie W. H. Ackermann 'Equality and non-discrimination: Some analytical thoughts' (2006) 22 *SAJHR*597.

[262] *Mazibuko & others v City of Johannesburg & others* [2009] ZACC 28; 2010 (3) BCLR 239; 2010 (4) SA 1 (CC).

[263] Albertyn and Fredman 'Equality beyond dignity' (2015) *Acta Juridica* 430 at 453.

four-dimensional framework', aimed 'at addressing stigma, stereotyping, prejudice and violence; redressing socio-economic disadvantage; facilitating participation; and valuing and accommodating difference through structural change'.[264] Diagnosing and analysing discrimination cases on their four-point axis responds closely to the causes of conflict that are articulated as discrimination claims. Would this tool have been useful in *Barnard* if the real source of conflict remained unarticulated?

Responding to Ackermann, McConnachie disagrees that dignity should guide the courts in diagnosing unfair discrimination.[265] Arising from *Harksen*, McConnachie advances

'three necessary conditions [that] have to be satisfied for the Court to conclude that dignity has been violated, leading it to find that discrimination is unfair: (i) there must be differentiation on the basis of protected grounds; (ii) that is disproportionate; and (iii) that threatens to create or perpetuate patterns of group disadvantage.'[266]

In my view McConnachie's approach to diagnose discrimination in a particular dispute is useful. However, it does not excavate the sources and causes of conflict that triggered the litigation in the first place.

McConnachie's advocacy is uncontroversial but incomplete. The aggregate of his reflections should be much more than the mechanics of differentiation, proportionality and assessing patterns of race and gender group disadvantage. However, his support for Ackermann's 'important call for greater transparency and rigour in judicial reasoning ought to be heeded,' is far more exciting.[267] This is a cue for legal actors and litigants to reflect deeply about what it means to be South African on the axis of the cumulative values of dignity, equality and freedom.

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[264] Albertyn and Fredman 'Equality beyond dignity' (2015) *Acta Juridica* 430 at 430.
[265] McConnachie 'Human Dignity' *Oxford Journal of Legal Studies*, Vol 34, Issue 3 (2014), 609–629.
[266] McConnachie 'Human Dignity' *Oxford Journal of Legal Studies*, Vol 34, Issue 3 (2014), 612.
[267] McConnachie 'Human Dignity, Unfair Discrimination' and Guidance' *Oxford Journal of Legal Studies*, Vol. 34, Issue 3 (2014), 609–629; also C McConnachie '"Affirmative Action" and Intensity of Review: *South African Police Service v Solidarity obo Barnard*', (2015) 7 *CCR* 163.

For me 'greater transparency' requires legal actors to probe beyond the causes to their sources of the complaints. The idea of equality and dignity being mutually exclusive repulses me. Like the two-part black and white Chinese Yin Yang symbol represents simultaneously unity and duality, equality and dignity are distinct, but inseparable for humans to be whole. Furthermore, the Constitution does not recognize a hierarchy of rights. Separating equality from dignity and democracy, and encouraging a hierarchy of rights and values, is an over-simplification of complex, intersecting, 'interdependent and mutually supportive' values.[268]

'Rigour in judicial reasoning' anticipates that lawyers would help judges devise appropriate remedies that most closely resemble a common, collective vision of being South African, imbued cumulatively with the values of dignity, equality and freedom. In *Barnard*, neither class or socio-economic status and redistribution entered the decisional equation. For, beneath the apparent neutrality of status-based discrimination lies 'a rich diet of misrecognition and mal-distribution', of prejudice, poverty and class-based distinctions.[269]

Returning to Michelman's prognosis above, what neither he nor any optimistic human rights constitutionalist would have anticipated, is a constitutional culture in which a democratic government elected by a majority of 'the historically downtrodden group' would have such a high tolerance for the erosion of dignity and equality through the deprivation of livelihood rights. Eliminating formal inequality, especially on the basis of race, gender and sex, has not deepened to substantive dignity-restoring equality through adequate housing and related services, vocational training for decent jobs, and so forth. A constitutional culture in which dignity attracts higher currency for implementing race- based affirmative action than for advancing socio-economic rights, sharpens the contradictions between race and class.

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[268] Henk Botha 'Equality, plurality and structural power' (2009) 25 *SAJHR* 1 at 6-8.
[269] Botha 'Equality, plurality and structural power' (2009) 25 *SAJHR*. 1 at 9.

Tension between race and class dominated the anti-apartheid struggle. Divisions between the ANC and SACP underscored these tensions.[270] That there should be no 'have-nots' was common cause. However, 'nationalising monopoly capital' and a 'Marxist agenda' were off limits for the ANC. I have yet to find a judgment of the CC that accounts for this historical tension in the current treatment of socio-economic rights. So, re-engineering constitutional culture to elevate dignity onto a decent socio-economic platform remains a struggle.

The constitutional culture about discrimination on grounds of marital status, (discussed under unarticulated premises below) is startlingly similar to the pedestrian pace of substantive socio-economic transformation, but quite the opposite of the lightning speed at which formal race discrimination was accomplished. When discrimination is indirect generally, and specifically on the grounds that affect women, South African constitutional culture suffers from a blind spot.

For instance, *Jordan* revealed that law enforcers applied s 20(1)(*a*A) of the SOA[271] to criminalize only the conduct of the prostitute, not the patron. They discriminated mainly against women, workers and the poor. The ostensible purpose was to outlaw commercial sex. If the majority had imposed a positive duty on law enforcers to prosecute both patrons and prostitutes, it would have achieved the law's purpose more effectively, thereby eliminating the gap between s 20(1)(*a*A), social attitudes[272] and the flawed application of anti-prostitution law.[273]

Despite counsel for the state asking for it,[274] Ngcobo J for the majority refused to declare the law invalid and to grant a suspended order of invalidity. Such an order, which O'Regan J for the minority granted, was less likely to cause

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[270] Clingman Bram Fischer - Afrikaner Revolutionary (2013); Callinicos Oliver Tambo – Beyond the Engeli Mountains (2004) at 582-583.
[271] Sexual Offences Act 23 of 1957.
[272] S v Jordan & others (Sex Workers Education and Advocacy Task Force & others as Amici Curiae) 2002 (6) SA 642; 2002 (2) SACR 499; 2002 (11) BCLR 1117 (CC)) para 16.
[273] *Jordan* para 19.
[274] *Jordan* paras 123 and 128.

disorder, dislocation or prejudice to good governance.[275] An immediate striking-down would have left prostitution unregulated, a case of throwing the baby out with the bath water.[276] Legalising prostitution was not the obvious policy option, nor was it on the CC's agenda. The consequence of upholding the validity of the section was that the order imposed no positive duty on law enforcement agencies to prosecute both prostitutes and patrons. Five years later, when Parliament amended the Sexual Offences Act in 2007,[277] it left the prostitution section intact. An opportunity for vital social change was lost. Sixteen years after *Jordan* the majority decision remains 'sticky', despite it being on the agenda of the South African Law Reform Commission since 2002. Embarrassingly, in April 2014 international and foreign jurisdictions adopted enlightened and pragmatic approaches to discourage double standards and moralizing about prostitution.[278]

Double standards indeed it was when South Africa debated legalizing prostitution for the limited duration for the 2010 Football World Cup. Arguments ranged from the economic benefits to tourist attractions.[279] What happened to morality? The practice of harassing sex-workers and protecting patrons continue unabated. Male patrons are the primary, if not the exclusive, beneficiaries of the implementation of the law in its current state of criminalising women prostitutes. The prospect of criminal prosecution deters women from charging male patrons for assault, rape, robbery and refusal to pay for their services. This state of affairs sparks speculation about what the subversive unarticulated reasons must be for not fixing the law to at least bring it up to

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[275] *Jordan* para 123.
[276] *Masiya* para 27.
[277] Section 68 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.
[278] Dhaya Pillay 'Whither the Prostitution Industry?' (2014) 35 ILJ 1749.
[279] World Cup 2010 and the Legalisation of Sex Work: Postulations and Expostulations http://www.ngopulse.org/article/world-cup-2010-and-legalisation-sex-work-postulations-and-expostulations; 'World Cup 2010: 40,000 prostitutes to enter South Africa' https://www.telegraph.co.uk/sport/football/world-cup/7374301/World-Cup-2010-40000-prostitutes-to-enter-South-Africa.html;
Xolani Mbanjwa 'Legalise prostitution for 2010' https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&cad=rja&uact=8&ved=2ahUKEwi4qdnT_7TlAhVaQEEAHdTcCMAQFjABegQIChAF&url=https%3A%2F%2Fwww.iol.co.za%2Fnews%2Fsouth-africa%2Flegalise-prostitution-for-2010-381832&usg=AOvVaw36a2JZO3q-5ltxTOIfr8Iq (accessed 24 October 2019).

international standards. Ineptitude is not a complete answer. Elite, powerful, vested, patriarchal interests continue to trump vestiges of a constitutional culture that aspire to achieving a genuinely egalitarian society. South Africa, once the front runner for constitutional reform, now lags behind the rest of the enlightened world on the issue of prostitution.[280]

Neglect of class and gender discrimination is no coincidence. It is another tool of divide and rule.[281] Calcified during apartheid and through various religious and cultural practices, the democratic state is in no hurry for a classless, gender-sensitive society. The state has no means and the rich are not willing to part with theirs.

As for the tension within the judiciary between form and substance, which is an important difference characterising our constitutional culture, the CC struggles to stay weighted towards substance as the recent changing of the guards shows swings towards formalism.[282] Against this backdrop, the struggle for economic redistribution of limited state resources and more generously endowed private resources, waged on the platform of litigation, assembles wide and intensely conflictual interests.

With the departure of many of those involved in the constitution-drafting project, taking with them their invaluable experiences, institutional memory and aspirations for fundamental constitutional transformation, their political, constitutional and legal culture and consciousness are lost. Under these

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[280] See Staff Writer 'Why South Africa is a flawed democracy' (11 January 2019) https://businesstech.co.za/news/government/293154/why-south-africa-is-a-flawed-democracy/ (accessed 13 January 2019) where the following was said
'South Africa's democracy score has been slowly declining since the Index launched in 2006, where its score was 7.91. This has gradually fallen over time to 7.24 in 2017 and 2018, with slight recoveries in 2013 and 2014.'

[281] Paulo Freire *Pedagogy of the Oppressed* (1970) at 141.

[282] C Hoexter 'The enforcement of an official promise: Form, substance and the Constitutional Court' (2015) 132 *SALJ* 207 at 214. Albertyn and Fredman at 455: '[A] minority of judges who seem more resistant to the resolution of these tensions and the "intrusion" of constitutional rights in customary law. This was evident in the minority judgments in *Pilane v Pilane* and *Mayelane*, which signal that the balance is tipping towards an accommodation of difference which threatens to undermine the other factors of substantive equality, in particular, participation and voice, redressing disadvantage (both material and in terms of power differentials) and reinforcing of stigma and stereotypes (inferiority of women).' (Footnotes omitted.)

conditions, cultivating solidarity, altruism, common purpose and reciprocity around constitutional values is infinitely harder than remedying the relatively linear, superficial disputes about direct discrimination on recognised grounds that characterised the first 10 years of democracy.

### 2.7.3 Legal Theories

Mindful of Kennedy's pessimism about theories of law,[283] without new theories being culled from prevailing objective and subjective conditions, transformation would be directionless, if not misdirected. Solutions to fix dysfunctional institutions in complex societies, including litigation, are not readymade and packaged with instructions for instant application. What are the essentials of any useful theory or combination of theories, given the objective and subjective conditions described above? They must be rooted in reality and be pliable for strategic application in the ongoing struggles for political and socio-economic transformation. Instead of delineating adjudication and law from politics and economics, they should account for material reality, combine objective and subjective material conditions with the constraints of legal materials to offer some explanation for rule and fact choices and fashion progressive remedies from the existing law. Treating adjudication as another site of political struggle, acknowledging adjudication and law as having both mutually reinforcing political and distributional consequences,[284] would encourage recognition of the seamlessness between society, institutions, politics, law and struggle. Theories that originate in dialectical materialism are open-textured, exploratory, innovative and participatory. They are receptive to hosting transformative constitutionalism. I adopt four theories that meet these criteria singly and cumulatively: CLR, agonism and jurisgenerative constitutionalism, experimentalism and a positive instead of normative approach to analysing the judicial function. A description of each theory will show that they while they have the criteria that commends them to me, their differences complement one another. Just as no single principle provides a complete solution to every

[283] Hackney Jr 'In conversation with Duncan Kennedy 'Critical Legal Studies' NYU Press Scholarship (2012) at 45.
[284] Dennis Davis and Duncan Kennedy 'A Critique of Adjudication: A Challenge to the Business as Usual Approach of South African Lawyers' (2000) 117 *SALJ* 697 at 709.

problem, no single theory offers a complete toolbox for analysing litigation and legal process. This matrix of theories acknowledges what judges actually do, proffer a theoretical approach to problem solving through litigation as one of several battlefronts; and suggest a lexicon to articulate strategies and tactics for development towards egalitarian ends through interpretation, dialogue and politics. They also synchronise with process tools such as destabilisation rights and experimentalism.

#### 2.7.3.1 CLR

Davis and Klare suggest that CLR inspires techniques of legal critique that challenge legal actors to re-examine their legal culture and legal reasoning.[285] CLR offers space in litigation for transformative constitutionalism, a theory that Klare developed to mean:

'a long-term project of constitutional enactment, interpretation, and enforcement committed … to transforming a country's political and social institutions and power relations in a democratic, participatory, and egalitarian direction.'[286]

And,

'It is not a neutral concept but … connote(s) a social good. By using law and non-violent political processes it seeks to induce large-scale social change.[287]

CLR confronts contradictions and realities head-on, the sine qua non for a deep diagnosis of sources and causes of conflict before prescribing remedies. What it is not, is nihilism.[288] Davis and Klare argue that interrogating settled or conventional understandings of law and society to destabilise them would initiate ways of practising law more creatively. Reasoning to 'criticize values, interrogate social practices, deepen self-consciousness, and inform judgment' coupled with good-faith dialogue that build on 'social experience, empathy and solidarity' would generate debate to distinguish between not only good and bad legal arguments,[289] but also, in my view, some options in between that are less

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[285] Davis and Klare 'Common and customary law' (2010) 26 *SAJHR* 403 at 436.
[286] Klare 'Legal Culture' (1998) *SAJHR* at 150.
[287] Klare 'Legal Culture' (1998) *SAJHR* at 150.
[288] C.W. Maris Van Sandelingenambacht, Legal Postism and the End of European Private Law - Duncan Kennedy's A Critique of Adjudication, 10 *Eur. Rev. Private L.* 111 (2002) at128.
[289] Davis & Klare 'Critical Legal Realism in a Nutshell'.

than perfect, but simply pragmatic.

CLR offers ways to make value-laden choices intrinsic to the legal materials when conventional canons of legal decision-making like deduction and applying precedents do not work.[290] Value and integrity are not extraneous but integral to the legal materials.[291] Choices, often conflicting, have to be made to fill gaps, reconcile conflict and clarify ambiguities in legal materials. The usual canons of reasoning – deduction, induction, precedent, separation of powers, deference, purposive interpretation and proportionality tests – do not automatically cure the indeterminacy of the texts to generate 'determinate outcomes.'[292] Instead, depending on the choice of canon(s), 'multiple, even conflicting' outcomes are possible solutions to problems to manage conflict.[293] In *Barnard*, indeterminacy of the texts was not the problem; gaps in the facts gave rise to inferences being drawn to fill them. At the crossroads of testing, precedent and deference, which one did the courts take and why?

#### 2.7.3.2 Agonism and jurisgenerative constitutionalism

CLR also accommodates jurisgenerative constitutionalism, [294] another dialogical, theory of inclusive politics that requires 'a pragmatic willingness' and 'jurispathic restraint' to engage with the Other, constructively and purposefully, a theory that acknowledges the reality of pluralism and hybridity, and the inevitability of conflict; it seeks to convert enemies into adversaries and antagonism into agonism.[295] Mouffe ratchets up 'deliberative democracy' with

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[290] Davis and Klare 'Common and customary law' (2010) 26 *SAJHR* 403 at437, e.g. *Laubcher* above.
[291] Davis and Klare 'Common and customary law' (2010) 26 *SAJHR* 403 at 438.
[292] Davis and Klare 'Common and customary law' (2010) 26 *SAJHR* 403 at 438.
[293] Davis & Klare 'Critical Legal Realism in a Nutshell'.
[294] Reva B. Siegel 'The Jurisgenerative Role of Social Movements in United States Constitutional Law' at 675-678. https://law.yale.edu/system/files/documents/pdf/Faculty/Siegel_Jurisgenerative_Role_of_Social_Movements.pdf (accessed 5 November 2018).
[295] Chantal Mouffe 'The Democratic Paradox' 13 (2000); Chantal Mouffe 'Democratic Politics and Agonistic Pluralism' http://consellodacultura.gal/mediateca/extras/texto_chantal_mouffe_eng.pdf (accessed 5 November 2018).

agonism. [296] Agonism, which embraces rather than denies conflict as pluralism's partner, holds better prospects for democracy. It searches for solutions founded in reality, instead of avoiding hard issues that are the sources and consequent causes of conflict that manifest in litigation and other forms of non-violent and violent expression.[297] Agonism pins conflict down to bedrock.

In *Mwelase* the CC acknowledged 'that joint efforts will not always be frictionless. … an understanding of the separation of powers as "a relationship of mutual accountability, responsiveness and openness between the three branches", may give rise to unavoidable – even productive – tension.'[298]

Constitutions head into crisis when they constantly fail to deliver on the aspirations of the population for livelihood rights. In near-crisis situations in constitutionalism, ubiquitous, (un)controlled popular participation reformulating traditional principles of sovereignty are unlikely to find a home in deliberative democracy, which eschews antagonism. It misses 'the specificity of the political' and 'collapses the politics into ethics.' [299] Under desperate conditions, deliberative democracy emerges as a neoliberal theory ambiguously aimed at either genuine dialogue for constitutional transformation or at tethering 'the beast'.[300]

Although both deliberative democracy and agonism build on pluralism, agonism embraces dissent whereas deliberative democracy subdues or sidesteps it by building on 'collective deliberation conducted rationally and fairly among free and equal individuals.'[301] Implicitly, democratic deliberation would flourish only for as long as the participants are free, equal and therefore, predictably reasonable in the liberal sense of what people, free and equal, consider to be

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[296] Chantal Mouffe: Agonistic Democracy and Radical Politics http://pavilionmagazine.org/chantal-mouffe-agonistic-democracy-and-radical-politics/ (accessed 15 April 2018).
[297] Mouffe: Agonistic Democracy and Radical Politics http://pavilionmagazine.org/chantal-mouffe-agonistic-democracy-and-radical-politics/ (accessed 15 April 2018).
[298] *Mwelase* para 47.
[299] Mouffe 'Deliberative Democracy or Agonistic Pluralism' Institutional Repository at IHS Vienna 13.
[300] Juristocracy discussed in Chapter 3 under 'What if we do not care about litigation?'
[301] Mouffe 'Agonistic Pluralism' Institutional Repository at IHS Vienna 5 citing Seyla Benhabib 'Towards a deliberative Model of Democratic Legitimacy' (1996) at 69.

reasonable.[302] Fraser's 'parity of participation' is required.[303] However, stipulating freedom and equality as preconditions for democratic deliberation, disqualifies significant popular majorities still reeling from the ravages of apartheid and colonialism. The very aim of engagement is for participants to be free and equal. Furthermore, searching for solutions by insulating politics from pluralism, and popular sovereignty from participation, would be avoiding the material reality of the inherent dynamics amongst these interacting elements that constitute democracy.[304]

Mouffe concludes that to take pluralism seriously means giving up 'the dream of rational consensus.'[305] Why should consensus be the only goal of pluralist democracy? Dissent paradoxically sharpens debate and outcomes, irrespective of whether consensus or some other outcome is reached. To redress the deficiencies in the deliberative model, Mouffe advocates centralising power and antagonism so that power is not external to, but constitutive of, contesting identities.[306] Social order characterised by hegemony and power challenges legitimacy, for which Mouffe's 'agonistic pluralism' is an alternative to the aggregative and deliberative model.[307] Similarly, jurisgenerative constitutionalism compels decision-makers to reflect on processes, to 'design on-going practices, procedures, or institutional arrangements to constitutionally embed …inquiries' into other appropriate systems.[308]

Conflict, natural to pluralism, is capable of resolution through jurisgenerative politics, when sufficient effort is exerted in seeking common aims and reciprocity.[309] The stronger the common purpose and reciprocity, the better the

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[302] Mouffe 'Agonistic Pluralism' Institutional Repository at IHS Vienna 5 citing Joshua Cohen in 'Democracy and Liberty' Jon Elster ed. (1998) at 194.
[303] Nancy Fraser 'Social Justice in the Age of Identity Politics: Redistribution, Recognition, Participation' (1998) ISSN Nr. 1011-9523; Nancy Fraser 'Social Exclusion, Global Poverty, and Scales of (In)Justice: Rethinking Law and Poverty in a Globalising World in at 13.
[304] Mouffe 'Agonistic Pluralism' Institutional Repository at IHS Vienna 9.
[305] Mouffe 'Agonistic Pluralism' Institutional Repository at IHS Vienna 12.
[306] Mouffe 'Agonistic Pluralism' Institutional Repository at IHS Vienna 14.
[307]Mouffe 'Agonistic Pluralism' Institutional Repository at IHS Vienna 14.
[308]Paul Schiff Berman 'Jurisgenerative Constitutionalism: Procedural Principles for Managing Global Legal Pluralism'. https://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=2228&context=faculty_publicatios (accessed 5 November 2018).
[309]Fuller 'Forms and Limits of Adjudication' (1978) 92 *Harv. L. Rev* at 357.

prospects for reconciliation, peace and sensible, coherent outcomes through litigation.

#### 2.7.3.3 Experimentalism

Sabel and Simon (2003) demonstrate the interdependence theoretically and practically between rights declaration and remedy formulation in public law litigation. They distinguish between polycentricity, precedent and disputes that ramify and simple fact-based dispute resolution, between public law and private law litigation, and between 'command-and-control injunctions' and 'experimentalist interventions'[310] (or what Sturm referred to as the '"catalyst approach"').[311]

Public institutions that 'chronically' fail to fulfil their obligations and insulate themselves from political accountability are susceptible to claimants exercising 'destabilization rights' to 'unsettle and open' them up to judicial scrutiny. This enables courts to intervene from the outset to unsettle litigants' expectations and to facilitate 'experimentalist collaboration'.[312] 'Experimentalist regulation' is more flexible as it combines 'provisional norms with procedures for ongoing stakeholder participation and measured accountability'.[313] Experimentalist remedies are less threatening and invoke greater civic participation,[314] accountability[315] and goal-setting. Effectively, 'the remedy institutionalizes a process of ongoing learning and reconstruction'.[316]

The role of the court diminishes once the norm setting that defines compliance

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[310] Sabel and Simon 'Destabilization Rights: How Public Law Litigation Succeeds (2004) *Harv. L. Rev*. at 1019.
[311] Susan Sturm 'Resolving the Remedial Dilemma: Strategies of Judicial Intervention in Prisons' (1990) 138 *U. Pa. L. Rev*. 805 at 856-59. Cited in Sabel and Simon 'Destabilization Rights: How Public Law Litigation Succeeds (2004) *Harv. L. Rev Harv. L. Rev.* at 1036.
[312] Sabel and Simon 'Destabilization Rights: How Public Law Litigation Succeeds (2004) *Harv. L. Rev Harv. L. Rev.* at 1021.
[313] Sabel and Simon 'Destabilization Rights: How Public Law Litigation Succeeds (2004) *Harv. L. Rev Harv. L. Rev.* at 1019.
[314] Sabel and Simon 'Destabilization Rights: How Public Law Litigation Succeeds (2004) *Harv. L. Rev Harv. L. Rev.* '' at 1015.
[315] Sabel and Simon 'Destabilization Rights: How Public Law Litigation Succeeds (2004) *Harv. L. Rev Harv. L. Rev.* 'at 1027.
[316] Sabel and Simon 'Destabilization Rights: How Public Law Litigation Succeeds (2004) *Harv. L. Rev*) *Harv. L. Rev.* at 1019.

shifts from the judiciary to 'the actors who live by them'.[317] Continuous collaborative processes reduce dependence on judicial management, 'the risk to its political legitimacy'[318] and 'hence mitigate separation-of-powers concerns about structural remedies'.[319]

In a related article Dorf and Sabel[320] introduce the idea of democratic experimentalism as a form of government. Power, and with it, participation is devolved to enable citizens to tailor solutions using local knowledge. Coupled with information sharing and mutual monitoring, democratic experimentalism protects constitutional values to counter hegemonic interactions associated with the separation of powers doctrine.

The need for flexibility, for common aims and reciprocity cultivated through civic participation and collaboration, for commitment to the constitutional values of accountability and transparency, all of which conduce towards substantive societal transformation, elevates experimentalism as a pre-eminent tool-in-aid for efficient litigation in the twenty-first century. Experimentalism, synonymous with novelty, innovation, investigation, information, tentativeness, experience and evidence, has in-built flexibility to reinvent itself in tandem with societal needs. With enhanced participation and mutual goal setting, the risk of overreach and trenching on the separation of powers principle recedes.[321] New precedents are set in novel ways of problem solving.

The current state of antagonistic politics in South Africa poses huge challenges for litigation. Divorcing conflict and politics from litigation under these conditions would amount to ignoring material 'proofs and arguments' that conduce to reasoned judgment(s).[322] Shock treatments to rejig institutions, including the

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[317] Sabel and Simon 'Destabilization Rights: How Public Law Litigation Succeeds (2004) *Harv. L. Rev Harv. L. Rev*. at 1020.
[318] Sabel and Simon 'Destabilization Rights: How Public Law Litigation Succeeds (2004) *Harv. L. Rev Harv. L. Rev*. at 1020.
[319] Sabel and Simon 'Destabilization Rights: How Public Law Litigation Succeeds (2004) *Harv. L. Rev Harv. L. Rev*. at 1091.
[320] Michael C Dorf and Charles F Sabel 'A Constitution of Democratic Experimentalism' (1998) *Vol 98 No 2 Col.L.R*.
[321] See Stu Woolman in Chapter 3 under 'Separation of powers.'
[322] Fuller 'Forms and Limits of Adjudication' (1978) *Harv. L. Rev*. at 357.

judiciary, are needed rather than palliatives to calm simmering discontent. Below, Woolman develops experimentalism with flourishing, social capital and choice architecture.[323]

Linking CRL theories to experimentalist remedies is strategic in the struggle for achieving egalitarian ends through law. Litigation would occur in the milieu of ever-evolving legal, constitutional and political cultures. It would actively shape and be shaped by these and other cultures. Equally, the relationship amongst legal actors is not one-dimensional. Nor can the agency of clients, communities and institutions be occluded from the confluence of factors impacting on both the form and substance of litigation. The legal actors are agents for the people and the institutions they represent. The people and institutions in turn are agents for themselves and for the society they seek to cultivate for their future and those of their offspring. For litigation to be a useful tool-in-aid in conflict management, revitalising litigation would also mean progressively reconfiguring its practice in tandem with the evolution of society in order to manage its complexities.[324]

#### 2.7.3.4 Positive vs Normative approach

Underpinning my adoption of CLR and experimentalism is my positive approach to investigating the judicial function. Friedman makes a persuasive case for positive theories of judicial review and the judicial function.[325] Positive theories examine what judges do and why, rather than what they ought to do.[326] How judges ought to behave is a normative legal question usually asked and answered within the legal academy.[327] Ultimately, if positive theories gain sufficient traction they conduce to normative theories. Then they would be on more reliable foundations. Normative theories remain relevant only for as long

[323] Chapter 3 under 'Separation of powers'.
[324] Chapter 4 'Recommendations'.
[325] Such reservations as I have about finer points of his approach, I discuss later in the section on the judicial function.
[326] Barry Friedman 'The Importance of Being Positive: The Nature and Function of Judicial Review' 72 *U. Cin. L. Rev*. 1257 2003-2004 1258; Barry Friedman 'The Politics of Judicial Review' 84 *Tex L Rev* 257 (2005).
[327] Friedman 'The Politics of Judicial Review' 84 *Tex L Rev* 257 (2005) 258.

as they reflect reality.

Michelman warns against 'normative jurisprudence' as containing 'the steepest and deepest of the intellectual ditches through which legal criticism can slide, carelessly and unreflectively, from Is to Ought.'[328] He elaborates that no set of rules can be legislated to be 'impersonal and general enough to command the assent of a truly democratic legislature' and be so 'complete and determinative for all cases' that it 'precludes judicial dictatorship.' Cases arise that seek resolution through 'judicial originality', irrespective of how finite the rules seem.[329] Michelman advocates pragmatism[330] and efficiency 'when no superior principle of justice - fairness, equality, reciprocity, altruism, whatever, succeeds in ranking the competing claims of the parties'. Normative approaches that struggle to reduce law 'to one simple principle' forsake attempts at 'figuring out the meaning of all the data of the law' that preceded the single principle. [331]

Positive theories of judicial review appeal to me because they seek to diagnose reality, i.e. why judges decide the way they do, instead of how they ought to decide. Building on what *is* rather than what *ought* to be is organic, developmental and therefore capable of strengthening strategies for problem solving.

What motivates the judges to decide the way they do preoccupies me. I offer no answers, only clues to answers. Motives are hard to mine at the best of times, even with direct evidence. For instance, the motives of a person who pulls the trigger that kills another person can range from 'I didn't intend to kill. I thought it was toy gun,' to 'I didn't intend to kill *her* but *him*.' Pinpointing the particular phenomena that induced unpredictable reasoning and decisions, is near impossible, even by the judge who made the decision, unconscious of her

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[328] F I Michelman, 'Norms and Normativity in the Economic Theory of Law' 62 *Minn. L. Rev*. 1015, 1048 (1978) at 1043.
[329] Michelman 'Norms and Normativity in the Economic Theory of Law' 62 *Minn. L. Rev.* 1015, 1048 (1978) at 1044.
[330] Michelman 'Norms and Normativity in the Economic Theory of Law' 62 *Minn. L. Rev*. 1015, 1048 (1978) at1046.
[331] Michelman 'Norms and Normativity in the Economic Theory of Law' 62 *Minn. L. Rev*. 1015, 1048 (1978) at 1046-1047.

unarticulated premises. Identifying say, the particular legal philosophy or ideology of legal actors, whether they are feminist, liberal, social democratic or something else, would be difficult to diagnose. Ideologies are not static but 'eclectic'[332] as they morph into one another to suit the situation. A pragmatic judge who usually prefers substance over form might insist on compliance with form in a particular case for ideological reasons that one can only speculate about from the clues in the judgment and elsewhere.[333] In *Barnard*, Moseneke ACJ and his 'jurisprudential sweetheart' Cameron J,[334] both pragmatic judges, settled for rule application and deference. Ideology is but one of several phenomena informing decision-making.

Discovering what judges do is usually limited to what they say and write in their judgments. Uncovering why they do what they do is even harder. Biographies and articles by or of judges help to answer these questions. Otherwise, the academy is left to speculate, as I do. A critical mass of cases generates patterns of thought processes and conduct that, in turn, point to clues about why judges do what they do.[335] My project as a desk-bound jurist is considerably attenuated. Applying a positive, pragmatic approach, I choose cases to search for clues to explain the unpredictability of judicial reasoning and decisions. A multi-disciplinary exercise involving a range of specialists – statisticians, social and political scientists and philosophers – drawing from an expansive database, would generate deeper, more precise explanations. Notwithstanding, such studies, including this one, serve primarily to raise awareness of the phenomena that bear on judicial conduct and decision-making so that legal actors would make conscious efforts to manage them. My secondary aim is also to raise awareness amongst legal representatives and

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[332] Hackney Jr 'In conversation with Duncan Kennedy 'Critical Legal Studies' NYU Press Scholarship (2012).
[333] C Hoexter 'The enforcement of an official promise: Form, substance and the Constitutional Court 2015 *SALJ* 207 at 214.
[334] Moseneke DCJ's description during a media interview after the special sitting of the CC on the retirement of Cameron J on 20 August 2019.
[335] Alan Paterson *Final Judgment – The Last Law Lords and the Supreme Court* which draws on over 100 interviews, more than 40 of which were with Law Lords and Justices, is an example of the scale of such a project. Similarly, Penny Darbyshire *Sitting in Judgment – The Working Lives of Judges* spent 7 years shadowing judges in their daily work to demystify the judiciary. Judicial Analytics discussed in section 6 is a new field of studying judicial conduct and decision-making to predict outcomes.

litigants of their own conduct, choices, decisions and ideological dispositions for it is their input of evidence and arguments into litigation that emerges as judgments ultimately. Notwithstanding its instrumentality, the scope of my research to support my secondary aim is also considerably attenuated. A deeper study of legal representatives and litigants would broaden the scope of research well beyond the limits set for this study.

### 2.7.4 Unarticulated Factors and Phenomena

Do unarticulated premises influence decision-making? Answering 'yes' is easy. Proving this as a fact is less so. Unarticulated premises of legal actors are elusive. As a prelude to the phenomena I unearth three judgments in which the judges took unarticulated premises head-on. With judges articulating that unarticulated premises are at play in these cases helps to overcome the first hurdle of establishing that they do arise in litigation.

Thereafter, I analyse judgments of the CC on discrimination. It is a field of litigation practice that is filled with choices. Choices about comparators, grounds of discrimination, whether the test for equality or discrimination analysis should apply, and various permutations of these suggest that influences extraneous to the legal materials are at work. Dissents fortify this proposition. Tracking the evolution of marital status alone as a ground of discrimination secures the 'evidential data' for the prevalence of unarticulated premises in discrimination and other high stakes litigation.

Recognising their influence means that they have to be accounted for in some way. Paradoxically, because they are unarticulated, they are difficult for others to detect and influence. Often an intuitive sense suggests that something does not add up to justify a finding or conclusion. Dissents and separate concurrences expose some clues. Recognising their prevalence is sufficient to lay the foundation for my discussion on possible unarticulated premise.

#### 2.7.4.1 Articulating the unarticulated

First, *Du Plessis*[336] was a defamation action by Mr De Klerk against the Pretoria News, instituted before any Constitution had come into force. In the appeal before the CC, the debate turned on the question of the horizontal application of the Bill of Rights. Dissatisfied with the majority's conclusion 'that the individual's legal rights guaranteed by Chapter 3 of the Constitution are directly enforceable against the state alone'[337] Kriegler J (Didcott J concurring) stripped down the 'inarticulate premises' to expose the 'bogeyman' thus:

'[119] The legal issues involved are inherently complex. The conundrum is compounded by perceptions of its social, political and economic implications, as also by inarticulate premises, culturally and historically ingrained. It is therefore necessary to strip the problem down to bedrock. To that end two basic points should be made at the outset of the discussion. The first is that the debate is not one of "verticality" versus "horizontality". … The true debate relates to the manner of its "horizontal" operation in common law relationships.

[120] The second point concerns a pervading misconception held by some and, I suspect, an egregious caricature propagated by others. That is that so-called direct horizontality will result in an Orwellian society in which the all-powerful state will control all private relationships. The tentacles of government will, so it is said, reach into the marketplace, the home, the very bedroom. The minions of the state will tell me where to do my shopping, to whom to offer my services or merchandise, whom to employ and whom to invite to my bridge club. That is nonsense. What is more, it is malicious nonsense preying on the fears of privileged whites, cosseted in the past by laissez faire capitalism thriving in an environment where the black underclass had limited opportunity to share in the bounty. I use strong language designedly. The caricature is pernicious, it is calculated to inflame public sentiments and to cloud people's perceptions of our fledgling constitutional democracy. "Direct horizontality" is a bogeyman.' [338] (my underlining)

Second, in *Makwanyana*, Mahomed J exposed the unarticulated premises that informed punishment for crimes in the following extract from his concurring contribution:

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[336] *Du Plessis and Others v De Klerk and Another* (CCT8/95) [1996] ZACC 10; 1996 (3) SA 850; 1996 (5) BCLR 658.
[337] *Du Plessis* para 118.
[338] *Du Plessis* para 119 - 120.

'It is difficult to appreciate why a sentence which compels the offender to spend years and years in prison, away from his family, in conditions of deliberate austerity and rigid discipline, substantially and continuously impeding his enjoyment of the elementary riches and gifts of civilized living, is not an effective and adequate expression of moral outrage. The unarticulated fallacy in the argument that it is not, is the proposition that it must indeed be equivalent in form to the offence committed. That is an impermissible argument. The burning of the house of the offender is not a permissible punishment for arson. The rape of the offender is not a permissible punishment of a rapist. Why should murder be a permissible punishment for murder?'[339](my underlining)

Third, in *Laubscher*, Froneman J's dissent exposed the unarticulated premises underpinning marital status and the possibility that *Volks*,[340] a CC precedent, had been incorrectly decided.[341] To appreciate fully his dissent and the foundation it laid for *Holomisa*, a historical perspective is necessary of marital status as a supersensitive ground of discrimination for South African society, as reflected from the earliest responses of the CC.[342]

#### 2.7.4.2 Marital status: unarticulated patriarchy, economics or something else?

Discrimination on the grounds of race had better showings than marital status. So did claims by black women and homosexual people on the grounds of gender, HIV status, sex and sexuality.[343] What unarticulated premises influenced the judges to sidestep marital status as the ground of discrimination?

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[339] *Makwanyana* (Mahomed J) para 296.
[340] *Volks NO* v *Robinson* [2005] ZACC 2; 2005 (5) BCLR 446 (CC).
[341] *Laubscher N.O.* v *Duplan and Another* (CCT234/15) [2016] ZACC 44; 2017 (2) SA 264 (CC); 2017 (4) BCLR 415 (CC) para 60.
[342] *Brink* came before the CC as its first discrimination case. Section 44(1) and (2) of the Insurance Act No 27 of 1943 discriminated against wives who were beneficiaries of policies taken by their husbands but not against husbands who were beneficiaries of policies taken by their wives. The comparators were therefore married men and women. The grounds of discrimination were sex and marital status. In that instance, the listed ground of sex discrimination was dispositive. Adopting a minimalist stance, the CC avoided deciding the discrimination claim on the grounds of marital status, which, at the time, it was an unlisted ground.
[343]On the grounds of: race: *Moseneke and Others v The Master and Another* 2001 (2) SA 18 (CC);
sex or gender: *Bhe and Others v Magistrate, Khayelitsha, and Others (Commission for Gender Equality as Amicus Curiae); Shibi v Sithole and Others; South African Human Rights*

*Harksen*

If the context were not so serious, *Harksen*[344] would be hilarious for the gymnastics that the majority employed to avoid equating 'spouse' and 'spousal relations' to marital status as a ground of discrimination. Unlisted in the 1993 Constitution when the litigation commenced, marital status was recognised as a listed ground under the 1996 Constitution. By then the CC was seized with the matter. Yet, the majority was reluctant to equate spousal relations to marital status. The majority and minority agreed that discrimination in s 21 of the Insolvency Act No 24 of 1936 was 'patent'[345] or direct. Both identified the comparators as the solvent spouse and everyone else associated with the insolvent. So, the point of departure between them was not the choice of comparators .[346] It turned on the ground of discrimination.

For Goldstone J writing for the majority, discrimination arose from 'attributes or characteristics as solvent spouses, namely their usual close relationship with the insolvent spouse and the fact that they usually live together in a common household.'[347] It acknowledged that these attributes have the potential to demean people. Studiously avoiding articulating them as characteristic of marriage and marital status, the majority settled for an 'unspecified but

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*Commissioner and Another v President of Republic of South Africa and Another* 2005 (1) SA 580 (CC) 2005 (1) BCLR 1 (CC); *Dawood, Van Der Merwe v Road Accident Fund and Another (Women's Legal Centre Trust as Amicus Curiae)* 2006 (4) SA 230 (CC);
sexual orientation: *Minister of Home Affairs v Fourie (Doctors for Life International and Others, Amici Curiae); Lesbian and Gay Equality Project and Others v Minister of Home Affairs* 2006 (1) SA 524 (CC); *Satchwell v President of the Republic of South Africa and Another* 2002 (6) SA 1 (CC); 2002 (9) BCLR 986 (CC); *Satchwell v President of the Republic of South Africa and Another* 2003 (4) SA at 266; *Gory v Kolver NO and Others (Stark and Others intervening)* 2007 (3) BCLR 249 (CC);
HIV status: *Hoffmann v South African Airways* 2001 (1) SA 1 (CC);
Affirmative action: *Minister of Finance and Another v Van Heerden* 2004 (6) SA 121 (CC) and refugee status: *Khosa and Others v Minister of Social Development and Others; Mahlaule and Others v Minister of Social Development and Others* 2004 (6) SA 505 (CC) (2004 (6) BCLR 569.

[344] *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC); 1997 (11) BCLR 1489.
[345] *Harksen* para 55.
[346] *Harksen* para 61.
[347] *Harksen* para 49, 62.

analogous' ground.[348] But nowhere did it identify that ground of discrimination. Nevertheless, it declared the analogous ground to be unfair.[349]

O'Regan J for the minority articulated the differentiation unambiguously to be on the ground of marital status. Stating the obvious that the definition of 'spouse' derives from marital status, she cogently argued that the property of other family members and business associates close to the insolvent did not vest in the Master or trustee. Only the property of the solvent spouse, broadly defined to include an unmarried man or woman living together, vested.[350] Such differentiation was unfair, she concluded.[351]

The choice of the ground of discrimination – marital status or some unarticulated unspecified but analogous ground – made the difference between transformation and the retaining the status quo, and, as the dichotomy bifurcated further, between altruism and individualism. The majority rested on direct discrimination between the facially neutral status of the solvent spouse and others associated with the insolvent whilst the minority struggled to muster support for its harder choice that discrimination was indirect between the historically disadvantaged status of a woman being married, or in a relationship akin to marriage, and others associated with the insolvent. The majority emphasised solvency, and by implication, its consequences for a capitalist system of economic policy. In contrast, the minority advocated spousal relations, urging that unlike solvency, patterns of disadvantage in spousal relationships were legally and socially enforced. At the time, the law did not recognize common law marriages and life partnerships. Instead, law and society subordinated women, married or unmarried, to the vulnerable position of dependent home and child minders. When compared to other people related to the insolvent, s 21 disproportionately prejudiced the solvent spouse. Only by reason of her marriage to the insolvent was her relationship distinguishable. 'Spouse', solvent or otherwise, was but the name given to partners in marriage,

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[348] *Harksen* para 61.
[349] Harksen para 67-68.
[350] *Harksen* para 87.
[351] *Harksen* para 100.

a point so trite that the CC later accepted it without demur in the immigrants' case.[352]

The majority's resistance against recognising marital status as a ground of discrimination was so contrived that explanations had to lie in some extraneous unarticulated premise. Although when the cause of action arose in *Harksen*, marital status had not yet been listed as a ground of discrimination, the majority's resistance was much more than a mere time-based technicality. It also implicated the onus of proving unfair discrimination. As a listed ground under the Constitution of 1996, that onus would have rested on the Master or trustee of the insolvent spouse. That could have been a game changer for insolvency law.

The cause of the conflict articulated in the litigation as discrimination on the grounds of marital status belied the real source of the conflict. In my view the source was economic. The majority judgment was premised on the unarticulated belief that insolvency affected spouses who were typically modern, western and wealthy. Preserving the traditional system of liquidation of insolvents was important to capitalism. The majority's preference for preserving the interests vested in a capitalist economy outflanked the minority's liberal feminist assault on s 21. A piffling discrimination complaint by a white, middle-class wife could not be allowed to trifle with capitalism's grand scheme. Conservative capitalist ideology triumphed.

*Volks*

The Maintenance of Surviving Spouses Act provided for maintenance to surviving spouses in heterosexual marriages.[353] The CC had to decide whether the survivor in a heterosexual life partnership was entitled to maintenance.

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[352] National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) para 33 (the immigration case).

[353] Section 2(1) of the Maintenance of Surviving Spouses Act, 27 of 1990 (the Act) provided:
'If a marriage is dissolved by death after the commencement of this Act the survivor shall have a claim against the estate of the deceased spouse for the provision of his reasonable maintenance needs until his death or remarriage in so far as he is not able to provide therefor from his own means and earnings.'

Skweyiya J, writing for the majority, concluded that the Act was 'not reasonably capable' of extension to unmarried heterosexual partners.[354] It was common cause that the law discriminated on the presumptively unfair ground of marital status.[355] As to whether it was actually unfair, the majority answered 'no'.[356]

It went on to mollify its stance by articulating its 'genuine concern for vulnerable women who cannot marry despite the fact that they wish to and who become the victims of cohabitation relationships.'[357] It even accepted that laws were appropriate to regulate such relationships so that the vulnerable partner was not taken advantage of.[358] But it was not 'the under-inclusiveness' of the Act that caused 'their misery.'[359] 'Unfortunately' the reality was that 'maintenance claims in a poverty situation' were 'unlikely to alleviate vulnerability in any meaningful way.' Instead 'a broader societal reality' had to be 'corrected through the empowerment of women and social policies by the legislature.' Something more was needed than the mere 'palliative measures' of extending benefits under the Act to survivors.[360] For the majority, the answer lay in legislation that would make a real difference to vulnerable women at a time when both partners to the relationship were still alive.[361] These sentiments would not have rung out as rhetoric if they were triggered a structural interdict to supervise the reform, as the minority ordered. That would have avoided the anomaly that arose subsequently in the same sex case of *Laubscher*.

Sachs J refused to join the all-male majority in kicking the can over to the Legislature. Instead, he stirred the hornets' 'subterranean' nest. For him the problem was not about 'defining the technical legal question.'[362] It was also 'not difficult to illustrate the practical issues involved' for the survivor to be 'treated as a legal stranger to his estate, with no claim for subsistence because they

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354 *Volks* para 39 and 40.
355 *Volks* para 50.
356 *Volks* paras 56 and 68.
357 *Volks* para 68.
358 *Volks* para 65.
359 *Volks* para 65.
360 *Volks* para 66.
361 *Volks* para 68.
362 *Volks* para 146.

were never married.'[363] For Sachs J, the source of the complexity appeared to lie elsewhere:

'In my view this is one of those cases in which however forceful the reasoned text might be, it is the largely unstated subtext which will be determinative of the outcome. The formal legal issue before us is embedded in an elusive, evolving and resilient matrix made up of varied historical, social, moral and cultural ingredients. At times these emerge and enter explicitly into the legal discourse. More often they exercise a subterranean influence, all the more powerful for being submerged in deep and largely unarticulated philosophical positions.'[364] (my underlining)

With heightened expectations I searched for what the 'unstated subtexts' and 'subterranean influences' were that infused the judgments. However, constrained as he was by the context, Sachs J exercised discretion not to speculate as I am free to do. I suspect that some of the 'unarticulated philosophical positions' in *Volks* were the unforeseen, the unforeseeable and the unintended practical consequences of extending the protection in s 2(1) to cohabiting partners in customary and polygynous relationships. Furthermore, secret lovers could show up to claim maintenance. Disproving these claims would be almost insurmountable without the deceased. It would impede the efficient administration of deceased estates which is designed for western style monogamous marriages.

On the facts in *Volks*, the survivor was not destitute as the deceased had provided for her in his will. Would it have made a difference if the survivor was not a white, middle-class woman? Would the all-male majority have adopted the same stance if the survivor was a man claiming from the estate of his wealthy life partner? Framed as a claim for post death spousal maintenance, the cause of conflict was articulated as a discrimination claim. Based full square on marital status, there was no wriggle room to avoid this ground. But the unarticulated source of the conflict on trial was patriarchy. Again, for context, a liberal feminist attack on behalf of a middle-class white woman, not as

[363] *Volks* para 147.
[364] *Volks* paras 147 and 148.

vulnerable as the widow in *Bhe*, assuaged the concerns of the majority to opt for deference and tolerance for the consequent delay that legislative reform would cause.

The majority's 'genuine concern' would have been more convincing if it had supported, even for different reasons, the structural remedy offered in both dissenting judgments of Mokgoro and O'Regan JJ and Sachs J of declaring the law unconstitutional but suspending its invalidity for two years.[365] The contradictions in the majority's inertia surfaced subsequently when survivors in same sex partnerships and marriages claimed maintenance. Froneman J was quick to point them out in *Laubscher*.[366]

*Van Der Merwe*

Section 18(b) of the Matrimonial Property Act 88 of 1984 allowed spouses married out of community of property to claim patrimonial damages from the other spouse but denied that right to spouses married in community of property. In other words, a husband who injures his wife in a motor accident would escape liability for damages if he was married in community of property as most marriages were. In *Van Der Merwe*[367] the CC found this differentiation between marriages in or out of community of property to lack a legitimate governmental purpose. Its illegitimacy and arbitrariness emerged after comparing two marital property regimes. But it found no support in the 'dictionary meaning of "marital" and "status"' to 'adopt a generous and expansive meaning of "marital status" as required when giving effect to a right in the Bill of Rights'. However, having identified the comparators to be all married people who belonged to two different proprietary regimes,[368] Moseneke DCJ left open the question of marital status as the ground of discrimination. To hold that it was, he said, would imply that any difference in the proprietary consequence of marital regimes is

[365] *Volks* para 67.
[366] Discussed above in *Laubscher.*
[367] Van Der Merwe para 47.
[368] Van Der Merwe para 44-45.

presumptively unfair; and that would be a far-reaching conclusion with possibly untenable consequences.[369]

This reasoning is odd considering that discrimination on the basis of marital status was by then already presumptively unfair; and whether marital status or marital regimes were unfair and unjustifiable in the future depended on the context then prevailing. However, having determined *Van Der Merwe* exclusively on the equality analysis via s 9(1), Moseneke DJC avoided making any findings of discrimination, and with it, identifying any grounds of discrimination.[370] This, despite accepting that s 18(b) probably impacted as indirect gender discrimination because its gender-neutral terms belied its more devastating impact on women married in community of property than on men.[371] Minimalism served the purpose of eliciting a unanimous judgment in favour of legislative reform.

The plaintiff was a woman, probably white and middle class. She was also abused. The claim arose because the husband 'intentionally' knocked his wife over with their motor vehicle and 'went on to reverse over her while she was lying on the ground.'[372] Perhaps maximalism by entering into a discrimination analysis would have sacrificed unanimity. In panel courts garnering consensus is a prevalent extraneous influence. Caution should prevail in attributing to scribing judges, labels or descriptions that might arise from a collective pursuit to secure unanimity through compromise.

*Fourie*

The sensitivities around marital status peaked in *Fourie,* [373] the most controversial of all eight sexual orientation discrimination cases decided by the

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[369] *Van* Der Merwe para 47.
[370] *Van Der Merwe* para 47.
[371] *Van Der Merwe* para 28; 54; 67.
[372] *Van Der Merwe* para 11.
[373] *Minister of Home Affairs* v *Fourie* (Doctors for Life International and Others, Amici Curiae); *Lesbian and Gay Equality Project and Others* v *Minister of Home Affairs* 2006 (1) SA 524 (CC) para 33.

CC by that stage.[374] *Fourie* was controversial not because the CC had any doubt that section 30(1) of the Marriage Act[375] discriminated on the ground of sexual orientation. Nor was there any doubt that the comparators were same-sex and heterosexual couples. Having found s 30(1) to be unjustifiably discriminatory, the only remedy was to declare it invalid. That was also uncontroversial. The controversy was exclusively about whether the declaration of invalidity should be immediate or suspended.[376] What seemed like an open and shut case, took as long as seven and half months to decide, a record for the CC which, in those days was quick to turn out its judgments.

Unanimity achieved in previous same-sex cases was lost as the CC split nine to one on the issue of the remedy. Unlike O'Regan J, Sachs J, writing for the majority, declined to read in an amendment to section 30(1) so that same-sex couples could conclude valid contracts of marriage without having to wait for Parliament. The majority shifted responsibility for devising a remedy to Parliament for the following reasons:

- Same-sex marriage was a matter involving status for which legislation was required to produce a secure, enduring and stable remedy.
- A temporary remedy was less likely to achieve the enjoyment of equality than lasting legislative action.
- Same sex couples should be able to live openly and freely enjoying life in the mainstream of society. For that, a more secure 'institutional imprimatur' would result in 'more tranquil and enduring unions'.

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[374] *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC); 1998 (12) BCLR 1517 (CC); *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC); *Satchwell v President of the Republic of South Africa and Another* 2002 (6) SA 1 (CC); 2002 (9) BCLR 986 (CC); *Satchwell v President of the Republic of South Africa and Another* 2003 (4) SA at 266; *Du Toit and Another v Minister of Welfare and Population Development and Others (Lesbian and Gay Equality Project as amicus curiae)* 2003 (2) SA 198 (CC); 2002 (10) BCLR 1006 (CC); *J and Another v Director General, Department of Home Affairs, and Others* 2003 (5) SA 621 (CC); 2003 (5) BCLR 463 (CC); *Minister of Home Affairs v Fourie (Doctors for Life International and Others, Amici Curiae); Lesbian and Gay Equality Project and Others v Minister of Home Affairs* 2006 (1) SA 524 (CC).

[375] Marriage Act 25 of 1961.

[376] *Fourie* para 5, 63-87 and 169.

- Same sex marriages conjure 'deep public and private sensibilities'.
- The legislature is in the frontline of setting public standards that protect vulnerable people from unjust marginalisation and abuse. The greater the degree of public acceptance for same-sex unions, the greater the achievement of equality.
- Equality claims were best served by respecting the separation of powers.
- The issue was ready for prompt consideration by Parliament.[377]

For these reasons the CC found it 'just and equitable' to suspend the declaration of invalidity.[378]

These reasons did not adequately explain the CC's election to defer to Parliament.[379] First, same-sex discrimination was always a matter involving status, except this time it was on the additional ground of marital status. Sexual orientation did not prevent the CC from decriminalising same-sex as sodomy,[380] and extending pension benefits,[381] adoption,[382] parenting[383] and immigration rights to same-sex partners.[384] The last four are matters incidental to marriage. They had greater material external impact on third parties than the marital status of same-sex couples. However, they had neither more nor less material impact than those of heterosexual marriages.[385]

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[377] *Fourie* para 131, 132 136-139.
[378] *Fourie* para 132 and 135.
[379] For a definition of what it means to 'defer' or 'deference' see C McConnachie '"Affirmative Action"' 7 Const. Ct. Rev. 163 (2015) at 167.
[380] *National Coalition for Gay and Lesbian Equality* v *Minister of Justice* 1999 (1) SA 6 (CC); 1998 (12) BCLR 1517 (CC). (The sodomy case.)
[381] *Satchwell v President of the Republic of South Africa and Another* 2002 (6) SA 1 (CC); 2002 (9) BCLR 986 (CC).
[382] *Du Toit and Another* v *Minister of Welfare and Population Development and Others* (Lesbian and Gay Equality Project as amicus curiae) 2003 (2) SA 198 (CC); 2002 (10) BCLR 1006 (CC
[383] *J and Another v Director General, Department of Home Affairs, and Others* 2003 (5) SA 621 (CC); 2003 (5) BCLR 463 (CC).
[384] *National Coalition for Gay and Lesbian Equality* (The immigration case.) para 42.
[385] *Fourie* para 159 where the majority acknowledged that the budgetary implications of same sex marriages were "*minimal*". On April 3, 2009, the Supreme Court of Iowa, after considering similar arguments raised in *Fourie*, found that banning same-sex marriages served no legitimate governmental interest (*Katherine Varnum, Patricia Hyde, Dawn Barbouroske, Jennifer Barbouroske, Jason Morgan, Charles Swaggerty, David Twombley, Lawrence Hoch, William M. Musser, Otter Dreaming, Ingrid Olson, and Reva Evans, Appellees v Timothy J.*

Second, until *Fourie*, the CC had not shied away from granting temporary relief. The Legislature was always free to change the CC's order at any time. Langa CJ acknowledged this subsequently when he said that '(t)he Court's task (is) to facilitate the cleansing of the statute book of legislation so deeply rooted in our unjust past ... as an interim measure.'[386] As precedent for its decision to defer to Parliament to fashion a remedy, the CC cited *Fraser*[387] and *Dawood*.[388] Despite its deference in both those cases, the CC granted immediate interim relief.[389] Furthermore, those cases were distinguishable from *Fourie*. Reading-in and severance were not techniques that could have been applied to those cases. Remedying the law and practices was complex, requiring 'multifarious and nuanced legislative responses'.[390]

Designing a remedy in *Moseneke*[391] was a Herculean task best deferred to the Legislature. Nevertheless, the CC granted immediate temporary relief. *Moseneke* was an easy case for the CC; the impugned law was manifestly racist. The grounds of discrimination were race, ethnic origin and colour;[392] the comparators were Africans and all other race groups. Sachs J declared s 23(7) of the BAA[393] unconstitutional with immediate effect. But designing a remedy was difficult. The complication stemmed not only from the legislative void

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*Brien* Case No. 07–1499); *Fourie and Another* v *Minister of Home Affairs and Others* 2005 (3) SA 429 (SCA) para 117- 125 per Farlam JA.

[386] *Bhe* para 115-116.

[387] *Fraser* v *Children's Court, Pretoria North, and Others* 1997 (2) SA 261 (CC); 1997 (2) BCLR 153 (CC). [Fraser (1).

[388] *Dawood, Shalabi and Thomas* v *Minister of Home Affairs* 2000 (3) SA 936 (CC); 2000 (8) BCLR 837 (CC).

[389] In *Fraser* the declaration of invalidity was effective immediately. (See para 52 of order at 1) In *Dawood* the applicants were given an opportunity to apply for permits whilst the officials of the Department of Home Affairs were directed not to refuse to extend the validity of the permits except for good cause. (See para 70 of order at 1.3, 1.4 and 1.5).

[390] Fraser v Children's Court, Pretoria North, and Others 1997 (2) SA 261 (CC); 1997 (2) BCLR 153 (CC). [Fraser (1). para 50.

[391] *Moseneke and Others v The Master and Another* 2001 (2) SA 18 (CC); 2001 (2) BCLR 103.

[392] *Moseneke* para 22. Regulation 3(1) of the regulations published in Government Notice 10601 of 6 February 1987 published under the Black Administration Act No 38 of 1927 barred widows and children from participating in winding up the deceased estate of Black people (meaning Africans), whereas the Administration of Estates Act No 66 of 1995 expressly allowed widows of all races to participate in or be appointed as executors. The Black Administration Act also deprived the Master of the Supreme Court of the power to issue letters of administration in the estates of deceased Africans.

[393] Black Administration Act No 38 of 1927.

created by simply striking down the law itself but also from the practicalities of implementing a non-racial, non-sexist system of estate administration for the entire population and not just a small minority. Masters' offices had to be capacitated to cope with the flood of thousands of estates from African people. [394] Furthermore, the amendments sought to the legislation fundamentally challenged customs, practices, traditions and ideology that entrenched sexism and patriarchy, as evidenced in *Bhe* above. Designing a remedy to marry the misfit between custom and the Constitution, between law and practice was a task best left for the Legislature.

Despite these practical difficulties, the CC gave heirs and executors in African intestate estates a choice of winding up such estates either under the BAA or the Administration of Estates Act.[395] By granting a temporary but immediate remedy in *Fourie*, the CC would also have given same-sex partners a choice. They could either choose to wait for a permanent remedy from Parliament or terminate their enforced indignity forthwith by order of the CC. Cameron J's order in *Fourie* in the SCA was final,[396] unless the CC or Parliament changed it. The same-sex couples themselves obviously did not mind a temporary remedy because that is what they sought and got in the SCA; they also did not cross-appeal against Cameron JA's order granting immediate relief. [397] Unusually, the CC did not refer at all to its many precedents for granting immediate relief or reading in. So why the majority concluded that a temporary remedy was less likely to achieve the enjoyment of equality than lasting legislative action is puzzling.[398]

Third, before *Fourie*, no matter how deep private and public sensibilities ran, the CC guarded against such sentiment prevailing over disciplined constitutional adjudication. Take the death penalty. Despite the assumption that public sentiment favoured the death penalty, the CC outlawed it unanimously

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[394] This emerged from my discussions with the erstwhile Master of the High Court, Kwa-Zulu Natal.
[395] Act No 66 of 1965.
[396] *Fourie* (SCA) para 38 and 49.
[397] *Fourie* para 33.
[398] *Fourie* para 136.

because it was inconsistent with the constitutional principles of equality, freedom and human dignity.[399]

Fourth, unusually, the CC made no reference to foreign law. Two foreign cases to which the CC could have referred were *Halpern*[400] and *Schachter*.[401] *Halpern* was substantially similar on the facts and the law to *Fourie*. Resistance to recognizing same-sex marriages was also on similar grounds. It resulted in the first court-ordered same sex marriage in the world on 14 January 2001.[402] *Schachter* was authority for the technique of 'reading in' applied in the immigration case.[403] Cameron J in the SCA had relied on *Halpern* and *Schachter* when deciding *Fourie*. Thus, the CC had been reminded of these cases.

A significant difference between *Halpern* and *Fourie* is that sexual orientation was not a ground of discrimination listed in the 1982 Canadian Constitution; the Canadian Court heard the complaint as an "*analogous ground*" of discrimination.[404] Already elevated in our Constitution as sexual orientation on a scheduled ground of discrimination, the CC had a stronger basis for eliminating discrimination immediately.

Another similarity between *Halpern* and *Fourie* was that in both cases, an amendment was sought to a rule of the common law of marriage.[405] The Canadian and South African courts have an obligation to reformulate or develop the common law consistently with their respective constitutions.[406] *Halpern* met this obligation, *Fourie* did not.

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[399] *Makwanyane*.
[400] *Halpern v Canada (Attorney General)* 172 O.A.C. 276 (2003).
[401] *Schachter v Canada* 10 C.R.R. (2d) 1; 1992 C.R.R. LEXIS 45.
[402] Kevin Bourassa married Joe Varnell and Elaine Vautour married Anne Vautour http://www.egale.ca/index.asp?lang=E&menu=51&item=373; http://www.buddybuddy.com/mar -c-02.html; Metropolitan Community Church Of Toronto Info Sheet Same-Sex Marriages - Frequently Asked Questions July 12, 2003; R Douglas Elliot *The Canadian Earthquake Same Sex Marriage in Canada* NELR Vol [38: 3 2004] 591 at 592; *Halpern* para 156 (5). (Note: R Douglas Elliot was counsel for the MCCT in *Halpern*.)
[403] National Coalition for Gay and Lesbian Equality (The immigration case).
[404] Elliot R Douglas Elliot *The Canadian Earthquake Same Sex Marriage in Canada* NELR Vol [38: 3 2004] 591 at 605-608.
[405] *Fourie* para 6-32, especially para 11; *Halpern* para 37, 72 and 143 -144.
[406] *Halpern* para 149, 151; Section 173 of the Constitution of the RSA.

Fifth, respect for the separation of powers principle did not stop the CC from granting immediate relief in every sexual orientation discrimination case preceding *Fourie.* Furthermore, in *Moseneke,* the CC amended legislation that discriminated on grounds of race; in *Fourie* the CC was asked to amend provisions of the common law which discriminated on grounds of sexual orientation. The amendment in *Moseneke* did not offend the principle of the separation of powers, but the majority opined in *Fourie* that it did. Developing the common law was expressly and constitutionally authorised. Moreover, as described above, there were serious practical and ideological problems of implementing *Moseneke.*

As a general proposition, deference to the Legislature was ostensibly a compelling argument when three possible models for legislating same-sex marriages existed. Ideally, the Legislature should select the most effective model. Furthermore, anomalies could arise if two different regimes regulated same-sex marriages. However, the law that the couples sought to change was the Marriage Act, which regulated the *formalities* to conclude a valid contract of marriage; it did not regulate the content, substance or consequences of marriage. Unlike patrimonial and other substantive consequences of marriage, the formalities had minimal, if any, impact on persons other than the participants. Extending pension rights to same-sex couples had greater material impact on third parties than the formalities of marriage.

De Vos questioned the degree to which the judgment 'valorises the institution of marriage' and its endorsement that 'legal marriage remains the only comprehensive and valid way' for law and society to recognise the relationship between gay men and lesbians.[407] He also pointed to this trend set in *Dawood* and *Volks* (above). *Fourie* generated much criticism for the reasons discussed above.[408] Another gay academic, journalist and author described the judgment as being 'so bathed in sunlight that one finds oneself searching for the

[407]Pierre De Vos 'The "Inevitability" of Same-Sex Marriage in South Africa's post-Apartheid state' at 457 SAJHR vol 23 (3) 2007 p. 432 – 465 at 457.
[408] De Vos 'The "Inevitability" of Same-Sex Marriage' at 458 fn 135.

shadows'.[409] However, De Vos acknowledges that despite the flaws in the public participation that preceded the legislation of the Civil Union Act, it created an 'unprecedented platform' for dialogue about gay and lesbian rights.[410]

The singular, critical factor that distinguished *Fourie* from other sexual orientation discrimination cases in which immediate relief had been granted, was the ground of discrimination. Marital status struck at two sensitivities in a single blow: patriarchy and religion. Establishment morality and values were threatened.[411] The opportunity for critique of marriage as an institution was lost.[412] Furthermore, the absence of grassroots conscientisation, mobilisation and organisation resulted in a diluted victory for the elite who choose to marry. Those who cannot afford the protections of the Civil Union Act remain vulnerable.[413]

Historically, this was the background to discrimination on the grounds of marital status before *Laubscher* in which the CC was unanimous in its conclusion that same-sex permanent partners would continue to enjoy intestate succession rights, notwithstanding the passing of the Civil Union Act[414] that legalised same sex marriages.[415] However, *Laubscher* resurrected the ghost of *Volks*, and with it, exposed the anomaly perpetuated in *Fourie*.[416] In his dissent in *Laubscher*, Froneman J pointed out that the effect of the reasoning of the majority amounted to 'unfair discrimination to make a distinction between [unmarried] same-sex and heterosexual couples.'[417] Distinguishing between 'the subject-

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[409] Johnny Steinberg 'Two judgments that show a new light, an old shadow' Business Day 17 January 2006.
[410] De Vos 'The "Inevitability" of Same-Sex Marriage' at 458 fn 135.
[411] Richard Thaler and Cass Sunstein *Nudge* – Penguin Books 2009 chapter 13. Thaler and Sunstein offered a transformative construction of marriage. They advocated privatizing marriage. Based on their theory of 'libertarian paternalism', their proposal abandoned all bias favouring marriage and the historical baggage accompanying it. They replaced marriage with a civil union for same-sex and heterosexual couples. The business of State would be to regulate domestic partnerships. Marriage would be the business of religious and other private organizations. Religious freedom was respected; equality prevailed amongst various types of unions. Some rules had to be imposed to protect children, third parties, vulnerable people and the State. Mostly, couples could flexibly regulate their union.
[412] De Vos 'The "Inevitability" of Same-Sex Marriage' at 460.
[413] De Vos 'The "Inevitability" of Same-Sex Marriage' at 464-465.
[414] Civil Union Act, 17 of 2006.
[415] *Laubscher* para 55, 87.
[416] De Vos 'The "Inevitability" of Same-Sex Marriage' at 462.
[417] *Laubscher* para 66.

matter of intestate succession and post-death maintenance of spouses' did not adequately explain why the legislature preferred that 'the formality of marriage should apply in one case but not in the other. Both are predicated on the existence of a reciprocal duty of support.'[418]

Furthermore,

'the jurisprudence recognises that discrimination based on marital status exists between married and unmarried couples, be they same-sex couples who could not marry or heterosexual couples whose "marriage" was not legally recognised. In general, however, critics say, this is remedied by allowing, and requiring, unmarried couples to formalise their unmarried status by marrying in the formal legal manner. This "marriage-centric" approach is the "bad" part, at least for some critics. It is bad because the reason for being "marriage-centric" is unarticulated, and the unarticulated preference lies in moral choices not countenanced by the Constitution. The decision in *Volks* is said to be an example of this unreasoned moral preference.'[419] (my underlining)

And then Froneman J asked and answered the poignant question:

'[W]hy do we seek a way out from *Volks*? We seek a way out, even though we do not articulate it in that way, because, first, the criticisms appear to be valid and, second, *Volks* reflected views of its time, not inclusive enough in the present social context. It is either time to articulate the underlying preference for equalisation by way of the formalisation of marriage route, or to recognise that its justification is wanting.[420]

For the first time in the history of the CC, one of its judges departed from a previous decision satisfied that it was 'clearly wrong' 'to attempt to eradicate unfair discrimination by creating another form of unfair discrimination.' [421] Echoing Davis and Klare about what it means to be transformative in the face of a precedent to be departed from,[422] Froneman J continued:

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[418] *Laubscher* para 77.
[419] *Laubscher* para 82.
[420] *Laubscher* para 84.
[421] *Laubscher* para 86.
[422] Davis and Klare 'Common and customary law' (2010) 26 *SAJHR* 403.

'Because it is hindsight that helps us to this conclusion we remain respectful of the earlier start along the road to eradicate discrimination in our society. But the application of our Constitution to changing circumstances can never be static. Our law of precedent recognises the possibility of change and I have attempted to justify this change within those substantive parameters.' [423]

Constitutional rulings are sticky, but not static. Social and legal landscapes change constantly. No single rule is so perfect as to fit all circumstances. [424] How long people are prepared to abide the hardships of adverse constitutional rulings depends on how hard they are prepared to work to muster critical masses of public and judicial support.[425] Although Froneman J's solitary dissent does not correct *Volks* by overruling it, it laid the basis for expediting the dialogue for more inclusive approaches to marital status, which came soon after *Laubscher* in the celebratory victory for equality and discrimination jurisprudence in *Holomisa*.[426]

*Holomisa*

*Holomisa* (above) departs from previous cases both in respect of its approach to discrimination analysis and its clarity about marital status and matrimonial rights. Transitional arrangements to unify South Africa under a single legal system that included previous 'homelands' like the Transkei resulted in Mrs Holomisa undergoing a divorce on the basis that her marriage was automatically out of community of property, unless she had an antenuptial contract to exclude that regime. In the meantime, for the rest of South Africa, legislation had changed the default proprietary regime for all marriages to be the opposite, i.e. in community of property, unless an ante-nuptial contract was concluded. Additionally, section 7(3) of the Divorce Act [427] had aimed to ameliorate the potentially harsh consequences of a marriage out of community

[423] *Laubscher* para 86.
[424] Michelman 'Norms and Normativity in the Economic Theory of Law' *62 Minn. L. Rev.* 1015, 1048 (1978).
[425] Barry Friedman 'The Importance of Being Positive: The Nature and Function of Judicial Review' 72 *U. Cin. L. Rev*. 1257 2003-2004 at 1293.
[426] *Bukelwa Nolizwe Holomisa v Sango Patekile Holomisa and Another* [2018] ZACC 40.
[427] Divorce Act 70 of 1979.

of property under certain circumstances.[428] Mrs Holomisa was discriminated against, because the Transkei law deprived her of this protection.

Sparing no time for identifying comparators and grounds of discrimination, the CC hit the inequality nail with the hammer of irrationality. For the first time the CC recognized the intersectionality of multiple grounds of discrimination including previously unlisted grounds:

'The discrimination in this case is a relic of South Africa's apartheid history which sought to disadvantage women on the basis of a number of intersecting grounds: gender, race, ethnicity, marital status, geographic location and socio-economic status. The intersectional nature of this discrimination compounds the gravity of Parliament's failure to rationalise the Transkei Marriage Act. Although Parliament did not seek intentionally to continue to discriminate against women in the former Transkei, the effect of its failure to remedy the situation is that the discrimination continues. It is imperative to acknowledge and eradicate all forms of discrimination in order to achieve effective change.'[429]

Prejudicial impact was a consideration compelling enough for the CC to clear away the procedural hurdles that the SCA found insurmountable. As for sitting as a court of first and last instance to consider a constitutional attack that should properly have been raised in the papers at the outset, the CC responded that the issue was not complex but 'simple and straightforward':

'A failure to raise the constitutional issue may amount to a breach of legality and the rule of law. The test for meeting the problem of inadequate pleading is that of potential prejudice in dealing with the point on a factual or legal level.'

Finding no prejudice of that kind, the degree of disadvantage was enough to move the CC to grant direct access.[430]

Its approach was not only an example of how not to default to formalist error but also a reminder of Michelman's[431] urgings that no single rule is so perfect

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[428] *Holomisa* para 16.
[429] *Holomisa* para 29. See also Sandra Fredman 'Discrimination Law' (2011) at 139-143 on 'cumulative discrimination'.
[430] *Holomisa* para 30.
[431] Michelman 'Norms and Normativity in the Economic Theory of Law' 62 *Minn. L. Rev*. 1015, 1048 (1978) above.

as to fit all circumstances; a positive account of the judicial function shows that judges attentive to society do consider preceding applications of a rule to make it work better going forward. In contrast, reaching unanimity in *Laubscher* was easy for the majority as it defaulted to formalist tendencies by clinging to precedent and deference as if they were singularly perfect, immutable rules. From so many perspectives, *Holomisa* clears the way forward for mainstreaming Froneman J's correction of *Volks* in *Laubscher*.[432] Perhaps *Holomisa* opens the door to revisit precedents like *Masiya* that permit or create discrimination of one form while striking it down in another form. Whether the CC will live up to its promise that it is '[b]etter then to articulate the underlying reasons for the protection in order to ensure that these often-unarticulated premises fall within the constitutional framework,'[433] remains to be seen as constitutionalists like Froneman J end their term of office.

In *Barnard*, what unarticulated influences prevailed when the applicable law and facts were common cause? Did the legal actors in *Barnard* say what they meant and meant what they said? What was unsaid? Was the litigation a polite proxy for an unarticulated discourse about who 'owned' the Constitution? Was it cynical of whites to invoke the Constitution to protect themselves against racial discrimination, when they used apartheid to resist constitutional democracy? Was the SAPS's plan to employ skilled whites at lower levels, as backup for less skilled blacks in higher ranks? Was white acquiescence in affirmative action genuine racial reconciliation or a façade?

### 2.7.5 Causes of unarticulated phenomena

Having exposed the prevalence of unarticulated phenomena in adjudication, it remains to identify some of their causes. There are many. But four top my list: Ideology, binaries, the nature of the judicial function and judges as humans. Kennedy shows how ideology is at work the performance of the judicial function. His *Phenomenology* judges, including me, to be self-conscious. Court

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[432] *Laubscher* para 87.
[433] *Shoprite Checkers (Pty) Limited* v *Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape and Others* (CCT 216/14) [2015] ZACC 23; 2015 (6) SA 125 (CC); 2015 (9) BCLR 1052 (CC) (30 June 2015) para 39.

administration that encourages binaries as a speedy resolution of disputes misses out on discovering the cornucopia of choice between 0 and 1 which, when exercised yield not just dispute resolution but problem-solving remedies. *Tough Cases* is a rich resource from which I draw lessons about the nature of the judicial function. Breakfast bias theories illustrates the seriousness with which judges as humans are studied.

#### 2.4.5.1 Ideology

> 'Society is . . . entitled to demand from judges fidelity to those qualities in the judicial temper which legitimize the exercise of judicial power. Many and subtle are the qualities which define that temper. Conspicuous amongst them are scholarship, experience, dignity, rationality, courage, forensic skill, capacity for articulation, diligence, intellectual integrity and energy. More difficult to articulate, but arguably even more crucial to that temper, is that quality called wisdom, enriched as it must be by a substantial measure of humility, and by an instinctive moral ability to distinguish right from wrong and sometimes the more agonising ability to weigh two rights or two wrongs against each other which comes from the consciousness of our own imperfection.' – Ismail Mahomed: Chief Justice of South Africa.

Kennedy defines ideology generically as choosing one path and rejecting another, in the genuine belief that the chosen path is objectively correct and the other objectively wrong. Having made the choice, adopted a position, then whatever one sees and does commits to the preferred path, and spurns other available paths. Good faith governs one's choice, but good faith would also govern the choice of others who choose the rejected path. Believing in good faith that one has no choice but the chosen path, is ideology at work. Thereafter one's energies are committed to supporting the choice at the expense of ignoring other possibilities.[434] Therefore, ideology is 'a set of contested ideas

[434] Duncan Kennedy 'A Cultural Pluralist Case for Affirmative Action in Legal Academia' *Duke L.J.* 705 (1990) at 743. 'Ideology. Once you choose an ideology, you have "rejected one path in favor of another," and what you see and do as you travel that path will be different from what you would have seen and done going the other way. Ideology is commitment. It is the decision to work on this line of inquiry rather than that one, to assume away these issues rather than those, in a situation where one cannot say that there was no other course available. You may be able to say that given your good faith belief in the rightness of your path, you obviously had no choice. But if other people believed equally in good faith that your path was wrong, and

that provides a "partisan" interpretation (descriptive and normative) of a field of social conflict,' e.g. between employer and employees, Moslems and Hindus, blacks and whites, municipalities and residents, and so forth.[435] I adopt Kennedy's definition of ideology for its simplicity. It serves my limited purpose of explaining the distinction between ideologists and ideologues to a readership beyond academia.

An ideologist is one who makes choices 'between contested views that influence the intellectual work one does (and are influenced by it).' Justification for choice and the sources of conflict may be multiple and intersecting, 'from philosophy to economics to religion to biology'.[436] The ideologist cherry-picks the ideas to 'fit her partisan allegiance, and therefore lacks allegiance to "truth".' This does not mean that an ideologist is 'closed minded, or uninterested in questioning fundamental assumptions, or being blind to evidence that contradicts those assumptions.'[437] However, partisanship does sometimes skew intellectual work towards serving causes or interests of the ideologist. Wherever social conflict exists and is open to interpretations, ideology comes into play. Then the intellectual is neither 'objective' nor 'neutral' as she attempts 'to empower an audience to judge for itself.' Ideologues, distinguishable from ideologists, encourage cultural and other forms of domination.[438]

Knowledge as true or 'fake news', is ideological.[439] Choosing what knowledge to share, with whom to share, when, where and how to share are loaded with ideological options. Unarguably, imposing Afrikaans in black schools blatantly externalized the ideological domination of apartheid. In constitutional democracies desperately trying to rebuild themselves, public relations firms collaborating with auditing and accounting firms conjure narratives to suit the

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theirs right, then your choice was ideological. Once one has made, explicitly or implicitly, choices of this kind, there are kinds of work one doesn't find oneself doing and kinds of problems one finds oneself ignoring. My view is that it just isn't possible to do legal scholarship without making choices of this kind, consciously or unconsciously. [This view is part of my ideology.]'

[435] Kennedy 'Affirmative Action' *Duke L.J.* 705 (1990) at 727.
[436] Kennedy 'Affirmative Action' *Duke L.J.* 705 (1990) at 743.
[437] Kennedy 'Affirmative Action' *Duke L.J.* 705 (1990) at 727.
[438] Kennedy 'Affirmative Action' *Duke L.J.* 705 (1990) at 727.
[439] Kennedy 'Affirmative Action' 1990 *Duke L.J. 705* (1990) at 736, 727.

political agendas of the ideologues who pay them.[440] Whether knowledge production and distribution are political, is itself ideological.[441] How, why and what law is taught informs ideology, legal culture and ultimately choice. Manifestly, ideology is rather a matter of one's consciousness and choice than one's cultural identity, which is less of a choice.[442] As discussed above, culture is 'deeply ingrained' into the status of a person or community rather than something acquired.[443] It replicates itself in the way children are reared and by living in a 'habitually closed discursive system.' A conscious effort could change or assimilate to other cultures.[444] Consciousness often blends with culture almost indivisibly. How ideology, consciousness and culture intersect shores up in choices in the reasoning and decision-making of legal actors and litigants.[445]

Ideological divisions exist along various axes – radical-liberal-moderate-conservative-fascists; traditional-modern-postmodern, science-social science-humanities-arts, and so on.[446] In litigation, what is actually done, what ideas are accepted and rejected, how ideas flow, fall within the range between the two 'c's: conservatism on the far right and communism on the far left. Legal actors incline towards one or other political ideology.[447] Labelling legal actors and litigants prematurely as conservative, liberal or something else, without indicators as 'evidence' as to where on the ideological spectrum they fall, would be a mistake. Ideological labels come loaded with preconceived descriptions not all of which necessarily fit particular legal actors, litigants and their choices. Prematurely attributing labels to choices could discourage dialogue about what

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[440] 'The Reputation Laundering Firm that Ruined its Own Reputation' _ *The New Yorker* https://www.newyorker.com/magazine/2018/06/25/the-reputation-laundering-firm-that-ruined-its-own-reputation; 'How Bell Pottinger PR Firm for Despots and Rogues, met its End in South Africa' - *The New York Times* https://www.nytimes.com/2018/02/04/business/bell-pottinger-guptas-zuma-south-africa.html; 'Deal that undid Bell Pottinger: Inside story of the South Africa Scandal' – *The Guardian* https://www.theguardian.com/media/2017/sep/05/bell-pottingersouth-africa-pr-firm (accessed 27 November 2018)

[441] Kennedy 'Affirmative Action', *Duke L.J. 705 (1990)* at 736, 727.

[442] Kennedy 'Affirmative Action', *Duke L.J. 705 (1990)* at 743.

[443] Kennedy 'Affirmative Action' *Duke L.J. 705 (1990)* at 742.

[444] Kennedy 'Affirmative Action' *Duke L.J. 705 (1990)* at 742.

[445] Kennedy 'Affirmative Action' *Duke L.J. 705 (1990)* at 742.

[446] Discussion with Duncan Kennedy at Harvard Law School (2018-2019).

[447] Duncan Kennedy 'Strategizing Strategic Behavior in Legal Interpretation' *Utah L. R. 1996: 785.*

is being done and inhibit the willingness of decision-makers to shift intellectually for fear of abandoning one position and adopting a preloaded, labelled ideology with all its characteristics with which they do not identify. Assessing the impact of decisions after choices are made and then attributing a label(s) to them is useful for the limited purposes of description and assessing their normative value. Furthermore, ideologies intersect. A person who is, say a feminist, Africanist but also a capitalist may be for or against land expropriation without compensation, depending on which ideology best suits her particular cause at a point in time. Feminism and Africanism may clash with her liberal or conservative capitalist aspirations for (foreign) investment and a viable banking system reliant on mortgages being repaid. Eclectic is Kennedy's description of such ideological dispositions.

There is much overlap amongst ideologies before differences are detected. Conservatism, liberalism and social democracy have in common majority rule, the rule of law, individual rights, and a regulated market economy complete with safety nets.[448] But emphasis on each element differs. How each element balances with the others is shaped by ideological choices for the preferred form of governance. Social democracy has wider and stronger safety nets in a market economy than both conservatism and liberalism. Conservatives cling to tradition as the 'natural order' and authoritarian modes of governance, whereas liberals, and more so social democrats, are open to pluralism and participatory governance. However, each ideology is 'internally incoherent in the ways that it tries to realize its ideological preferences.'[449]Liberals promote first generation rights like equality, freedom of religion and culture, but like conservatives, rule on the side of the mainstream on questions such as the sale of alcohol on Sundays[450] and minorities wearing nose rings to school.[451] All three ideologies hit a wall when resolving contradictions amongst market economies, safety nets

[448] Maris Van Sandelingenambacht 'Legal Postism and the End of European Private Law - Duncan Kennedy's A Critique of Adjudication' *10 Eur. Rev. Private L.* 111 (2002) at116; Sanele Sibanda 'Not Purpose-made! Transformative Constitutionalism, Post-Independence Constitutionalism, And the Struggle to eradicate Poverty' in *Law and Poverty* eds. Sandra Liebenberg and Geo Quinot at 42.
[449] Kennedy *A Critique of Adjudication – Fin De Siècle*.
[450] *S* v *Lawrence* CCT 38/96 (6 October 1997).
[451] *MEC for Education: Kwazulu-Natal and Others* v *Pillay* (CCT 51/06) [2007] ZACC 21; 2008 (1) SA 474 (CC); 2008 (2) BCLR 99 (CC) (5 October 2007).

and distribution, especially when the demand for distribution far outweighs the capacity of markets to generate wealth and resources. How each ideology resolves contradictions is a matter of degree. It is these resolutions that define the ideology.[452]

Once an ideology is discovered, explored, grappled with, assimilated or converted, the ideologist adapts it to her purpose, changes it, perhaps even radically. But ideology has 'a trans-individual continuity'. Someone else will reinterpret the reinterpretation.[453] Ideological commitment is bias, conscious or unconscious, that cannot be purged.[454] For adjudicators, like all humans, to have opinions and feelings about things that matter should come as no surprise. What distinguishes adjudicators from other humans is that they are meant to be impartial in the sense of being open-minded, even-handed and unprejudiced, but never neutral, non-aligned, unwilling or incapable of exercising choice between competing, antagonistic or agonistic positions. Impartiality is one of the essentials of adjudication, but neutrality is its antithesis.

The South African legal system is hegemonic. But one law impacts differently on each social class. In a capitalist economy, capitalist classes, meaning those who wield economic, political and social capital to advance self-interest, tend to use law to entrench domination over the vast poor, welfare-dependent and unemployed masses. Legal actors caught between these extremes have to choose which side they favour, or where on the spectrum of ideological options they fall. For Kennedy, corporate lawyers are 'in alliance with selfish business interests. They lobby against regulatory legislation and try to pick it to pieces. In the courts; they do their best to bust unions, or to preserve "union-free environments," and by tax practice they mean tax minimization. In exchange for all of this antisocial activity, they receive grotesque monetary rewards, which they take without apparent trace of shame.'[455]Similarly, corporate practitioners

[452] Maris Van Sandelingenambacht, 'Legal Postism and the End of European Private Law - Duncan Kennedy's A Critique of Adjudication' *10 Eur. Rev. Private L.* 111 (2002) at 116.
[453] Kennedy 'Affirmative Action' *Duke L.J. 705* (1990) at 743.
[454] Kennedy 'Affirmative Action' *Duke L.J. 705* (1990) at 743.
[455] Kennedy, Are Lawyers Really Necessary, 14 Barrister 11 (1987)

prioritise protecting intellectual property rights of all kinds at the expense of public health, access to information and development.

As a class, legal actors are schooled to prop up and perpetuate state interests in their own interests.[456] The legal system requires the loyalty of legal actors as one of several classes to maintain the social structure of the state. When that structure is founded on capitalism, legal actors loyal to state and capitalist interests repeatedly tell 'people at the bottom' that they cannot have this or that livelihood right out of deference for one or other institutional actor, budgetary constraints or for some other reason.[457] Wage bargaining hits a similar ceiling. If workers push too hard, they are threatened that they would not only lose their jobs but the enterprise would collapse and all workers and their communities would suffer. That is possible. The task of the judge is to assess whether it is probable. Constitutional democracies have finessed the 'you can't have it because it's illegal' response to 'yes, you have rights but you can't have them now.'[458] Calling this bluff is the work of judges to avoid constitutional crises that must surely follow over time as repeated rights denials push poverty to the edge.

Between the binary of being for or against capitalism or the masses, liberalism found fertile ground in South Africa to mollify both extremes.[459] When the

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[456] Maris Van Sandelingenambacht, 'Legal Postism and the End of European Private Law - Duncan Kennedy's Critique of Adjudication' 10 *Eur. Rev. Private L.* 111 (2002) p116 – 'Legal intelligentsias moreover have autonomous interests of their own. The legal system gives them privileged access to the courts, which empowers them "to settle ideologized group conflicts, through a mystified adjudication process". 17 [16 D Kennedy, Critique, op cit, at 300. 17 Ibid, at 224.] They further their status by keeping up the appearance of being engaged in a neutral adjudication process; in this way, they preserve the legal status quo, in the heat of the ideological combat in which they are an active party.'

[457] Duncan Kennedy 'Antonio Gramsci and the Legal System' 6 *ALSA F.* 32 (1982) at 36.

[458] Kennedy 'Antonio Gramsci and the Legal System' 6 *ALSA F.* 32 (1982) at 35-37.

[459] D Davis, D Kennedy 'A Critique of Adjudication' 117 *SALJ.* 697 (2000) 'Jurisprudence in South Africa has been dominated by variants of positivism, which have sought to source decisions in the authority of the text, and by coherence theorists, who have analyzed the very idea of the legal system in terms of the promotion of an overlapping liberal consensus. Both of these theoretical streams were founded in a liberal idea of law as an instrument with the potential to guarantee the rights of the individual against an absolutist government. Law, as the product of an assembly of the people, was considered as the means to ensure that the exercise of power was accountable to the people. But in time the dilemma that the assembly could enact policies that could destroy the rights of the individual came to be increasingly appreciated; hence the arrival of political liberals like Dworkin, Rawls and Habermas who have argued (admittedly with variations on the theme) in favour of law being equated with a particular set of

masses have suffered enough to mobilise for rights enforcement, this tension between rights and 'impossible now' politics, this age of ambiguous constitutionalism, [460] will outlive its usefulness, and morph into some other palliative prophylactic to protect capitalism's profits. If lessons from history – including our own – about dramatic change remain valid, then it would be a matter of when rather than whether levels of deprivation would generate sufficient resistance. Perhaps next time around, threats to the environment, innovation and artificial intelligence would lead the charge for egalitarian economic and political reforms.

Capitalism's challenge to legal actors therefore is to choose between propping their selfish class interests or selflessly helping the poor masses. By helping I do not suggest patronising the poor with charity or even exercising agency on their behalf.[461] Rather, history shows that agents of change, which legal actors may choose to be, proactively organise, conscientise and mobilise to build political solidarity out of popular struggles for rights enforcement. Exercising this choice separates radical transformers from conservative conformist legal actors.[462] Opportunistically, centrists swing either way.

Legal actors who claim to '"constantly work ... to shape... the necessity that they are supposedly merely submitting to"', do nothing more than rationalize their choice to retain the status quo. Kennedy concludes that judges are 'ideological actors, at least some of the time.'[463] How they distinguish between easy and hard cases reveals their ideological bent. An 'easy' case is one for which 'there is a rule that obviously applies to the facts, given some explicit or implicit combination of deductive and policy arguments.'[464] Hard cases are those that

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moral and political values. All these jurisprudential ideas, which had dominated the literature, were suddenly confronted by the protagonists of indeterminacy.' (footnotes omitted)

[460] Kennedy 'Antonio Gramsci and the Legal System' 6 *ALSA F*. 32 (1982) at 35-37

[461] Freire *Pedagogy of the Oppressed* discussed in Chapter 4.

[462] Kennedy 'Antonio Gramsci and the Legal System' 6 *ALSA F*. 32 (1982) at 35-37

[463] D Kennedy 'Strategizing Strategic Behavior in Legal Interpretation'; Karl Klare 'Politics of Duncan Kennedy's *Critique' Cardozo L.R. Vol.22:1073.*

[464] Joanne Conaghan (2014) 'Celebrating Duncan Kennedy's Scholarship: A 'Crit' Analysis of *DSD & NBV v Commissioner of Police for the Metropolis* Transnational Legal Theory, 5:4, 601-621, DOI: 10.5235/20414005.5.4.601 at 608:

'Duncan does not argue that law is indeterminate or that judges are never constrained, nor that adjudication is a grand conspiracy by the rich and powerful to exploit and oppress the poor and disadvantaged. Rather he argues that the determinate effects of legal rules are both overstated

fall within the penumbra of a rule or the judge has a choice or discretion.[465] Paterson uses the term to refer to cases in which two or more judges 'disagree on the outcome, and either outcome would be regarded by some other final appellate judges as correct or "better" than any of the alternatives.' Is *Barnard* a hard case or a close call? Close calls are hard cases but are all hard cases close calls? No, answers Paterson.[466] *Barnard* shows that it is not necessarily the rules or the facts that make a case easy, hard or a close call but the responses of legal actors to it.[467] Finding obscure rules or developing old rules to apply in new ways to particular circumstances is a response to both hard cases and close calls. Often this is judicial law-making.

Does this law-making role implicate 'the legitimacy of adjudication in representative democracies'? Kennedy answers this question with a practical illustration. Writing as a hypothetical judge adjudicating an application for an injunction against a workers' lie-in to obstruct their employer from running its business, he argues that even when he thinks that the law favoured the employer, he should develop an argument against the injunction and in favour of the workers. If he succeeds, then impartiality requires him to test it against the best arguments for the employer. This, he argues, is the role of all the legal actors in search of the '"the correct legal outcome".' After all, legal actors know that what 'at first looked open and shut is ajar, and what looked vague and altogether indeterminate abruptly reveals itself to be quite firmly settled under the circumstances.'[468] However, what would 'betray legality' would be if he reached a conclusion different from '"what the law requires"'. That would be 'the wrong attitude'.[469]

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and misunderstood; to put it another way, it is not rules per se which determine outcomes but what judges do with and to rules. Judges, Duncan argues, 'work' the legal materials to reach ideological outcomes they desire while simultaneously experiencing themselves as bound by the 'texts' upon which they draw. They are then largely in denial about their role as political and ideological operators and this lack of awareness carries its own political consequences. Specifically, it reinforces the view that 'correct' outcomes to legal decision-making exist, placing those decisions beyond the reach of political and ideological challenges.'(footontes omitted)

[465] Paterson *Final Judgment* at 12-13.

[466] Paterson *Final Judgment* at 13.

[467] Conaghan (2014) Celebrating Duncan Kennedy's Scholarship: A 'Crit' Analysis' Transnational Legal Theory, 5:4, 601-621, DOI: 10.5235/20414005.5.4.601 at 608.

[468] Kennedy 'Phenomenology' *Journal of Legal Education* (1986) at 522-523.

[469] Kennedy 'Phenomenology' *Journal of Legal Education* (1986) at 522-523.

As to what thoughts move legal reasoning back and forth between judges' initial impressions and final outcomes,[470] Kennedy reflects from the sanctuary of his hypothetical position, would include, at a minimum, a good legal argument, fear of disapproval from the community, resistance to being reversed on appeal, the prospect of influencing popular consciousness going forward, of affecting his reputation and credibility, and ultimately testing his own ethical standing on the issues.[471]

What then is the relationship between ideology and integrity of the law? They are not mutually exclusive for as long as the legal actors act in genuine good faith. Their choices, reasoning and decisions could range anywhere on the spectrum between the facism, conservatism, liberalism and communism so long as the underpinnings are honesty and the law. Corruption or party-political bias would be examples of bad faith and dishonesty that discredit the integrity of law. So would jettisoning law entirely from reasoning in favour of ideology. A pretence of applying law would be a subtle way of allowing ideology to trump integrity.

Why did the majority in *Jordan* invoke four statutes entirely irrelevant to the context of criminalizing sex work. In order to set the patron (usually males) apart from the prostitute (usually females), Ngcobo J writing for the majority reasoned that there was a qualitative difference between the prostitute as dealer and the patron as customer: As the party who conducted the 'business' of prostitution, the prostitute was likely to be a repeat offender; as the party who sought the service of a prostitute, the customer may or may not be a repeat offender.[472] In my view, being or not being a repeat offender was irrelevant because prostitution is a crime no matter how many times the offenders – patrons and prostitutes alike – commit it.

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[470] Kennedy 'Phenomenology' *Journal of Legal Education* (1986) at 519.
[471] Kennedy 'Phenomenology' *Journal of Legal Education* (1986) at 527-528.
[472] *S* v *Jordan and Others* (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae) 2002 (6) SA 642 (CC) (2002 (2) SACR 499; 2002 (11) BCLR 1117).

Even more remarkably, the majority invoked four statutes[473] on the basis that they punished both the customer and the dealer alike, without reference to gender.[474] None of those statutes applied in contexts comparable to s 20(1)(aA) of the SOA,[475] which impacted sharply on values about sex, gender and socio-economic disparities. The dealer-customer comparator in the other statutes ignored the socio-economic needs driving an illegal, dignity-destroying trade in which sex workers were particularly vulnerable to their employers and clients. As an act of economic desperation, prostitution was not a voluntary business or career of choice for every prostitute. Thus, lumping the sex industry with other industries obscured the discrimination against vulnerable sex workers, both male and female.

The articulated reasons for the majority's decision simply did not add up. Intuitively, the hermeneutic of suspicion is awakened. Pinning the rule choices to ideology alone or a deferential legal consciousness or culture, to the exclusion of all other phenomena, is impossible unless the judges, after some reflection, speak for themselves to explain what, if any, unarticulated or extraneous phenomena might have swayed them. Even after bona fide soul searching, honest judges may not be able to give any reasons beyond those stated in the judgment simply because they are themselves unconscious of influences extraneous to the legal materials or other phenomena. Or rather, they have not been called upon to probe their consciousness. Or, worse, they deliberately choose not to compare and contrast alternative reasons because, as ideologues, no other outcome will suit their purpose, that is, the way they want the case to come out.

Ideology is a kind of bias of which legal actors cannot be purged. This means that it has to be recognized and carefully managed. Management begins with the consciousness and the conscience of individual legal actors in the choices

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[473] *Jordan* para 10 footnote 6; s 3(3) of Dangerous Weapons Act 71 of 1968; s 47 (f) of the Sea Fishery Act 12 of 1988; sub-sec 159 (e), 160 (b) and 161 (c) of the Liquor Act 27 of 1989; s 18(1) read with s 29(b) the Medicines and Related Substances Act 101 of 1965.
[474] *Jordan* para 18.
[475] Section 20(1)(aA) of the SOA regarded 'any person' who had carnal intercourse with any other person for reward as being guilty of an offence.

they make and the paths they take to reach their decisions. Institutional measures to manage ideology would include re-evaluating legal education, relationships between the legal profession, civil society and state institutions, and judicial selection, while constantly remaining focused on choices that would conduce to constitutional crises and those that would not.

Criteria for selecting judicial officers, prosecutors, parliamentarians, auditor-generals, public protectors and other high stakes decision makers should rest on much more than on an individual's race and gender. Individuality 'is a pattern we read into behavior … culled from the stockpiles of culture, ideology and psychology.'[476] It is much more than one's race, sex, class, culture, ideological presuppositions, immutable style and how they all combine to conduce to decision-making.[477] Legal scholarship is constantly about making competing, conflicting choices about how society is organized.[478] Doing legal scholarship without making such choices, consciously or unconsciously is impossible, because culture and ideology are built into rules, 'their habitual literary and intellectual devices.' [479] For as long as choice exists in decision-making, ideology will always be at play.

How and why judges behave the way they do are questions for the social sciences.[480] Some answers are found through empirical studies, others through extrapolation.[481] Gathering data about judges accurately is hard. Judges are not 'colour-coded' along ideological lines. Furthermore, they are expected to speak mainly through their judgments. Fearing to disqualify themselves from presiding in cases, judges are cautious about expressing themselves, even privately to researchers for the purposes of gathering data for academic study. The six values of the Bangalore Principles of Judicial Conduct, namely independence, impartiality, integrity, propriety, equality, competence and diligence reinforce and justify judges' reflexive resistance to giving interviews

[476] Kennedy 'Affirmative Action' *Duke L.J. 705* (1990) at 745.
[477] Kennedy 'Affirmative Action' *Duke L.J. 705* (1990) at 745.
[478] Kennedy 'Affirmative Action' *Duke L.J.* 705 (1990) at 743.
[479] Kennedy 'Affirmative Action' *Duke L.J. 705* (1990) at 745.
[480] Friedman 'The Importance of Being Positive: The Nature and Function of Judicial Review' 72 *U. Cin. L. Rev.* 1257 2003-2004 1273.
[481] Friedman 'Being Positive' 72 *U. Cin. L. Rev.* 1257 2003-2004 1273.

and otherwise expressing themselves outside of their judgments.[482]

Diagnosing a judge's ideology through judgments, and sometimes through public speeches and academic writings, requires a critical mass of such source materials that is not always forthcoming. Hence Paterson's and Darbyshire's[483] works are a breakthrough. So, researchers tend to find near 'proxies' to unveil judges' ideologies. An example of a proxy would be the political party to which the judge was aligned.[484] Notwithstanding criticism against its crudity, Friedman commends the test as reliable in predicting voting patterns amongst panel judges.[485] A huge risk of relying exclusively on proxies is that they are open to multiple inferences. Furthermore, judges' opinions before appointment to the bench are subject to dramatic change once constitutional values and other constraints come to bear on their discretion. For instance, a judge steeped in traditional cultural and religious practices that condemn same-sex marriages will have to change his ideological outlook fundamentally or check those values at the gates of the court, if not before his interview at the Judicial Services Commission!

The biographies of US Supreme Court Justice Harry Blackmun[486] makes compelling reading of the story of a man of Republican Party persuasion and a conservative jurist who, observers claim, shifted his position radically once he became a judge, to one of deep empathy for marginalized and vulnerable people by ruling in favour of abortion, the protection of homosexuals against outdated laws, and the preservation of life of death-row inmates. Perhaps his childhood experiences of financial and emotional insecurities had something to do with it. For, he disclaimed that it was he who had changed, but that the Court and the issues had done so. In contrast, his childhood and lifelong friend, Chief

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[482] http://www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf (accessed 10 April 2017).
[483] Paterson *Final Judgment* and Darbyshire *Sitting in Judgment*.
[484] Barry Friedman 'The Politics of Judicial Review' 84 *Tex L Rev* 257 (2005) 277.
[485] Friedman 'The Politics of Judicial Review' 84 *Tex L Rev* 257 (2005) 278.
[486] Linda Greenhouse *Becoming Justice Blackmun: Harry Blackmun's Supreme Court Journey*; Tinsley Yarbrough *Harry A. Blackmun – The Outsider Justice.*

Justice Warren E. Burger remained conservative and Republican. Political differences gradually strained their personal relationship.[487]

South African Judge Anton Mostert surprised the Afrikaner political establishment with his findings in the 1978 Commission of Enquiry into Exchange-Control Regulations. Dubbed as the 'Information Scandal', his report unearthed deep-rooted corruption at the highest levels. Fearlessly defying the apartheid era Prime Minister, P W Botha, he released his report to the public whose resounding response was 'Thank you, Judge Mostert!'.[488] On his passing in 1995 his eulogy acknowledged:

'He tore open the secret and corrupt underside of Government and he affirmed in dramatic terms the highest traditions of the judiciary. In so doing he was true to himself and to his own ideals; he was true to the higher values of the Afrikaner community which he loved so well and which he knew deserved to be served by truth and not by lies; by morality and not immorality, with courage and not in fear. And above all he was true to a South African nation struggling to be born, a nation that would require above all else a legacy of judicial independence, a legacy of courage and a legacy of integrity.'[489]

The decisions of Justices Blackmun and Mostert are grounded in law, as they should be. However, what compelled them to make choices that destabilised the establishment? A more reliable way to gather data about judges is to interview them, anonymously if necessary. Such interviews are not easy to come by. Judges must first accede to be interviewed. For that, the researcher has to gain and retain the trust and confidence of the judge throughout the gathering, analysis, production and publication of the data.[490] The difficulties of empirical studies of judicial opinion and conduct are probably an explanation for the dearth of literature on positive theories and the proliferation of normative theories of judicial review. Optimistically, the trend towards interviewing judges

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[487] Greenhouse *Becoming Justice Blackmun: Harry Blackmun's Supreme Court Journey*; Yarbrough *Harry A. Blackmun – The Outsider Justice*.
[488] Carmel Rickard *Thank you, Judge Mostert!* (2012).
[489] Michael Kuper SC 'Anton Mostert' *Consultus*, November 1995. https://www.sabar.co.za/law-journals/1995/november/1995-november-vol008-no2-pp142-143.pdf (accessed 24 July 2019)
[490] For research methodologies applied to the judiciary see Chapter 1 of Paterson *Final Judgment* and Darbyshire *Sitting in Judgment*.

is now gaining some traction.[491]

'*Tough Cases*'[492] is a refreshing breakthrough setting a new trend towards transparency of the judiciary. Judges in various courts in the USA at various levels of seniority give their personal accounts of how they experienced their toughest cases. This trend should be encouraged insofar as it is helpful for development, for all those interested in the law can learn first-hand from judges, rather than having to speculate what went on in a particular case or why they made the choices that they did. Judges being transparent about their experiences is not a disqualifier from presiding because the legal materials in each case impose their own constraints. Furthermore, ideology is one of several phenomena infusing reasoning and decisions. Amongst panel judges, transparency would encourage deliberation about articulated positions instead of assumptions, guesswork and even pretence about what each judge stands for. Taking a leaf of encouragement from Kennedy's *Phenomenology* and *Tough Cases* I account for my own experience in one of my toughest cases.[493]

In *Nahour* [494] I had three choices. The claimants had been sentenced to short terms of imprisonment for rape; they raised a typical defence – consent. The complainant was a sex-worker with whom sex would have been contractual and therefore consensual. After two appeals before lower courts, the SCA overturned their convictions on a technicality. Before me, they claimed from the state (i.e. Minister of Justice and Constitutional Development) more than R1m in compensation for unlawful prosecution (not arrest and detention as awaiting

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[491] See for instance Lord Hope of Craighead KT's description in his Forward to Paterson's *Final Judgment* (2013) at viii as 'a work of real scholarship'; EI Rossouw 'Flourishing of Judges' (unpublished Phd study) (2019).

[492] *Tough Cases* eds. R F Canan, G E Mize, and F H Weisberg (2018).

[493] As a prelude, I confess that I had not read Kennedy's 'Phenomenlogy' when I wrote *Nahour*. But when I did read it, I identified fully with Kennedy's imaginary judge. In casual discussions with Karl Klare about *Tough Cases* he remarked that my toughest case would be *Nahour.* In discussing my first draft of this section with Kennedy, he was deeply interested; another retired American judge had given him a similar account of her experience of adjudication. *Phenomenlogy* therefore captures common experiences of adjudicators, at least some of them, as they move between ideas and settle on the ones that constitute their decisions.

[494] *Nahour and Another v Minister of Justice and Constitutional Development* (6057/2007) [2018] ZAKZPHC 65 (3 August 2018).

trial prisoners) and a small amount for loss of earnings as a result of their time spent in prison over four years or so.

My first option was to grant the request, made by both sides jointly, to stand the matter over to the next day. A 'stand down' on the first day of trial often implied a possible settlement. In this instance it was likely to favour the claimants because the state was on the back foot. Over 25 years since the arrest of the claimants, its file had changed hands several times and was finally lost. In all this time, if the litigants could not ready themselves for trial, an adjournment for a day was not going to help. I refused the request and dismissed the formal application for an adjournment that followed. My second and third options presented after only the claimants testified and the state closed its case without leading evidence.

Option two was the easy road. I could find in favour of the claimants on some basis. The insufficiency of evidence for the state. If I did, the state's unpreparedness and lacklustre performance meant that an appeal was unlikely. However, both options one and two meant that the claimants would profit from their turpitude at the expense of the public purse. Intuitively, I knew that was wrong. Yes, judges too have intuition. I did not want the case to come out rewarding wrongdoers. Besides the pressing claims against public funds for socio-economic development, to reward offenders who unashamedly admitted to breaking the law, would have sent the wrong message about what the Constitution and the judiciary stand for.[495]

From the outset I knew how I wanted the case to come out. The claims struck me immediately as cynical, immoral and antithetical to constitutional values. It is not in every case that I know from the outset how I want a case to come out. Most cases invoke a natural 'gut feel' or prima facie view of each side's strengths and weaknesses, but all too often what starts out as 'open and shut' cases, prove otherwise. Mustering even a prima facie view of 'best interest' is hard in cases involving children and those who cannot speak for themselves.

[495] Kennedy 'Freedom and Constraint' (n 47) 12–13.

However revolted I might be by heinous crimes alleged against an offender, the rules of fair trial procedure constrain me strictly, leaving me with no discretion but to acquit if the prosecution slips up. And I was glad to be overturned on appeal when the appellate court made a case come out as I had preferred ideologically, but I had found that the law did not allow it.[496] Knowing how I want a case to come out has never made adjudication easier. On the contrary, it puts me on my guard to test my biases by reasoning for the other side before settling on the best outcome.

*Nahour*, took me on the hard road that led to option three. I based my judgment on the claimants' own version. Their concession that they had procured sex was to enable them to raise consent as their defence to rape, which by definition is sexual intercourse without consent. I turned to *Jordan* (above) for precedent.[497] The CC had split on a narrow six-five majority to uphold the validity of s 20(1)*(aA)* of the SOA which criminalised carnal intercourse or committing acts of indecency for reward. The majority reasoned that the section applied equally to sex workers (usually vulnerable women) as it did to clients (usually men). It found not the law, but its application was discriminatory in that only the sex workers were prosecuted, not the clients. Ironically, this finding proved to be true even in the prosecution of the claimants in *Nahour*. They were not charged for the crime of procuring sex, despite their brazen admission to being accomplices to prostitution. If the flaw was only in the application of the SOA, as the narrow majority in the CC found, then I had a duty to correct its application in *Nahour*. Accordingly, applying *Jordan*, I found that the claimants had broken the law. This finding based on the claimants' own version put their turpitude beyond question.

Returning to the claim in delict, the common law position was that anything done illegally was considered a nullity, subject to several exceptions to avoid 'greater inconveniences and greater impropriety'[498] in unravelling illegalities.[499]

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[496] *Mbete and other v Registrar of Deeds,* Pietermaritzburg case no. 12399/14 (unreported) KZNHC (Pmb).
[497] *Jordan* para 14.
[498] Voet *Commentarius* as translated by Gane 1 3 16 at 44 and 46.
[499] E.g. *Kylie v CCMA & others* 2010 JOL 25578 (LAC); 2010 (7) BLLR 705 (LAC); 2010 (4) SA

My research showed that the application of the doctrine of *ex turpi causa* to prevent abuse and misuse of the judicial process was well established in contract law and insurance law, but not in delict. The general approach was that courts should be allowed to bar recovery in delict on the ground of the claimant's immoral or illegal conduct only in very limited circumstances, because such claims are for compensation for personal injury or loss.[500] If I had stopped excavating the law at this stage, option three of applying the *ex turpi causa* rule of the common law would have resulted in success for the claimants. One more layer had to be explored.

Was the event triggering the claim the technical irregularity resulting in their convictions being set aside, or the claimants' turbid conduct of procuring sex? The technical irregularity was that the prosecutor had not disclosed, as she was required to, that she had a statement from the police to the effect that the victim was a prostitute. This would have been the event triggering the claim if it had led to the claimants having an unfair trial. Pursuing this line of enquiry meant carefully scrutinizing the record of the case in four courts, especially the criminal trial court, where the magistrate had the benefit of observing the claimants and formulating his opinion on their credibility.

As early as in the third paragraph of the magistrate's judgment, it emerged that it was common cause that the complainant was a sex worker. With the application of the law being biased against prostitutes, the complainant risked criminal prosecution and social ostracization if she admitted that she was a sex worker. Instead, she chose to perjure herself. Otherwise her evidence was impeccable. She withstood 'lengthy and repetitive questioning on three [court] appearances.' In contrast, the claimants left the magistrate unimpressed and unconvinced of their credibility, significantly, not in respect of their defence that the complainant was a prostitute, but in regard to their abominable violent conduct in many other respects. As the status of the complainant was on the

383 (LAC); 9 *Lawsa* 3 ed paras 334 and 338.

[500] *Hall v Hebert* [1993] 2 S.C.R. 159 at 168-169 (see the majority judgment of McLachlin J with which La Forest, L'Heurex-Dubé and Iacobucci JJ concurred); *R (on the application of Best) v Chief Land Registrar (Secretary of State for Justice, interested party)* [2015] 4 All ER 495 para 43 (see Sales LJ's judgment).

agenda of the trial court, and as the claimants had every opportunity of testing her under cross-examination, I found that non-disclosure of the police statement was a procedural formality that did not, as a fact relevant to their civil claim, impugn the claimants' fair trial rights. I also found that they could not prove that they would never have been prosecuted successfully if the irregularity had not occurred. As plaintiffs, they bore the burden of proof. Consequently, they failed the 'but for' test for delictual liability. My choice of facts and rules of law pertaining to the onus of proof enabled me to reach this conclusion. This finding sent me in search of authorities to bolster or refute option three.

Option three remained a conundrum. I found no South African cases in which the *ex turpi* principle was applied to a civil claim for damages (*iniuria*) in which the turpitude, that is, the conduct from which the claim originated was also a crime committed by the claimants. Canadian case law came to my rescue.

'Courts can bar recovery in tort on the ground of the plaintiff's immoral or illegal conduct but only in very limited circumstances. The basis of this power lies in the duty of the courts to preserve the integrity of the legal system and is exercisable only where this concern is in issue. Generally, the *ex turpi causa* principle will not operate in tort to deny damages for personal injury, since tort suits will generally be based on a claim for compensation.' [501]

I dismissed the claims with costs.

The common law principle *ex turpi causa* resonated with my ideological outlook. I eschewed options one and two because the rules I was invited to apply would have impugned the integrity of the legal system and led to injustices. In contrast, the claimants had found another common law rule in basic principles of delict, which they regarded as a rule of necessity, namely, that their illegal conduct was not a bar to compensation for alleged wrongful prosecution. So, the outcome depended on which one of the two rules of the common law applied and what facts were chosen as material. Bearing in mind that *Nahour*

[501] *Hall v Hebert* [1993] 2 S.C.R. 159 at 168-169 (see the majority judgment of McLachlin J in which La Forest, L'Heurex-Dubé and Lacobucci JJ concurred); *R (on the application of Best) v Chief Land Registrar (Secretary of State for Justice, interested party)* [2015] 4 All ER 495 para 43 (see Sales LJ's judgment). Citing from the headnote.

was a civil case, the requirements and standard of proof to establish wrongful conduct had to be established on a balance of probabilities.

Option three consumed considerably more time, resources and energies.[502] More so, because despite my invitation to the litigants to address my reluctance to award the claims, none was forthcoming. As for the state, capitulation is a polite description of its indifference. This was not litigation in the classic sense of the litigants adducing the evidence and arguments and the independent and impartial judge issuing a reasoned judgment. What is a judge to do when she gets no help from the lawyers for both sides? I had to bat on my own. Ignoring incompetence and malfeasance is a disservice to the public. Confidence for adopting a robust approach came from the CC itself in its hard-hitting judgments against malfeasance.[503] Dysfunctional institutions like the office of the state Attorney strained the structure, form and limits of litigation.[504] Both Counsel skirted discourse about transformative constitutionalism. Neither looked beyond old school lessons on delict. Interpreting and apply the common law to new circumstances was not on their agenda.

Not only did I anticipate an application for leave to appeal against option three, which I readily granted without even hearing the parties, I also anticipated being overturned on appeal. I expected the SCA to censure me (again) for straying beyond the remit of the materials before me, for calling on litigants to look into issues that they had failed to raise, but which I thought were constitutional, transformative and influential for my decision.[505] Depending on how the

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[502] Kennedy *A Critique of Adjudication – Fin De Siecle* 22 *Cardozo L. Rev.* 991 (2001) at 996, 369, 166.

[503] E.g. *SASSA.*

[504] Ten days after issuing *Nahour* the media broke with news about nationwide investigations into the State Attorneys' office. https://www.sanews.gov.za/south-africa/crackdown-corruption-state-attorney; https://www.news24.com/SouthAfrica/News/state-attorneys-involved-in-defrauding-the-state-must-be-arrested-motsoaledi-20180814; https://ewn.co.za/2018/08/14/siu-says-probe-into-corruption-at-state-attorney-s-office-to-take-12-months; http://www.702.co.za/articles/315329/corruption-allegations-to-be-investigated-in-the-state-attorney-s-office; https://www.reuters.com/article/us-safrica-politics-corruption/south-africa-probes-state-attorneys-as-ramaphosa-graft-crackdown-widens-idUSKBN1KZ0Y7; https://www.timeslive.co.za/news/2018-08-11-exposed-state-attorneys-collusion-with-law-firms-that-has-cost-government-r80bn/. (accessed 24 November 2018)

[505] *Four Wheel Drive Accessory Distributors CC* v *Rattan NO* (1048/17) [2018] ZASCA 124 (26 September 2018); *Four Wheel Drive Accessory Distribution CC* v *Rattan NO* (6916/13) [2017] ZAKZDHC 26; 2018 (3) SA 204 (KZD) (4 July 2017).

appellate panel is constituted, some judges might find in favour of the claimants on the basis that the event triggering the claim was the technical irregularity, not the turpitude of the claimants. Whatever the choice, dialogue about developing the common law to apply to new circumstances was underway. Censure is par for the course for puisne judges. For as long as all judges, puisne and appellate, abide by the three 'I's – Independence, Impartiality and Integrity – the judiciary is safe. However, if the bench becomes the 'refuge of the mediocre, the unambitious, the timid and the unsuccessful, or if the appointment of judges were to be blighted by the search for the safe, the conformist and the representative … the quality of justice would suffer and respect for the law decline.'[506] And surveys that challenge the integrity of judges will gain traction.[507]

As I write now, a fourth option presents. If this option had occurred to me when I was writing the judgment, it would have been so fleeting that I cannot recall it. The claimants might have appealed to my ideological leftist bent towards the poor. I could have justified my decision on their choice of the rule of the common law and awarded compensation as a means of redistribution of wealth to blue collar, working class litigants. If I had done so, my judgment would not have been appealed. I would not have risked censure from the appellate courts. The claimants and their lawyers would have, as the cliché goes, smiled all the way to the bank. As for actors for the state and its lawyers, so long as the public purse and not their personal pockets footed the bill, it was alright. But an amoral precedent would have been set on subversive reasoning. Subversive as it might be, a moralist invoking the hermeneutic of suspicion would have exposed my ideology as the basis for my reasoning.[508] Public perception would have been that rapists can be rewarded at taxpayers' expense. Then there was the matter of integrity, of law, litigation and my own.

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[506] Tom Bingham *The Business of Judging – Selected Essays and Speeches* at 385.
[507] 'The Integrity of the Judiciary In South Africa' (https://www.judgesmatter.co.za/opinions/the-integrity-of-the-judiciary-in-south-africa/) (accessed 3 November 2019).

[508] Kennedy 'Hermeneutic of Suspicion' at 369.

Exploring after the fact why I preferred option three over the others confirms that one case does not a legal actor's ideology define. Nor is ideology the exclusive or necessarily the dominant determinant of reasoning and decisions in every case. Other phenomena interact dialectically with ideology so that, depending on the context, one or some prevail over others. I was able to use such time as I had, my energies and our limited court resources to seek out relevant foreign cases. This is not always possible in practice. If I was presiding in a jurisdiction that had no internet access to online libraries, an impediment that befalls many African judges presiding in rural areas, the case could have come out differently. Legal actors have to do the best they can with whatever resources they have in the time available. Practicalities and logistics also impact on how cases come out.

Do I fit the profile of Kennedy's 'constrained activist judge'? Davis summarises such a judge as one who 'accepts the constraints of the text, and in her work attempts to show fidelity to the text. But in the process of engagement with the text the outcome plays a major role. When the outcome, dictated by a first reading of the text, appears to be contrary to that judge's concept of justice, she works with the text to change the meaning to be more congruent with her own ideology.'[509]

My constitutional mandate is to issue remedies in accordance with justice.[510] I was disposing of 'substantial ideological stakes.'[511] To reward the claimants

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[509] Davis and Kennedy 'A Critique of Adjudication' 117 *SALJ*. 697 (2000); Kennedy *A Critique of Adjudication – Fin De Siecle* 22 *Cardozo L. Rev.* 991 (2001) at 159-160.

[510] Section 173 of the Constitution of the Republic of South Africa, 1996. *SASSA*:
'[44] This Court's extensive powers to grant a just and equitable remedies… .
[51] It is necessary to be frank about this exercise of our just and equitable remedial power. That power is not limitless and the order we make today pushes at its limits. It is a remedy that must be used with caution and only in exceptional circumstances. But these are exceptional circumstances.'
For analysis of adjudication in terms of fidelity to principles of legality, see Lord Bingham of Cornhill, 'The Judges: Active or Passive' (2006) 139 Proceedings of the British Academy 55. For Lady Hale's reflections, prompted by Lord Bingham's article, on whether one can be both a judge and a feminist, see Baroness Hale of Richmond 'A Minority Opinion?' (2008) 154 Proceedings of the British Academy 319.

[511] Kennedy 'Hermeneutic of Suspicion'; Davis and Kennedy 'A Critique of Adjudication' 117 *SALJ* 697 (2000); Conaghan (2014) Celebrating Duncan Kennedy's Scholarship: A 'Crit' Analysis' Transnational Legal Theory 5:4, 601-621, DOI: 10.5235/20414005.5.4.601 at 608.

would have betrayed 'the duty of interpretive fidelity,'[512] an unwholesome preference for individualism over altruism. No law could be ethically and morally just if it allowed the outcome the claimants sought.[513] Our identity as a nation that rewarded turpitude was at stake. It would have opened the contingency fee floodgates wider, generated another cottage industry of spurious claims, with all the consequences of over-burdening the administration of justice. Most of all, it would have set an unwholesome precedent. Pragmatism had to prevail.[514]

Kennedy fortifies my view that 'ideology is mainly present through professionally legitimate legal work on the legal materials that exploits or generates or eliminates open texture.'[515] For as long as judges and other legal actors admit to being 'ideological performers' and remain willing to engage about their ideology, bad faith can be kept at bay.[516] Commitment to ideological work and to the integrity of law are, in my view, not mutually exclusive. On the contrary, denying the instrumentality of ideology in legal work would be bad faith that could subvert the integrity of law. Inviting engagement to an ideological position would, by strengthening or weakening it, 'purify' the integrity of law.[517] After all, as with law, politics and much else, 'ideology is also full of gaps, conflicts, and ambiguities.'[518] What should be debated constantly is the very proposition that ideology 'plays a major explanatory role… in understanding the way legal reasoning, … works. Without the concept of ideology, it's very hard to understand what's going on.'[519]

My adoption of Kennedy's account of what it means to be ideological is manifestly and unapologetically ideological. My account of *Nahour* is to

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[512] Kennedy 'Hermeneutic of Suspicion'; Davis and Kennedy 'A Critique of Adjudication' 117 *SALJ*. 697 (2000); Conaghan (2014) Celebrating Duncan Kennedy's Scholarship: A 'Crit' Analysis' Transnational Legal Theory 5:4, 601-621, DOI: 10.5235/20414005.5.4.601 p 608.
[513] Conaghan (2014) Celebrating Duncan Kennedy's Scholarship: A 'Crit' Analysis' Transnational Legal Theory, 5:4, 601-621, DOI: 10.5235/20414005.5.4.601 at 610-611.
[514] Michelman 'Norms and Normativity in the Economic Theory of Law' *62 Minn. L. Rev.* 1015, 1048 (1978) at 1046.
[515] Kennedy 'Hermeneutic of Suspicion' at 365 and at 366.
[516] Davis and Kennedy 'A Critique of Adjudication' 117 *SALJ*. 697 (2000).
[517] Davis and Kennedy 'A Critique of Adjudication' 117 *SALJ* 697 (2000).
[518] Hackney Jr 'In conversation with Duncan Kennedy 'Critical Legal Studies' NYU Press Scholarship (2012).
[519] Hackney Jr 'In conversation with Duncan Kennedy 'Critical Legal Studies' NYU Press Scholarship (2012)

illustrate the instrumentality of ideology in legal work, where The Law calls the shots. As trustees of judicial integrity, accountability, impartiality and independence, on behalf of the people, the only question judges must answer is: What is The Law on this matter?[520] Institutional independence is visible. The public witnesses how judges are nominated, interviewed and appointed. People observe and experience how the administration of justice works. From these manifestations they form their views as to whether institutionally, their trust is well placed.

What is not manifest is what goes through the minds of judges when they make their decisions. All that the people have to hold on to is trust. They trust that judges apply The Law. If the people did not seek decisions based on law, then there are countless other ways in which they could get decisions made.[521] They could toss a coin, hold a ballot, protest and use powerplay, or even consult an astrologer or the holy spirits. But it is The Law that the people want. It is the judges they entrust to bring The Law to them, in good faith and to the best of the judges' abilities. An improper exercise of judicial power, is 'a departure from the rule of law itself.'[522]

The discipline of law imposes constraints that interact dialectically with ideology, politics, sociology and other phenomena, articulated and unarticulated, to conduce to choices. [523] I disagree with the proposition that legal reasoning is not a sound method for making decisions.[524] Nor do I think

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[520] Margaret H Marshall, Chief Justice Supreme Judicial Court Massachusetts United States of America Bram Fischer Memorial Lecture - Legal Resources Trust Friday, November 13, 2009. This paragraph was also inspired at lunch today (10 December 2018) with Chief Justice Marshall and the Michelman's.

[521] David Pannick *Judges* (1988) at 1.

[522] Abram Chayes 'The Supreme Court, 1981 Term: Foreword: Public Law Litigation and The Burger Court' (1982) 96 *Harv. L. Rev.* 4. at 47.

[523] Davis and Kennedy 'A Critique of Adjudication' 117 *SALJ* 697 (2000); Kennedy *A Critique of Adjudication – Fin De Siecle* (1997) 159-160:'[T]he first modification is to get rid of the idea that there is an objective boundary line between questions of law that have correct determinate answers and questions that can be resolved only through ideological choice."' And 'we see the judge with an ideological project as "working in a medium", namely law, to bring about the rule choices he or she thinks are just. Sometimes such judges find it impossible to produce a good legal argument for the rule choice they prefer, and they find themselves "constrained" both by the internal force of their oath of fidelity in interpretation and by external pressure, to apply a rule that they would vote against were they legislators.'

[524] Davis and Kennedy 'A Critique of Adjudication'117 *SALJ* 697 (2000); 'For the purposes of this review a passage from D Kairys must suffice:

that the 'rule of law is a sham'.[525] To dismiss legal doctrine as 'convoluted' and an 'accommodating screen to obscure its indeterminacy and the inescapable element of judicial choice' would amount to throwing the baby out with the bathwater. Society has reached such high levels of complexity that a rule-less society – as basic as whether one drives on the left or right side of the road – is not foreseeable.[526] For as long as society needs rules, they must be interpreted and applied to best egalitarian effect.

Adjudicative accountability begins as a deeply internal experience for every individual judge. Reasoned decisions externalize judicial accountability. Transparency between internal and external accountability builds peoples' trust in the judges. Synergy between internal and external accountability is a mark of good faith. However, synergy exposes much more than good faith when it is induced by the use of law. Then internal judicial independence, impartiality and integrity are publicly 'visible' and accessible. The people may not agree with the judges' reasoning, their decisions or both. However, it will take a lot more to prove that their trust in the judge was misplaced. Faced with unpopular public and appellate responses, all that judges have to cling to is their personal courage and abiding commitment to their oath of office. If the people believe that judges apply law, then the judges' work is done, well and truly. Not quite.

A cornucopia of rules of law exist from which judges of any ideological persuasion can choose to hang their hats. From the perspective of the people, trust is earned when the rule choices impact in ways that improve their lives. So not only must judges apply the law, they must also apply law that is just.

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"The starting point of critical theory is that legal reasoning does not provide method or process that leads reasonable, competent, and fair-minded people to particular results in particular cases ... the ultimate basis for a decision is a social and political judgment incorporating a variety of factors, including the context of the case, the parties, and the substance of the issues. The decision is not based on or determined by legal reasoning.'"

[525] Van Sandelingenambacht 'Legal Postism' 10 *Eur. Rev. Private L.* 111 (2002) 131.

[526] Davis and Kennedy 'A Critique of Adjudication' 117 *SALJ* 697 (2000); J Conaghan (2014) Celebrating Duncan Kennedy's Scholarship: A 'Crit Analysis' Transnational Legal Theory 5:4, 601-621, DOI: 10.5235/20414005.5.4.601 p 612-613; or as Allan Hutchison has written:

'"The rule of law is a sham; the esoteric and convoluted nature of legal doctrine is an accommodating screen to obscure its indeterminacy and the inescapable element of judicial choice."'

Sticklers for formalism[527] who use rules of law to obstruct the delivery of services, tread dangerously close to losing the trust of the people desperate for services like education[528] and health.[529] What the people see and experience are not the niceties of the rules or how smartly the judges invoked them, but their adverse impact on their livelihoods.

Constitutional principles of legality, rule of law, deference and precedent are venerable. Citing *Grootboom*, and even *Mazibuko*, Young gave South African constitutional jurisprudence a glowing report of not avoiding the substance of economic and social rights, despite endorsing a reasonableness standard of review and deliberative remedies. She saw the courts' role as catalysing 'a substantive notion of democracy-supporting economic and social rights.'[530] Young's assessment of the South African situation was premised on jurisprudence generated at a time when conditions were such that the courts trusted that all actors would adhere to the venerable principles above. But what if the government and its administration cannot be trusted?[531] These principles would be open to abuse. Formalists who invoke them would be rubberstamping wrongdoing.

Ironically, s 217 of the Constitution on the public procurement of goods and services, which is meant to protect the public purse, has been turned on its

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[527] Boonzaier 'Good Reviews, Bad Actors' CCR Vol VII 2015. (accessed 12 December 2018).
[528] *KwaZulu-Natal Joint Liaison Committee* v *MEC for Education, KwaZulu-Natal and Others* [2013] ZACC 10, 2013 (4) SA 262 (CC), 2013 (6) BCLR 615 (CC)('KZN Joint Liaison Committee').
[529] *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd t/a Eye and Laser Institute*2014 (3) SA 481 (CC) ('*Kirland*').
[530] Young 'The Avoidance of Substance in Constitutional Rights Constitutional Court Review' https://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=2057&context=lsfp (accessed 12 December 2018); see also D Brand 'Proceduralisation in Rights and Democracy' in H Botha, A van der Walt & J van der Walt (eds) Rights and Democracy in a Transformative Constitution (2003) 33; D Brand 'Judicial Deference and Democracy in Socio-Economic Rights Cases in South Africa' 22 *Stell LR* 616 (2011); Brian Ray 'Evictions, Aspirations and Avoidance' (2013) 5 *Constitutional Court Review* 219.
[531] The days in which the CC deferentially entrusted the government to determine the means it would use to administer the delivery of housing and health services in *Grootboom and Minister of Health and Others* v *Treatment Action Campaign and Others* (No 2) [2002] ZACC 15, 2002(5) SA 721 (CC) at para 129, are over.

head to protect untrustworthy keepers of the purse.[532] Quite properly, the SCA departed from the doctrine of *functus officio* and its antiquated precedents, to allow state actors to correct impropriety in public administration. [533] Shamelessly when they were called to account in other cases, state actors banked on this doctrine and s 217 as licenses to ask the courts to undo manifest malfeasance occurring under their watch, purportedly in the names of good governance and public interest. Formalist judges were easily persuaded to oblige.[534] A simple question can help to distinguish genuine litigation from those intended to cover up cans of worms: Why does it take public administrators so long to approach the court to fix malfeasance? The lack of an explanation is suspicious enough.[535] Procurement of goods and services where much of the malfeasance occurs, has strict rules for compliance. For instance, a tenderer who fails to produce a tax compliance certificate is disqualified automatically. Yet tenders are awarded to nonqualifying tenderers. [536] Such 'irregularities' are criminal rather than administrative. Formalists fail to pierce the pretence of propriety and public interest to distinguish genuine mistakes from those that insidiously attempt to co-opt the courts to lend the imprimatur of judicial decorum to malfeasance. For now, several ground-breaking judgments put the brakes on malfeasance to the

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[532] Boonzaier 'Good Reviews, Bad Actors' https://constitutionalcourtreview.co.za/wp-content/uploads/2018/10/Good-Reviews-bad-reviews-CCR-VII-2015.pdf. (accessed 12 December 2018).

[533] *Pepcor Retirement Fund and Another* v *Financial Services Board and Another* [2003] ZASCA 56, 2003 (6) SA 38 (SCA) ('*Pepcor*'); *Municipal Manager: Qaukeni Local Municipality and Another* v *FV General Trading CC*[2009] ZASCA 66, 2010 (1) SA 356 (SCA); *Ntshangase* v *MEC for Finance, KwaZulu-Natal and Another* [2009] ZASCA 123, 2010 (3) SA 201 (SCA).

[534] *MEC, Department of Education, KwaZulu-Natal* v *Khumalo and Another* [2010] ZALC 79, 2011 (1) CLR 94 (LC); *Khumalo and Another* v *MEC for Education: KwaZulu-Natal* [2012] ZALAC 26, (2013) 34 *ILJ* 296(LAC) (*Khumalo*); *Kirland*.

[535] *Khumalo*; *Tasima (Pty) Ltd* v *Department of Transport* [2015] ZASCA 200, [2016] 1 All SA 465 (SCA)('*Tasima*').

[536] *Country Cloud Trading CC* v *MEC, Department of Infrastructure Development* [2013] ZASCA 161, 2014 (2) SA 214 (SCA). *Country Cloud Trading CC* v *MEC, Department of Infrastructure Development*, *Gauteng* [2014] ZACC 28, 2015 (1) SA 1 (CC), 2014 (12) BCLR 1397 (CC). *Gauteng MEC for Health* v *3P Consulting (Pty) Ltd* [2010] ZASCA 156, 2012 (2) SA 542 (SCA)('*3P Consulting*'); *Kwa Sani Municipality* v *Underberg/Himeville Community Watch Association* and *Another* [2015] ZASCA 24('Kwa Sani'); *Tasima*; *Provincial Government: North West and Another v Tsoga Developers CC and Others* [2015] ZANWHC 36. *Provincial Government North West and Another* v *Tsoga Developers CC and Others* [2016] ZACC 9, 2016 (5) BCLR 687 (CC).

extent of imposing personal cost orders and even imprisonment on wrong-doers.[537] Formalists have not captured the judiciary – yet.

#### 2.7.5.2 Defaulting to Binaries

At its simplest, binary means 'a dichotomy'.[538] Defined neutrally, it would mean an 'idea that is predicated on stable oppositions such as good and evil, male and female';[539] 'mind and body or active and passive'.[540] It is the 'ontological division of a domain into two discrete categories or polarities.'[541] Binaries are a way of differentiating. [542] Analysing complex objects or systems in terms of binaries simplistically, [543] can import pejorative connotations. More insidiously, binaries have been the cause of conflicts expressed as religious intolerance and racism, and dichotomisation of knowledge into worthy Western and peripherised indigenous knowledge.[544]

In politics we are either for or against something. Referenda are formulated as binary options to facilitate voters of differing capabilities to cast their ballot with the minimum of difficulties in comprehending their choices. In law, litigation is traditionally binary. Pleadings and submissions are usually framed in binary terms for the court to decide for or against the plaintiff. In criminal law, the accused is either guilty or not guilty.

In mathematics, there are infinite probabilities between 0 and 1. Why settle for less when so much more is probable? I explore the ideological and jurisprudential impact of binaries, of settling for less, on process, and vice versa. Examples from case law on socio-economic rights and discrimination show

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[537] *Pheko and Others* v *Ekurhuleni City* (No 2) [2015] ZACC 10, 2015 (5) SA 600 (CC)('*Pheko*'); *Tasima* para 3; *Trencon Construction (Pty) Ltd* v *Industrial Development Corporation of South Africa Ltd and Another* [2015] ZACC 22, 2015 (5) SA 245 (CC), *Boonzaier* 'Good Reviews, Bad Actors' https://constitutionalcourtreview.co.za/wp-content/uploads/2018/10/Good-Reviews-bad-reviews-CCR-VII-2015.pdf. (accessed 12 December 2018).
[538] https://www.thefreedictionary.com/binarism (accessed 15 January 2018).
[539] https://www.merriam-webster.com/dictionary/binarism (accessed 23 January 2018).
[540] http://www.oxfordreference.com/view/10.1093/oi/authority.20110803095506246.
[541] 'Binarism':
https://www.oxfordreference.com/view/10.1093/oi/authority.20110803095506246
[542] https://www.merriam-webster.com/dictionary/binarism (accessed 23 January 2018).
[543] https://www.thefreedictionary.com/binarism (accessed 15 January 2018).
[544] https://www.igi-global.com/dictionary/binarism/56593(accessed 23 January 2018).

how, substantively, binaries impede transformation. Simultaneously, with the demand for court services escalating, litigants are encouraged to default to binaries. How must this tension between the search for transformative solutions and the practicalities of strained court services be managed?

Although the structural simplicity of binaries is procedurally beneficial for the formal administration of justice, it is substantively constraining for conflict management and problem solving in complex cases. Resorting to binaries by asking, for instance, whether the reasoning and decision promote the status quo or constitutional transformation, individualism or altruism is limiting if not risky. Take individualism and altruism, 'two incompatible ideologies … in a state of permanent war.'[545] Kennedy describes the essence of individualism as follows:

'the making of a sharp distinction between one's interests and those of others, combined with the belief that a preference in conduct for one's own interests is legitimate, but that one should be willing to respect the rules that make it possible to coexist with others similarly self-interested. The form of conduct associated with individualism is self-reliance. This means an insistence on defining and achieving objectives without help from others (i.e., without being dependent on them or asking sacrifices of them). It means accepting that they will neither share their gains nor one's own losses. And it means a firm conviction that I am entitled to enjoy the benefits of my efforts without an obligation to share or sacrifice them to the interests of others.' [546]

In contrast, altruism, Kennedy suggests 'enjoins us to make sacrifices, to share, and to be merciful. It has roots in culture, in religion, ethics and art, that are as deep as those of individualism.'[547] By sharing he means this:

'an existing distribution of goods which the sharers rearrange. It means giving up to another gains or wealth that one has produced oneself or that have come to one through some good fortune. It is motivated by a sense of duty or by a sense that the other's satisfaction is a reward at least comparable to the satisfaction one might have

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[545] Maris Van Sandelingenambacht, 'Legal Postism and the End of European Private Law' Duncan Kennedy 'A Critique of Adjudication' 10 *Eur. Rev. Private L.* 111 (2002).

[546] Kennedy 'Form and Substance in Private Law Adjudication' *Harv. L.R.* (1976) 89:1685-1778 at 15.

[547] Kennedy 'Form and Substance in Private Law Adjudication' *Harv. L.R* (1976) 89:1685-1778 at 17.

derived from consuming the thing oneself. Sharing may also involve participation in another's losses: a spontaneous decision to shift to oneself a part of the ill fortune, deserved or fortuitous, that has befallen someone else. Sacrifice is the dynamic notion of taking action that will change an ongoing course of events, at some expense to oneself, to minimize another's loss or maximize his gain.' [548]

Kennedy cautions against assuming that leftist activism is necessarily altruistic.[549] For instance, trade union members striking for higher wages are individualistic insofar as their concern is only for themselves and their own rights, irrespective of the rights of the employer or the public. In contrast, pro- and anti- abortionists, and child and women's rights activists could be right- or left-wing activists who advocate from a sense of caring for the other. Individualism does not necessarily coincide with maintaining the status quo or being anti-transformation. Nor does altruism necessarily coincide with transformation. Striking for salary increases would be pro-transformation insofar as it aims to be redistributive to remedy socio-economic inequality. In contrast, altruistic activism could impede transformation if its aim is to promote cultural practices that impede equality, and women's freedom of choice and movement.

This dichotomy between individualism and altruism coincides with another split. Individualism prefers rules to apply rigidly for the sake of predictability and planning; altruism favours equitable, open standards, such as good faith and fairness even though they may serve little precedential purpose.[550] Extending these standards prevalent in altruistic legislatures to rule making in private law contracts means that mutual obligations 'go much further than the parties have explicitly agreed upon. The contractual relation requires therefore more

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[548] Kennedy 'Form and Substance in Private Law Adjudication' *Harv. L.R* (1976) 89:1685-1778 at 17.

[549] In conversation with Kennedy 29 October 2018 at 3.45 at HLS.

[550] Kennedy 'Form and Substance in Private Law Adjudication', *Harv. L.R.* (1976) 89:1685-1778 at1, 51: Maris Van Sandelingenambacht, 'Legal Postism and the End of European Private Law'; Kennedy 'A Critique of Adjudication' 10 *Eur. Rev. Private* L. 111 (2002) at 117: 'Legislatures with an individualistic bias tend to make laws in the form of rigid formal "rules", furthering predictability as a necessary condition for each individual for purposes of rational planning and the optimizing of his/her wellbeing. Altruistic lawmakers, on the other hand, prefer the form of open "standards" of a more substantial tenor, such as "good faith" or "fairness".'

solidarity than is implied in the free will and self-interest of the parties concerned'.[551]

Menkel-Meadow recognises that politics and law often involve multi-parties in engaging one another about multi-issues. Old order ideas and institutions of 'dualism and binary thinking' would be unsuitable for resolving and managing modern day legal and social problems, for which coordinated action from a multiplicity of constituencies and legal and political institutions is needed.[552] Solutions must be multifaceted to settle multi-source conflicts.[553]

Mathematically, the probabilities of binary options solving multifaceted conflicts is manifestly a hit and miss affair. Applying binaries to complex conflicts could aggravate rather than solve problems. Some, possibly many, issues could be suppressed or side-lined. Compromises of convenience to fit some issues into one or other option have insidious ways of percolating conflict later, often when one least expects it. But there is another danger.

Merely submitting to a dispute resolution process inspires hope for a peaceful solution. A flawed process would not meet this expectation. Unmet expectations trigger a range of unwholesome emotions – frustration, disillusionment, suspicion – reactions that seek solutions elsewhere and in other ways, not all of which would be socially constructive. Typically, negotiations for an increase in wages will have little prospect of yielding a settlement if the employer wants agreement on a percentage and the workers want to eliminate an apartheid era remuneration structure in which white workers held skilled and managerial posts and consequently earned more than unskilled black workers – typically a dialogue in which one side speaks of apples and the other of pears. Debating whether to award a 5 or 6 percent wage increase simply does not cut through the superficiality of the ostensible dispute

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[551] Maris Van Sandelingenambacht 'Legal Postism and the End of European Private Law' Kennedy 'A Critique of Adjudication' 10 *Eur. Rev. Private L.* 111 (2002) at 117, 131.
[552] Multi-Party Dispute Resolution, Democracy and Decision-Making, Volume 2 ed. Carrie Menkel-Meadow https://books.google.co.za/books ?isbn=1351916513.
[553] *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* (24/07) [2008] ZACC 1; 2008 (3) SA 208 (CC) ; 2008 (5) BCLR 475 (CC) (19 February 2008) para 21.

to reach deeper into the real cause of conflict. Similarly, a municipality will have a had row to hoe in convincing residents to accept its electioneering promises to settle their litigation about livelihood and land rights, if it does not address the community's anxieties about corruption and maladministration, the very cause of their deprivation. Excavating to reach sources and causes of conflict is indispensable in genuine searches for sustainable solutions.

Binaries could compromise not only the process of resolving disputes but also the substantive outcomes. Brand's investigation of the relationship between adjudication and transformative politics reveals that in socio-economic rights cases the impact has been positive but limited.[554] He attributes the limitations in part to the courts' treatment of the nature of legal rules and standards as binary.[555] He argues that to understand, interpret and apply legal rules and standards in the practice of law and conflict management in binary terms is both 'descriptively inaccurate' and 'normatively undesirable'.[556] Descriptively, rules as ready-made instruments are not packaged to fit every context. Instead, rules are interpreted and applied to facts.[557] Facts vary. So must interpretation according to the context. Standards draw their meaning from the particular legal community they serve.[558] Legal culture informs the performance of the judicial function.[559] Reality changes. Choices arise. Preferences evolve. All is relative.[560] Life is complex. But rules as determinate[561] are static.[562] Descriptively, therefore, being for or against something is simplistic.

Normatively, a binary approach to rules, rights and remedies is also limiting.

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[554] Danie Brand 'Transformative politics', Dissertation presented in partial fulfilment of the degree Doctor of Laws at Stellenbosch University April 2009 at iii.
[555] Brand 'Transformative politics', Dissertation presented in partial fulfilment of the degree Doctor of Laws at Stellenbosch University April 2009 at 203.
[556] Brand 'Transformative politics', Dissertation presented in partial fulfilment of the degree Doctor of Laws at Stellenbosch University April 2009,
[557] Brand 'Transformative politics', Dissertation presented in partial fulfilment of the degree Doctor of Laws at Stellenbosch University April 2009 at 203 para 4.2.2.1.
[558] Brand 'Transformative politics', Dissertation presented in partial fulfilment of the degree Doctor of Laws at Stellenbosch University April 2009 at 203 para 4.2.2.1.
[559] Brand 'Transformative politics', Dissertation presented in partial fulfilment of the degree Doctor of Laws at Stellenbosch University April 2009 at 204 para 4.2.21.
[560] Barry Friedman, 'Dialogue and Judicial Review' 91 *Mich. L. Rev.* 577 at 24.
[561] Brand 'Transformative politics' Dissertation presented in partial fulfilment of the degree Doctor of Laws at Stellenbosch University April 2009 at 203 para 4.2.2.1.
[562] Friedman 'Dialogue and Judicial Review' 91 *Mich. L. Rev.* 577 at 24.

Consistent application of rules and constraint is traditionally desirable for predictability and finality. Ironically, these very characteristics of litigation clash head-on with transformation.[563] Williams illustrates this limitation in her comparison of the CC's judgment[564] in *Mazibuko & Others v City of Johannesburg & Others (Mazibuko)*[565] and the German Federal Constitutional Court (FCC) in *Hartz IV*.[566]

She observes that doctrinal differences alone did not explain the variances in both courts.[567] Both courts declined to quantify social goods (free basic water and basic income respectively) and elected to defer to other branches of government. However, the German Constitution recognizes an inviolable right to human dignity whereas the rights in the South African Constitution are not absolute.[568] Williams opines that both courts could have reached the opposite result without straying beyond the boundaries of their doctrine.[569] She finds that doctrine imposed very little constraint in decision-making. Both courts said they applied the doctrine of the separation of powers. However, what they actually did rested on different understandings each court had of their respective constraints to enforce socio-economic rights claims and their capacity to call on the other branches to account and engage democratically with civil society.[570] Whereas the CC could have rendered *Mazibuko* to be more faithful to social

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[563] Brand 'Transformative politics', Dissertation presented in partial fulfillment of the degree Doctor of Laws at Stellenbosch University April 2009 at 205 para 4.2.2.2.
[564] Lucy A. Williams 'Role of courts in the quantitative-implementation of social and economic rights: A comparative study' (2010) 3 *Constitutional Court Review* 141 at 195.
[565] 2009 ZACC 28; 2010 3 BCLR 239 (CC) (Mazibuko CC). Lower court decisions are cited as *Mazibuko* v *City of Johannesburg & Others* 2008 4 All SA 471(W) (*Mazibuko* HC) and *City of Johannesburg* v *Mazibuko* 2009 3 SA 592 (SCA); 2009 8 BCLR 791 (SCA) (*Mazibuko* SCA).
[566] BVerfGE, judgment of 9 February 2009, 1 Bvl 1/09, 1 Bvl 3/09, 1 Bvl 4/09. (unofficial)
[567] Williams 'Role of courts' (2010) 3 *Constitutional Court Review* 141 at 147;
[568] Sandra Fredman is also critical of the South African and Canadian approach to dignity, which allows courts to avoid substantive interventions. See e.g. Sandra Fredman 'Redistribution and Recognition: Reconciling Inequalities' 23 *SAJHR* 214 (2007) at 225 -226; at 31: 'What then can courts legitimately add to the political definition of equality within the socio-economic sphere? There are certainly many respects in which deference to the democratic role is appropriate. I would argue, however, that courts can enhance rather than detract from democracy. They can do this by insisting that decision-makers demonstrate that the way in which eligibility for welfare rights is determined meets the demands of the equality principle. Decision-makers must thus show that their choice of eligibility criteria not only redresses disadvantage, but also promotes respect and dignity, accommodates diverse identities, and facilitates participation or counters social exclusion.'
[569] Williams 'Role of courts' (2010) 3 *Constitutional Court Review* 141 at 147-198.
[570] Williams 'Role of courts' (2010) 3 *CCR* 141 at 198-199.

transformation, the FCC in contrast fostered dialogue between the legislature and the courts, thus not only prodding both institutions to enhance their performance and democratic accountability but also to create platforms for public participation in democratic decision-making.[571]

Williams pinpoints the binary nature of the CC's remedy options in *Mazibuko* as a constraint against transformation. Either the CC had or did not have the power to determine the quantity of water that would enforce the socio-economic right.[572] It considered only two models for supplying free basic water, both proffered by the City: either a universalist policy that gave greater free basic water to all households or a means test policy. The CC failed to explore the resident's nuanced approach of a per person allocation. By preferring the means test model over the universalist model, the CC endorsed one of two flawed processes that failed to remedy the resident's genuine concerns about dignity.[573] In the result, the judgment suffered from 'internal tensions'. She finds that in contrast to the CC, the FCC was prepared to probe the methodology to ensure that the calculations were reasonable, not random.[574]

Friedman observes that to see government as 'one big ballot box' aggregating popular preferences would be overstating the case for majoritarianism, especially when mustering a majority is a binary choice of being for or against something. The counter-majoritarian resistance to judicial review fails, because it sees the majority and the majority will as static, immutable and insulated from the vicissitudes of reality, and the 'chimera' of popular opinion. Instead, preferences are malleable, relative, informed and transformed by discussion and debate, depending on who participates, when, why, how, and so forth. Spacious constitutions attract multiple interpretations and constituencies. Courts should collect, collate, debate and distil in striving for common norms.[575] Options should be ranked on a continuum.[576] Ultimately, when unanimity is

[571] Williams 'Role of courts' (2010) 3 *CCR* 141 at 199.
[572] Williams 'Role of courts' (2010) 3 *CCR* 141 at 195.
[573] Williams 'Role of courts' (2010) 3 *CCR* 141 at 196.
[574] Williams 'Role of courts' (2010) 3 *CCR* 141 at 197.
[575] Friedman 'Dialogue and Judicial Review' 91 *Mich. L. Rev.* 577 at 24.
[576] Friedman 'Dialogue' 91 *Mich. L. Rev.* 577 at 24.

impossible after diligent search and binaries result, choice would be a product enriched through a rational, reasonable process.

However one defines binaries, it reduces to comparing and weighing two opposites. Choosing the comparators, i.e. how the question for adjudication is posed, makes all the difference to the outcome. Long before binary decisions are made, choices are made about what the comparators should be. If the comparators are incapable of delivering the goods, then no expectations should arise that the decision will be any different.[577] Discrimination cases shore up how choosing comparators impacts on the outcomes. Two cases of indirect discrimination stand out for discussion.

In *Walker*,[578] the CC recognized that differentiating between the treatment of residents of townships, which were historically black areas and municipalities which were historically white areas, was indirect discrimination on the grounds of race. It was not the differential treatment for geographical areas that resulted in the discrimination, but rather the racial profiles of the people who occupied the areas that constituted discrimination and rendered it indirect on the grounds of race. Otherwise, it would have been 'artificial' to compare two geographical areas without looking beyond the surface.[579] Doing so exposed the effect of apartheid laws to link race and geography inextricably, with the latter seeming to be a neutral standard. If the CC settled for geographical areas as the comparators, and discrimination as direct, the result would have missed the underlying racism that rendered the treatment unfair. Both the majority (Langa DP) and the minority (Sachs J) recognised indirect discrimination on the grounds of race. They parted on whether the discrimination was unfair, with the majority finding that it was unfair.

In *Jordan* the majority adopted the dealer-customer and even the female-male axes as comparators. It also found that sex workers were discriminated against

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[577] Williams comments about the comparators the CC used and did not use in *Mazibhuko* in 'Role of courts in the quantitative-implementation of social and economic rights: A comparative study' (2010) 3 *CCR* 141.
[578] *Pretoria City Council* v *Walker* 1998 (2) SA 363 (CC); 1998 (3) BCLR 257 (CC).
[579] *Walker* para 32.

unfairly,[580] however, not by the law, but in the way law was enforced. Contracts of employment are usually bilateral; consequently, the parties to it must be jointly culpable. Patrons and brothel owners as contracting employer parties should be as culpable as prostitutes if equalising downwards was the policy choice. However, if the CC had additionally *recognised*[581] that prostitutes were workers and brothel owners and patrons – the recipients of services – were employers, the employee-employer relationship would have emphasised an additional binary. The structural inequality intrinsic in employment generally and particularly in the sex industry, would have exposed discrimination against the prostitute more explicitly than the sex-worker-repeat-offender versus patron-occasional-offender axes.[582] Pitching the subservience and vulnerability of workers against the power and control of employers generally exposes the intensity of harm for sex-workers in an illegal industry ungoverned by labour law.[583] Remarkably, Ngcobo J, who had been the Judge President of the LC and the LAC before he joined the CC, did not recognise the employment angle to the discrimination; for O'Regan who had not practiced at all before she came to the CC, the connection was palpable. What accounts for this difference? Ideology? Gender? Culture?

Adding socio-economic status and class as unlisted grounds (at that stage, both unrecognised grounds of discrimination) and social origin as a listed ground of discrimination, could have been a game changer. Conceptually, recognising these grounds of discrimination elevated the dispute beyond individual rights adjudication and situated it more firmly on a platform of seeking institutional remedies. Structural remedies would have been brought into sharper focus. Choosing additional comparators and grounds of discrimination would have emphasised a particularly vulnerable group of workers who should not have had to bear multiple burdens of discrimination – prosecution, social

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[580] Counsel for the state did not deny that if the section penalised only the prostitute and not the customer, this would be a case of indirect discrimination because, overwhelmingly prostitutes were women and customers men. There was thus no factual dispute between the parties as to whether the effect of the provision fell disproportionately on women.
[581] Fredman – 'Redistribution and Recognition: Reconciling Inequalities' 23 *SAJHR* 214 (2007).
[582] *Jordan* para 10.
[583] *"Kylie" v Commissioner for Conciliation, Mediation and Arbitration and Others* (2008) 29 ILJ 1918 (LC).

ostracization and economic destitution - whilst the recipients of their services escaped all these adversities. In a narrow six-five majority, choosing different comparators could have made a difference to the result. Despite the minority's urgings to look beyond the surface as the Court did in *Walker* – to see the gendered enforcement of the law, the majority was unmoved.[584] However, having regard to the rule choices of the majority, suspicion runs rife that it chose those rules (precedent for deference) to ensure that the case came out the way it wanted it to. Why did it prefer this outcome?

However, a rhetorical enquiry in *Pillay*[585] elevated the debate about the centrality of comparators to the impact of the law or treatment. In that case, the dress code, which prohibited a learner from a minority race and cultural group from wearing a nose ring, had the effect of preferring mainstream (Christian) culture and religion over Hinduism.

Binaries that reinforce Friedman's description of majoritarianism as static, insulated and an unimaginative choice between two opposites, would render decision-making on any platform the very antithesis of transformative constitutionalism.[586] As a 'long-term project of constitutional enactment, interpretation, and enforcement committed (not in isolation, of course, but in a historical context of conducive political developments) to transforming a country's political and social institutions and power relations in a democratic, participatory, and egalitarian direction',[587] transformative constitutionalism calls for a commitment, an innate belief, that it is possible to use law and legal

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[584] *Jordan* (O'Regan J and Sachs J) 'There are only three differences between them. The first is that the one pays and the other is paid. The second is that in general the one is female and the other is male. The third is that the one's actions are rendered criminal by section 20(1)(aA) but the other's actions are not. Moreover, the effect of making the prostitute the primary offender directly reinforces a pattern of sexual stereotyping which is itself in conflict with the principle of gender equality. The differential impact between prostitute and client is therefore directly linked to a pattern of gender disadvantage which our Constitution is committed to eradicating. In all these circumstances, we are satisfied that, as in *Walker's* case, this is a case where an apparently neutral differentiating criterion producing a markedly differential impact on a listed ground results in indirect discrimination on that ground.'

[585] *MEC for Education: Kwazulu-Natal and Others* v *Pillay* (CCT 51/06) [2007] ZACC 21; 2008 (1) SA 474 (CC); 2008 (2) BCLR 99 (CC) (5 October 2007).

[586] Brand, 'Courts, socio-economic rights and transformative politics' Dissertation presented in partial fulfilment of the degree Doctor of Laws at Stellenbosch University April 2009.

[587] Klare 'Legal Culture' (1998) 14 *SAJHR* 146 at 150.

processes to achieve dramatic positive social change.[588] Instrumental for both process and substance, binaries limit the human imagination, its potential for creative problem solving and its talent for managing conflict peacefully.

Binaries are structurally entrenched in the practice of litigation. A system of steering litigants towards simplifying decision-making by reducing choice to binaries, cuts down court time and resources. Welcome or not, binaries prevail almost as a default position in decision-making to produce win-lose outcomes in litigation. Submitting to binaries automatically, by default, mindlessly, because the 'system' insists on it, because the legal actors know of no other way of processing facts and arguments towards a reasoned decision, or simply by refusing to innovate or renovate mainstream biases is, in practice, a recurring impediment to creative, transformative outcomes. Some conflicts, especially complex ones, require both jurisprudential and process innovation. Exceptionally, courts direct litigants to engage meaningfully in socio-economic rights claims for housing.[589] Engagement broadens the range of possible outcomes beyond binaries, through meaningful exploration. Positional bargaining, which entrenches legal actors in their predispositions, merely moves the binaries out of the court room into retarded attempts at reaching consensus.

To conclude that binaries are good or bad would fall precisely into the trap that my critique of litigation seeks to avoid. Simply labelling processes, forms and procedures as good or bad for resolving disputes, problems or conflicts, limits insight into how dispute system design works. As a method in the process of decision-making, binaries have their place. Sometimes litigants just want a clear answer from the court. Is the death penalty cruel and unusual punishment? Is it constitutional or not? Is the prohibition against same-sex marriages discrimination? Questions like these call for absolute yes/no, black/white answers. The choice of one of the two is predictable. Grey answers would be an unpredictable and unsatisfactory compromise, especially if it splits

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[588] Klare 'Legal Culture' (1998) 14 *SAJHR* 146 at 150.

[589] Lucy Williams Talk at All Schools Day 2017 -You Tube https://www.youtube.com/watch?v=T5w4MN5QNZU (accessed 3 December 2018).

the baby. Then replacing predictability with ambiguity of the law is likely to generate more conflict.

The risks and limits of binaries are self-evident. Choices are multiple but binaries narrow them down. Binaries blinker a broader view of matters to be decided. Only two options appear on the radar for scrutiny. Society is complex. Conflicts have multiple causes. Pigeon-holing people and disputes into predetermined stereotypes would more likely lead to mistakes than open-textured dialogue. By enhancing the quality and range of processes for exercising choice and decision-making, by reengineering the dispute system design, by carefully choosing comparators for decision-making that deliver the most egalitarian and efficacious ends, by elevating the quality and quantity of participation in processes, it would be possible to lift the limits on litigation to yield outcomes that not only resolve disputes but also solve problems and manage conflict.

Facilitation is a process option to assess the usefulness of binaries in litigation. What comparators are chosen and how they would inform the preferred outcomes should be carefully analysed. Whether binaries are an impediment to transformation depends largely on context and timing when they arise. How facilitation works is described in Chapter 4.

#### 2.7.5.3 The Judicial Function

Some choices of legal actors are manifest from the evidence, and the arguments, the debates in court and even out of court. Beyond the ostensible, a curtain conceals other choices and reasons for making them, sometimes even from the very persons exercising choice. Much of what lies behind the curtain would usually be beyond the reach of most observers of the judicial function. Sociologists and experts from other disciplines have deeper access. However, there is a wide range of extraneous, overt and covert factors that a positive account of the judicial function exposes as influences that bear upon reasons and decisions.

The blue eyes of an employer witness unexpectedly flicked a switch for a judge, reminding her of Hitler; the appeal court confirmed her finding for the employee. For another it might be what the spouse might say if the decision was to leave children without shelter. Fortuitously, in a rare publication written by serving and retired judges tell their stories of some of the hardest cases they ever tried. *Tough Cases* enables me to draw on the performance of the judicial function in the USA so that I do not offend or breach the confidences of my South African colleagues. For a judge steeped in the culture of Odawa Indians, gazing at a symbolic white eagle feather inspired her to make the 'right decision' for that community when sentencing a drug dealer.[590] However, as Chief Justice Margaret Marshall remarked, 'an individual jurist can put aside prior experience and beliefs when new substantive law so demands.'[591] She was speaking of Chief Justice William Cushing, 'a slaveholder of long standing' whom historians described as 'having been "reluctant" to free even slaves to whom he had promised freedom'; he pronounced the court's decision that made the US state of Massachusetts become 'the first government anywhere to abolish slavery by judicial decree.'[592]

Undoubtedly law informs adjudication, but law alone does not constrain adjudication as normative theorists posit.[593] Research shows that a variety of other extraneous factors motivate judges. Influences include judicial administration, politics, public opinion and what particular groups may think of judges, [594] academic criticism, [595] consideration for other branches of government,[596] subjective experiences, human factors, ego and inclinations to prescribe their preferred outcome, ensuring compliance with their will, pursuing promotion and even increasing their leisure on golf days when litigants might

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[590] Judge A G Maldonado 'Walking with My Ancestors' *Tough Cases* R F Canan, G E Mize, and F H Weisberg eds. (2018) (2018) 176-195 at 188-189.
[591] Marshall Chief Justice Supreme Judicial Court Massachusetts United States of America Bram Fischer Memorial Lecture - Legal Resources Trust Friday, November 13, 2009. "Quock Walker Case" 5 *American Journal of Legal History* 118, 139-140 (1961).
[592] Marshall, Chief Justice Supreme Judicial Court Massachusetts United States of America Bram Fischer Memorial Lecture - *Legal Resources Trust* Friday, November 13, 2009. At 5-6.
[593] Friedman 'The Politics of Judicial Review' 84 *Tex L Rev* 257 (2005) 280.
[594] Friedman 'The Politics of Judicial Review 84 *Tex L Rev* 257 (2005) 270.
[595] Posner *How judges think* at 12.
[596] Friedman 'The Importance of Being Positive: The Nature and Function of Judicial Review' 72 *U. Cin. L. Rev*. 1257 2003-2004 1277.

be urged to settle![597] Judges' campaign funding (in the USA), collegiality, the reaction of appellate courts, promotion and even 'breakfast bias theories' that inspired both consternation and scientific research, are the tip of the iceberg of extraneous influences. What follows is just the tip.

Judges are exposed to the media and public opinion. Extraneous factors emanating from ubiquitous media in its many forms, is a serious strain on adjudicators to stay the course of legal interpretation and application of law to proven facts. Judges are aware of academic critiques of their judgments;[598] they read newspapers and react according to their individual perspective to what they read.[599] Whether these extraneous factors influence the performance of the judicial function is hard to say with certainty for as long as they are unarticulated.

Panel judges have additional influences from other members. Paterson finds that in the final court in the UK, contexts and the composition of the panel hearing the case influence the frequency and effectiveness in which dialogues occur between the judges and counsel and amongst the judges themselves. Neither the judges' ideologies nor philosophies are the prime focus. Instead, where the judges stand on the individualism and collective-mindedness spectrum, their leadership skills and the links between the judges appear to be the main influences on effective inter-judicial dialogues.[600] This discussion splits into judges sitting alone in trials and as panels in appeals.

#### 2.7.5.3.1 Trial judge

Two accounts from *Tough Cases* stand out for discussion on the impact of the media on judges performing their function and how they stuck to the legal materials without being swayed by public opinion.

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[597] Friedman 'The Politics of Judicial Review' 84 *Tex L Rev* 257 (2005) 271; *Posner* at 36-37.
[598] Stephen Breyer 'Making Democracy Work – a Judge's View' (2010) at 10.
[599] Stepen Ellmann 'The Struggle for the Rule of Law in South Africa' 60 *N.Y.L. Sch. L. Rev*. 57 (2015–2016) 60.
[600] Paterson Final Judgment at 169.

In 'Crazy or Cruel' Judge Frederick H. Weisberg presided over the prosecution of Ms Jacks for the murder of her four daughters between the ages of five and sixteen. A crew assigned to evict Ms Jacks came upon the bizarre scene – rather, the malodour – that led to the discovery of the skeletal remains of the deceased.[601] Needless to say a tragedy of such proportions excited media and public interest and commentary. Once Ms Jacks opted to be tried without a jury, Judge Weisberg became trier of both fact and law. To preserve his impartiality, he describes the following personal precautions he imposed on himself:

'I have a personal rule. Almost all of my colleagues disagree with me. When I am presiding in a non-jury trial, where I am acting as both the judge of the law and the finder of the facts, during the trial and during the "deliberations" I will not discuss the facts with anyone including judicial colleagues, intimate friends and family members or even my law clerk. My reason is simple. In a jury trial we instruct the jury not to discuss the case with anyone, including each other, until all the evidence is in; and we instruct them that during deliberations they may discuss the case only among themselves when all twelve of them are present in the privacy of the jury room. I believe the same principles should apply when I am the sole fact finder to ensure that the facts I find are based on the evidence as I assess it and are not based on the impressions or biases of anyone with whom I might have discussed the evidence. As I stated, most judges feel that my rule is excessively punctilious, but I nonetheless felt I should not make an exception for this tragic and difficult case. As a result, deciding the guilt or innocence of Banita Jacks was probably the loneliest assignment I have had in my forty years as a trial judge.'[602]

To reassure the packed courtroom, Judge Weisberg began his judgment thus: Unlike other people who knew about the case, heard about the case, or read about the case, and who probably had a very normal human reaction to it when they heard about the events that unfolded on January 9, 2008, along the lines of "Well she must have killed them, but what would drive a person to do that? Why would she do that?" I have not approached the case from that point of view, for obvious reasons. I have, as a finding of fact, started with the presumption that there are four unexplained deaths. I have done everything humanly possible to give Ms Jack's the benefit of the presumption of innocence to which she is entitled, and I have required the government

[601] Judge F H Weisberg 'Crazy or Cruel' in *Tough Cases* 198-235 at 198.
[602] Judge F H Weisberg, 'Crazy or Cruel' in *Tough Cases* 198-235 at 231.

to prove its charges beyond a reasonable doubt. So the question for me as the factfinder is, and has always been: Was this a homicide? And if so, who did it and how? And can the government prove its charges against Ms Jacks beyond a reasonable doubt?'[603]

Measures to preserve one's judicial independence ultimately originates in one's personal discipline. Judicial practice and culture differ between South Africa and America. South African judges actively engage with the assessors who preside with them whereas American judges do not deliberate with their juries. Conferring with colleagues who are unlikely to preside on the case on appeal is accepted practice in both jurisdictions. Far safer to test one's theories in the privacy of collegiality than to blunder spectacularly in the full glare of public consternation.

'Elián' by Judge Jennifer D. Bailey was a heartrending custody dispute about a boy of five years whose mother drowned whilst trying to cross from Cuba to Florida in the USA. Elián's great uncle litigated to keep him in the USA whilst his father wanted him returned to Cuba. As the only survivor, Elián attracted international media attention from the outset. Media coverage was unrelenting[604] even though social media did not exist in 1999. People were camped outside the uncle's house chanting continuously.[605] Politicians joined the fray. Communist Cuba or liberal America? Elián's story was on television every night and even the subject of jokes for late night comedians.[606] Under these conditions there was no way that Judge Bailey could isolate herself from the public discourse. Shutting out the 'noise', she used the law to steer her course. However, Judge Bailey concludes: 'It was the correct result under the law. Whether it was "right" in the end depends, for each of us, on what we value most.'[607] Purposely, I refrain from disclosing the reasoning and conclusions in both media intense cases, so as not to spoil the thrill of reading about these tough cases

[603]Judge F H Weisberg, 'Crazy or Cruel' in *Tough Cases* 198-235 at 233.
[604]Ellián González https://en.wikipedia.org/wiki/Elián_González (accessed 4 December 2018).
[605] Judge J D Bailey 'Elián' in *Tough Cases* 254- 278 at 27.
[606] Judge J D Bailey, 'Elián' in *Tough Cases* 254- 278 at 275.
[607] Judge J D. Bailey 'Elián' in *Tough Cases* 254- 278 at 278.

In the information age, avoiding media in its many facets is a near impossibility for any functioning intellectual. For judges, being constantly conscious of the three 'I's[608] and the range of phenomena that might feed one's conscious and sub-conscious biases, is a way to manage the risks of being exposed to public discourse on cases yet to be decided.

On campaign funding, Judge Mark Davidson gives an account of the influence of this practice in the USA on elected judges. In the early 1990's Harris County, Houston, Texas was undergoing political change.[609] The bench, previously populated by Democrats was moving in a Republican direction. By way of background to a case that he became seized with, Judge Davidson explains:

'Because media in Houston is expensive, many judges raised money on a year-round basis from lawyers with cases pending before then. Tales of judges calling a lawyer before a hearing and asking for a contribution for an election that was three years away were not uncommon – and boasted about by some lawyers who were frequent donors. Two judges who sought and received campaign contributions on the year-round basis were Judge Richard Millard …. and Judge Norman Lee… .' [610]

The law firm of litigant YZ, himself a lawyer, deposited $1000 campaign contribution for Judge Lee.[611] YZ was the defendant in a claim by AB for personal injuries, a former divorce client, allegedly for raping her. 'Co-incidentally', the following day in a pre-emptive strike, YZ successfully counterclaimed in Judge Lee's court for a pre-judgment garnishment against AB's bank to secure damages he might be awarded later.[612] Judge Davidson surmises:

'It is likely that in the ten years Lee would serve as judge of the 257th [District Court], he had never before and would never again consider a pre-judgment garnishment. He

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[608] Independence, Impartiality and Integrity.
[609] Judge M Davidson 'Uneasy lies the Head That Wears a Crown' in *Tough Cases* 72-83 at 72.
[610] Judge M Davidson 'Uneasy lies the Head That Wears a Crown' in *Tough Cases* 72-83 at 72.
[611] Judge M Davidson 'Uneasy lies the Head That Wears a Crown' in *Tough Cases* 72-83 at 74.
[612] Judge M Davidson 'Uneasy lies the Head That Wears a Crown' in *Tough Cases* 72-83 at 75.

would consider this one, and he did so the day after the campaign contribution was received.'[613]

Lee ordered AB's bank to hold the money.[614] Remarkably, he received the contribution three years before he was up for re-election.[615]

#### 2.7.5.3.2 Panel judges

Panel judges are not immune to collegial pressures.[616] Notwithstanding the freedom to concur or dissent,[617] appellate panel judges sitting together strive to muster unanimity or at least a majority; compromising to this end is an influence outside the law itself. The pressure of work, the accumulation of reserved judgments, the urgency of the matter, timing, that is whether it is at the beginning or the end of the term, 'dissent aversion'[618] collegiality and currying support for another time,[619] and sheer laziness are but a few factors influencing compromises. Panel judges are 'a cooperative enterprise.' Judges have to get along.[620] In South Africa, they have no direct say in who gets appointed. How panels are constituted is at the discretion of senior judges. Judges of diverse life experiences, abilities and ideologies both enrich and destabilise collegiality.[621]

Within each panel balance shifts between conservative, liberal and socialist ideological tendencies. [622] Ideology, culture, conscious, professional experience, personal traits like race, sex and gender, and personality traits or temperament cumulatively influence decision-making amongst panel judges.[623] Unlike disagreements about the best way to craft an agreed outcome,

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[613] Judge M Davidson 'Uneasy lies the Head That Wears a Crown' in *Tough Cases* 72-83 at 75.
[614] Judge M Davidson 'Uneasy lies the Head That Wears a Crown' in *Tough Cases* 72-83 at 75.
[615] Judge M Davidson 'Uneasy lies the Head That Wears a Crown' in *Tough Cases* 72-83 at 75.
[616] Friedman 'The Politics of Judicial Review' 84 *Tex L Rev* 257 (2005) 280.
[617] Friedman 'The Politics of Judicial Review' 84 *Tex L Rev* 257 (2005) 281.
[618] Posner *How Judges Think* (2008) at 33.
[619] Hoexter 'The enforcement of an official promise: Form, substance and the Constitutional Court' (2015) 132 *SALJ* 207.
[620] Posner *How Judges Think* (2008) at 33.
[621] Posner *How Judges Think* (2008) at 33.
[622] Posner *How Judges Think* (2008) at 33.
[623] Posner *How Judges Think* (2008) at 10.

ideological contestation is most intractable because arguments are seldom premised on shared values.[624] Judges who feel strongly that their views should prevail are not averse to dissenting. Dissent sharpens debate. Most judges avoid dissenting.[625] The cost of dissent is weighed against its benefits. Garnering support from centrists for one's position may be a benefit; it preserves collegiality, avoids conflict within the panel and beyond.[626] Is it a benefit if consensus is sought and given in the hope, perhaps unconsciously, of 'reciprocal consideration in some future case'? However, 'doing the right thing' 'without fear, favour or prejudice' as Justice Harlan[627] or the 'Great Dissenter' Michael Kirby[628] did, may come at more than the energy costs of writing separately.

Centrists who are less committed to their ideological positions may join either side. Principle may be traded off against strategic considerations.[629] Like a legislator, a judge might 'use charm, guile, vote trading, and flattery to induce other judges to go along with him'.[630] However, the issues at stake may of themselves be so compelling that consensus has to be secured in the national interest. Anecdotal accounts of securing consensus in cases like *Brown,*[631] *Grootboom*[632] and *Makwanyane,*[633] are legendary. Circulating a single text[634]

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[624] Posner *How Judges Think* (2008) at 33.
[625] Posner *How Judges Think* (2008) at 32.
[626] Posner *How Judges Think* (2008) at 32-33.
[627] *Plessy* v *Ferguson*, 163 U.S. 537 (1896).
[628] Documentary Interviewer Monica Attard 'The Great Dissenter: Justice Michael Kirby' (25 November 2007https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=4&ved=2ahUKEwivo_2QlNLjAhWORhUIHbz8BuUQFjADegQIAxAC&url=https%3A%2F%2Fwww.michaelkirby.com.au%2Fimages%2Fstories%2Fspeeches%2F2000s%2Fvol64%2F2007%2F2237b-ABC_Interview_-_Attard_-_The_Great_Dissenter_%2528Nov_and_Dec_2007%2529.doc&usg=AOvVaw3MSXrTKY2cBhh_KtNcpmLC; M Lavarch 'Great Dissenter is no ordinary judge' (29 January 2009) https://www.theaustralian.com.au/business/legal-affairs/great-dissenter-made-his-mark/news-story/603507d2a112994bcfbd2e6f4f6fe93c (accessed 26 July 2019).
[629] Posner *How Judges Think* (2008) at 31.
[630] Posner *How Judges Think* (2008) at 10.
[631]Lackland H.Bloom. Jr. *Do Great Cases Make Bad Law?* At 229; *Brown v Board of Education of Topeka*, 347 U.S. 483 (1954) https://en.wikipedia.org/wiki/Brown_v._Board_of_Education#Consensus_building; (accessed 26 July 2019).
[632] *Government of the Republic of South Africa and Others v Grootboom and Others* (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169 (4 October 2000).
[633] *Makwanyane*.
[634] I explain single text facilitation in Chapter 4.

in the first two cases achieved the same objective of embalming the judgments with gravitas as did the separate but concurring judgments of 11 judges in the third case. What would have been the practical consequences in *SASSA* if there had been a split, or worse, a tie as there was in *Jacobs*?[635]

Women judges perceived as 'gender-benders' have a hard time to convince male co-panellists to convict rapists, or not to deviate from the prescribed minimum sentences for rape. Variances in rape sentences link directly with the constitution of panels. The quest for collegial compromise could influence a judge to exercise her discretion differently in a reconstituted panel with (un)fortunate consequences for predictability.[636]

Hoexter finds from her study of case law that there is a coincidence of formalism with conservatism.[637] This diagnosis triggers her 'two camps' theory.[638] Who constitutes each camp is not important for my purposes. What defines each camp is relevant. Froneman J accepts, as I do, Hoexter' s definition of formalism as:

'"a judicial tendency to attach undue importance to the pigeonholing of a legal problem and to its superficial or outward characteristics; and a concomitant judicial tendency to rely on technicality rather than substantive principle or policy, and on conceptualism instead of common sense."'[639]

Or, as Henk Botha describes, formalism is '[w]here some see constraint, others

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[635] *Jacobs and Others* v *S* [2019] ZACC 4; 2019 (5) BCLR 562 (CC); 2019 (1) SACR 623 (CC) (14 February 2019); https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=2ahUKEwjT3KjhutLjAhWpSxUIHdY8DNAQFjAAegQIAhAB&url=https%3A%2F%2Fconstitutionallyspeaking.co.za%2Fan-embarrassing-mistake-from-the-constitutional-court%2F&usg=AOvVaw0-0k_jCO2zTyvaGqDnktOe (accessed 26 July 2019).

[636] Friedman 'The Importance of Being Positive: The Nature and Function of Judicial Review' 72 U. *Cin. L. Rev*. 1257 2003-2004 1274.

[637] Cora Hoexter 'The enforcement of an official promise: Form, substance and the Constitutional Court 2015 *SALJ* 207 at 214; Boonzaier, 'Good Reviews, Bad Actors' https://constitutionalcourtreview.co.za/wp-content/uploads/2018/10/Good-Reviews-bad-reviews-CCR-VII-2015.pdf

[638] Hoexter 'The enforcement of an official promise: Form, substance and the Constitutional Court 2015 *SALJ* 207 at 214 at 213.

[639] *KwaZulu-Natal Joint Liaison Committee* v *MEC Department of Education, Kwazulu-Natal and Others* (CCT 60/12) [2013] ZACC 10; 2013 (6) BCLR 615 (CC); 2013 (4) SA 262 (CC) (25 April 2013) para 80 citing Hoexter, 'Contracts in Administrative Law: Life after Formalism' (2004) 121 *SALJ* 595 at 597; Cockrell "Rainbow Jurisprudence" (1996) 12 *SAJHR* 1 at 5, referring to Atiyah and Summers *Form and Substance in Anglo-American Law: A Comparative Study of Legal Reasoning, Legal Theory, and Legal Institutions* (Clarendon Press, Oxford 1987) at 1 ff.

see freedom'.[640]

Hoexter explains:

'In cases displaying formalistic legal reasoning the merits often seem strangely divorced from the outcome of the case, so that it is difficult and perhaps even embarrassing to explain the case to a layperson. There is often a reliance on what one might call *code*: legalistic shorthand that lawyers may understand, however dimly, but that others will find impenetrable and altogether mystifying. Above all, as Alfred Cockrell has observed, there is a tendency to avoid substantive reasons in the form of 'moral, economic, political, institutional or other social consideration[s]' and instead to put up a screen of formal reasons. Thus formalism as I describe it here frequently entails a kind of misdirection: not adverting to the real or fundamental reasons behind a particular result, not saying what one really thinks.'[641]

By comparing two cases, *Kirland*[642] and *KZN Joint Liaison Committee*,[643] Hoexter lays the foundation for a worrying trend. Concern in both cases was the end game. *Kirland* was about delivering health services to people in the Eastern Cape. *KZN Joint Liaison Committee* was about delivering education to learners in KwaZulu-Natal. In both, non-compliance with rules of procedure obstructed the substantive goal of delivering services. In *KZN Joint Liaison Committee*, the formalists insisted on compliance with the rules. As a minority, they did not prevail. If they had, then the state would have escaped its duty to subsidise the schools. In *Kirland*, the transformers insisted on compliance with the rules, even though this meant sacrificing legality in favour of strict application of a procedural rule of law. If they had not, then the state would have escaped its duty to provide health services to the people.

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[640] David Botha 'Freedom and constraint in constitutional adjudication' (2004) 20 *SAJHR* 249 at 250-1.

[641] *KwaZulu-Natal Joint Liaison Committee* v *MEC Department of Education*, *Kwazulu-Natal and Others* (CCT 60/12) [2013] ZACC 10; 2013 (6) BCLR 615 (CC); 2013 (4) SA 262 (CC) (25 April 2013) para 80 Hoexter, 'Contracts in Administrative Law: Life after Formalism' (2004) 121 *SALJ* above n 49 at 597.

[642] *Kirland*, above.

[643] Comparing the responses of each camp in two cases illustrates these defining features. In *KwaZulu-Natal Joint Liaison Committee v MEC for Education, KwaZulu-Natal and Others* [2013] ZACC 10, 2013 (4) SA 262 (CC), 2013 (6) BCLR 615 (CC)('*KZN Joint Liaison Committee*').

Boonzaier suggests two reasons for this apparent 'about-face'. First, in *Kirland* the party seeking judicial review was a private person whereas in *KZN Joint Liaison Committee* it was a public authority, which has 'greater resources' and the special 'constitutional duties to "respect, protect, promote and fulfil" rights' and that the state is 'not an indigent or bewildered litigant, adrift on a sea of litigious uncertainty.'[644] Second, holding the state to its prior decision required insistence on procedural rectitude in *Kirland*, and the opposite in *KZN Joint Liaison Committee.* Boonzaier prefers the second reason, because government's 'special status is that the rule of law requires it to be held to its prior decisions in ways that private parties are not.'[645] In my view, where the principle of legality is concerned, I see no reason to let private parties off the hook more easily than the state. With ever-increasing overlap between private and public, this dichotomy is doctrinally untenable.[646] Furthermore, it also does not adequately explain the formalists' consistent and passionate preference for rules and their surprising mellowing in *Kirland*, and the transformers persistent antipathy for illegalities. Why did the formalists wanting to undo an illegality whereas the transformers were prepared to live with it? Something else was at play.

The hermeneutic of suspicion that ideology was at work has doctrinal durability. Not only does it explain the apparent flip-flopping by both camps in the two

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[644] *Kirland*; Boonzaier 'Good Reviews, Bad Actors' https://constitutionalcourtreview.co.za/wp-content/uploads/2018/10/Good-Reviews-bad-reviews-CCR-VII-2015.pdf.

[645] Boonzaier 'Good Reviews, Bad Actors': 'contrast here is between the principle of legality and scrupulous adherence to procedure for the sake of certainty and finality in litigation. The richer contrast is between the principle of legality and the fact that the rule of law requires the government always to act for legitimate reasons, both when it makes decisions and when it tries to undo them. Procedural rules are a way of ensuring the latter – sometimes. If the real end is holding the government to its prior decisions, we should not be surprised that the procedural rules are modulated according to their usefulness as a means.
Another way of putting the point is this: Yes, indubitably the government's special status matters when procedural rules are applied to it. But that is not because of its special status qua litigant; it's not about its extra 'resources' or whether its legal team is 'bewildered'. Its special status is that the rule of law requires it to be held to its prior decisions in ways that private parties are not. If exacting procedural rules are helping to achieve this, expect judges to deploy them strictly. If they aren't, don't. That is what *Kirland* and KZN show. Cameron and Froneman JJ's treatment of the procedural rules varies dramatically between the two cases, but only because of the underlying continuity between them, namely the need to keep the government honest.

[646] *Du Plessis and Others* v *De Klerk and Another* (CCT8/95) [1996] ZACC 10; 1996 (3) SA 850; 1996 (5) BCLR 658 (15 May 1996) para 72-75.

cases but in the many that preceded and followed.[647] The formalists 'do not apply the brakes as firmly because they are slower to doubt the government's motives in undoing its prior decisions. Whereas [the transformers] … view the power of the state with suspicion and disrupt it in favour of the citizenry.'[648] Why? If not ideology, legal culture and conscious combined with collegial loyalty and collegial compromise, as I suggest, then what is it that divides judiciaries?

In *Tough Cases*, Judge Edward S Wilson tells of his service as an international judge with the United Nations mission in Kosovo in 2002. In 'Building Justice in Kosovo' he relates two instances when his navigation of differences amongst his panel judges reminded me of the film 'Twelve Angry Men'. In the first instance, the panel had to decide on the sentence to impose on Ramadani, a Kosovo who had shot a man in Turkey. The premeditated murder was aimed at robbing the deceased of his family's meagre life savings on the pretext of selling him a piece of land. Realising that the European justice system was far more lenient than the USA, Judge Wilson abandoned his initial idea of life imprisonment and suggested a term of fifteen years imprisonment. Others started haggling from five years. They settled on seven years. Feeling that the sentence was 'grossly inadequate, given the degree of planning involved, the cruel manner in which he [Ramadani] disposed of the body, and the collateral harm done to the victim's sisters, who lost their only brother and the money on which they depended to help them in their old age,' Judge Wilson reconciled himself that this was Kosovo, where judges talked together to reach 'a rough compromise which hopefully approximated justice.'[649]

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[647] Boonzaier 'Good Reviews, Bad Actors' https://constitutionalcourtreview.co.za/wp-content/uploads/2018/10/Good-Reviews-bad-reviews-CCR-VII-2015.pdf; *Geo Quinot* 'The Puzzle of Pronouncing on the Validity of Administrative Action on Review https://www.constitutionalcourtreview.co.za/wp-content/uploads/2018/10/The-Puzzle-of-Pronouncing-CCR-VII-2015.pdf; accessed 7 September 2019); *Raisa Cachalia* 'Clarifying the Exceptional Circumstances Test in *Trencon*: An Opportunity Missed' https://www.constitutionalcourtreview.co.za/wp-content/uploads/2018/10/Clarifying-the-Exceptional-Circumstances-Test-CCR-VII-2015.pdf (accessed 7 September 2019).

[648] Boonzaier 'Good Reviews, 'Bad Actors' https://constitutionalcourtreview.co.za/wp-content/uploads/2018/10/Good-Reviews-bad-reviews-CCR-VII-2015.pdf at 19. (accessed 12 December 2018).

[649] Judge Wilson 'Building Justice in Kosovo' in *Tough Cases* 237-254 at 247.

In his second case, the Basha family, a 'notorious criminal organisation that had wreaked havoc on the Prizren community for years', was on trial with others. The panel consisted of three lay judges, a local attorney and Judge Wilson.[650] After all the evidence was led and arguments presented, Judge Wilson was convinced that there was not enough evidence to convict the co-accused. During deliberations in chambers, one of the lay judges declared immediately, 'They are all guilty.' Shocked, and wondering whether they had heard the same evidence, Judge Wilson 'painstakingly went over the facts.' Just as he ran out of arguments, the attorney judge on the panel weighed in. Then it was a matter of issuing a verdict to convince a crowded courtroom why the co-accused had to be acquitted despite being 'bad people', and only members of the Basha family could be convicted.[651]

Panel judges have the added advantage of curbing 'gut feel', or intuitive reactions to legal materials. The Basha case is a celebration of how legal craft and the rule of law is used to persuade collegial and community opinion towards reaching just ends. It also implies that adjudication calls for leadership and the power to command respect for one's opinions, because they are grounded in the legal materials and in good faith. Sensitivity to social context of what justice means to a particular community does not leap out of pleadings or argument but from the embedded culture and consciousness of the legal actors.

Do judges change their minds? Paterson's findings on how dialogue between the Bench and counsel and amongst panel judges influences decisions, resonates with my own experience.[652] Usually, judges form a prima facie opinion of the case from the pleadings or at the start of the hearings. Depending on the quality of the dialogue in court, prima facie views are confirmed, jettisoned or adjusted by the end of the hearings. The first conference of the panel is another moment when the dialogue may result in judges changing their minds. Judges may also change their minds once they start writing the judgment or when the drafts are circulated for comment.

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[650] Judge Wilson 'Building Justice in Kosovo' in *Tough Cases* 237-254 at 248.
[651] Judge Wilson 'Building Justice in Kosovo' in *Tough Cases* 237-254 at 252-253.
[652] Paterson *Final Judgment* 176-180.

However, if judges have thoughts about issues not considered or different from those expressed during the hearings, then fairness requires that the litigants be given an opportunity to address the court again.[653] Evidence of judges changing their minds is seldom accessible to the public. Furthermore, whether this should be subjected to scholarly research is debateable. More importantly, however, that they do change their minds after dialogue and further reflection is healthy for democracy.[654]

Paterson finds that voting patterns amongst panel judges have little to do with friendship. Instead, factors like group-orientation, tactics, leadership skills, whether a judge has a high or low dissent rate, and the intellectual and philosophical stances of the judges go to determining voting patterns.[655] Urgency and timing exert a compelling influence. For instance, in election related disputes such as *Bush*,[656] the opportunity to persuade swing voters in the panel is not available.[657]

Political science-based attitudinal studies of judicial conduct focusing on strategic decision making seeks to link the scrutiny of the preferences of judges with practical politics.[658] 'Strategic' judges moderate their personal views to strike tactical and ad hoc alliances in order to move appellate courts in a favoured direction. The studies show that collegiality, teamwork or group thinking can override values.[659] Such studies are impeded unless researchers have access to the judges' bench books and papers.[660] Although such materials are more accessible now than they were 40 years ago, they are still hard to come by.[661] Friedman also accepts that 'strategic' judges adjudicate towards achieving outcomes that resemble most closely their personal preferences or even in conflict with their personal views if the greater plan is,

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[653] *Mawala v S* (AR267/16) [2018] ZAKZPHC 52 (12 October 2018).
[654] Paterson *Final Judgment* 176.
[655] Paterson *Final Judgment* 170.
[656] *Bush v Gore* 531 US 38 (1985).
[657] Paterson *Final Judgment* 129.
[658] Alan Paterson *Final Judgment* at 1-2.
[659] Paterson *Final Judgment* at 2.
[660] Paterson *Final Judgment* at 2.
[661] Paterson *Final Judgment* at 2-3; Darbyshire *Sitting in Judgment* at 3-4.

for instance, to redirect the law.[662]

However, Friedman generalises between 'sincere' and 'strategic' judges. 'Sincere' judges adjudicate without any influence other than their own best understanding of the law. I would caution against this binary. It implies that strategic judges are not sincere, that they would allow their personal preferences to trump the law. Fitting judges into one or other mould misses out on a host of other possibilities. Paterson's social process approach to judicial decision-making shows how dialogue amongst panel judges and with counsel influences outcomes but not to the expense of applying law. Furthermore, having elected to pursue a positive approach to analysing the judicial function, Friedman lapses into assumptions drawn from normative theories of how judges ought to adjudicate. What is a judge's own best understanding of the law if not one that is shaped by ideology and a host of influences extraneous to the legal materials? More importantly, he takes little account of the many internal phenomena that shape intellect in adjudication. Friedman's dichotomous description would be repugnant to bona fide judges who work hard with law to achieve justice and transformative constitutionalism. That said, other aspects of his research remain useful.

From empirical studies Friedman finds that panel courts seldom talk, let alone deliberate; communication usually centres around tweaking a draft produced by the scribing judge to improve on it, clarify ambiguities, avoid thorny issues and accommodate other views in order to secure concurrence.[663] Mostly, this would be a fair description of cases not involving high stakes and panellists who have similar ideology, culture and consciousness. Otherwise, in what might seem to be an open and shut case, the reasoning might differ, even if the panel concurs in the result.

Who scribes the judgment, whether leave to appeal is granted, whether the particular case is an ideal vehicle for the judiciary to speak, are some factors

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[662] Friedman 'The Politics of Judicial Review' 84 *Tex L Rev* 257 (2005) 282.
[663] Friedman 'The Politics of Judicial Review' 84 *Tex L Rev* 257 (2005) 287.

that set the agenda for the court.[664] Lower court judges may be influenced by reasons outside of the proofs and arguments to follow or deviate from precedent by factors such as fear of disapproval or reversal, or even the prospect of promotion.[665]

#### 2.7.5.4 Judges are Human

'[J]udges are not moral or intellectual giants (alas), prophets, oracles, mouthpieces, or calculating machines. They are all-too-human workers, responding as other workers to the conditions of the labor market in which they work.'[666]

Posner's description above would be enriched with a reference to the rule making powers of these 'workers' as the third arm of government. This aspect of the 'job-description' of judges elevates the value of their service to society. Simultaneously, they are vulnerable to all the strengths, hopes and frailties of humans.

Traditionally judges are trained in the law, not politics, economics, technology or any of the multiplicity of disciplines that law regulates. Disputes referred for litigation are complex and sometimes indeterminate, not least because they pose moral questions or they compel economic and political choices.[667] Law is 'shot through with politics and with much else besides that does not fit a legalist model of decision making.'[668]Judges have to exercise 'decisional discretion' to fill the gaps left open by the application of law to the facts.[669] They do not have 'special abilities' to decide matters of moral principle. [670] Nor are they traditionally trained to discern the merits of one economic model or political choice over another.

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[664] Friedman 'The Politics of Judicial Review' 84 *Tex L* Rev 257 (2005) 293-4.
[665] Friedman 'The Politics of Judicial Review' 84 Tex L Rev 257 (2005) 299.
[666] Posner *How Judges Think* (2008) at 7.
[667]Michael C Dorf 'Legal Indeterminacy and Institutional Design' 78 *N.Y.U. L. Rev* 875, (2003) 877, 888, 890, 892-3, 898-900, 902, 916, 918, 937, 970-9.
[668] Posner *How Judges Think* (2008) at 9.
[669] Posner *How Judges Think* (2008) at 9.
[670] Christine Bateup 'The Dialogic Promise: Assessing the Normative Potential of Theories of Constitutional Dialogue' 71 Brook. L. Rev. (2006) at 1117.

Judges make mistakes. Lawyers who adduce a reliable quality and quantity of legal materials help to not only shape judicial discretion, but also guard against judges making mistakes. Appellate courts help to correct mistakes of lower courts, with some exceptions.

In *DPP* the CC corrected the High Court's mistake – 'something which courts sometimes do' – of pronouncing on the constitutionality of a range of provisions of the Criminal Procedure Act[671] pertaining to child witnesses, especially in sexual offences. If left uncorrected, the mistake would have created uncertainty in a substantial case load that fills court rolls daily.[672]

Sometimes the mistakes are shockingly sloppy. For instance, a full court of three judges of the Eastern Cape Division had 'considerable difficulty in understanding' why three judges of the SCA[673] interfered with the prescribed minimum sentence of life imprisonment[674] for conviction for rape after the appellant had already pleaded guilty in the trial court of participating with others in raping the complainant more than once.[675] The SCA also erred in finding that accused 6 was not before the trial Court when he was none other than the appellant himself![676] Disconcertingly *Mahlase*[677] prevails as some lower courts find themselves bound to follow the SCA.[678] Journalist Rickard writes:

'The *Mahlase* decision has been the cause of considerable controversy ever since, with courts commenting on the anomalies and injustice it created. Several High Court judges have tried to find a way around the SCA decision, but in this case the majority (both men) found they were bound to follow the decision. They said they were not concerned with whether the SCA was wrong, but with the fact that its decisions were binding on lower courts. They therefore reduced the life sentence imposed on Ndlovu to 15 years, commenting: 'The circumstances of the rape were horrendous, and I agree

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[671] Criminal Procedure Act, 51 of 1977.
[672] *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development* 2009 (4) SA 222 (CC) ('the DPP case') para 64.
[673] *Cock v S, Manuel v S* [2015] 2 All SA 178 (ECG) para 20.
[674] Part 1, Schedule 2 of the Criminal Law Amendment Act, 105 of 1997; *Cock v S, Manuel v S* [2015] 2 All SA 178 (ECG) para 6.
[675] *Cock v S, Manuel v S* [2015] 2 All SA 178 (ECG) para 23.
[676] *Cock v S, Manuel v S* [2015] 2 All SA 178 (ECG) para 22.
[677] *Mahlase v The State* [2011] ZASCA 191.
[678] *Ndlovu v S* (AR96/2018) [2019] ZAKZPHC 56 (12 August 2019).

with my colleague (Hadebe) that (Ndlovu) deserved to be sentenced to imprisonment for life. On the basis that I have explained, that option is unfortunately not open to us.'[679]

In fairness to the judges concerned in *Ndlovu*, they also found that they 'could not impose a sentence in excess of what the regional court could have imposed,' which was 15 years' imprisonment.[680]

Judge Russell F. Canan writes in 'Rough Justice' of the occasion when he had 'skirted the line' at a cost to his fidelity to the law.[681] The accused had pleaded not guilty. Judge Canan believed his testimony. However, he had assumed, wrongly, that the jury would render a verdict of guilty that would result in the accused being sentenced to a long term of imprisonment. Anxious to 'do the right thing', he encouraged the legal representatives on both sides to settle for a plea of guilty on a lesser charge. Reluctantly, the accused agreed. Judge Canan observed the accused tearfully hugging his two dependent daughters who would be left alone if he was imprisoned. Then he retook the oath and reversed both his plea and his evidence. The judge informed the jury of the plea agreement. Looking quizzical, the jury left. He adjourned for sentencing. Then the courtroom clerk discovered the verdict form. It revealed that the jury would have acquitted the accused on all charges. Mortified by the consequences of his improper interference, Judge Canan tried to undo the travesty of justice. Did he succeed? That's for readers of 'Tough Cases' to find out.[682] Would Judge Canan do it again? Not at 'a cost' to his 'fidelity to the law.'[683]

Rarely are such cases of judicial misconduct exposed, least of all by errant judges. Should exposure be encouraged? Posner acknowledges that 'judges are reticent about talking about judging, especially talking frankly about it, whether to their colleagues or to a larger professional audience. This reticence

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[679] Carmel Rickard 'Judge condemns SCA precedent in horrific rape appeal' https://legalbrief.co.za/media/filestore/2019/08/hadebe_rape_SCA.pdf.
[680] *Ndlovu* para 12.
[681] Judge R F Canan 'Rough Justice' in *Tough Cases* at 37-56.
[682] Judge R F Canan 'Rough Justice' in *Tough Cases* at 37-56.
[683] Judge R F Canan 'Rough Justice' in *Tough Cases* at 56.

makes the scholarly study of judicial behaviour at once challenging and indispensable.'[684]

In contrast to Judge Canan, Judge Gregory E. Mize managed his emotions differently in 'Brave Jenny'.[685] Her mother, Mary, suffered from Munchausen's Syndrome by Proxy, a rare psychological disorder that caused her to inflict harm on Jenny, in order to render Jenny unusually dependent on Mary. The litigation was about Mary trying to regain her lost access and custody of Jenny. Judge Mize expresses his emotions best himself:

'As we adjourned, I am sure my body mirrored the same sorrow and distress I saw on the faces of everyone in the courtroom. We had been meeting like this for almost three years, ending with yet another denial of Mary's request to visit with Jenny. As I kept an anxious mother away from her preteen daughter, I thought of what that would mean to my wife in relation to our daughters. I asked myself could someone else take this case. Let someone else play the Oracle of Delphi! I could not wait to leave the courthouse after the hearing. I sorely wanted to be at home with family. When I did arrive to huddle with my crew, I counted my blessings and thought of Mary. Unlike my warm place, her home was probably quite stark and empty.'[686]

Six months after the case, Judge Mize read in the newspaper that Mary had died in a boating incident.[687] Twenty years later he met Jenny who was by then 30 years, a successful gymnast and a dental hygienist. Then Jenny wrote to him:

'I want to reiterate to you that you 200% made the right decision when you …. Up until this point, I always considered myself a victim of child abuse, but now I see myself as a survivor and the majority of that came from you reaching out to me.'[688]

Whatever decision Judge Mize made about the custody of Jenny, he concludes his story thus:

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[684] Posner *How Judges Think* at 6; see also Paterson *Final Judgment* and Derbyshire *Sitting in Judgment* above.
[685] Judge G E Mize 'Brave Jenny' in *Tough Cases* at 85-112.
[686] Judge Mize 'Brave Jenny' in *Tough Cases* at 100-101.
[687] Judge Mize 'Brave Jenny' in *Tough Cases* at 107.
[688] Judge Mize 'Brave Jenny' in *Tough Cases* at 111.

'I tell Jenny's story not because I enjoy telling it. Now, decades later, her case haunts me. I do so principally because it prompts large questions about our human condition and the limits of the judicial office.' [689]

Cases in which judges must speak for people who cannot do so for themselves are some of the hardest. Identifying which of two contestants for child custody would make a better custodial parent often has little to do with affordability, proximity to schools, services or conveniences, and the range of other information traditionally found in the legal materials. What does not leap out from the legal materials but must be discerned, often from what is not said, is always the child's best interest. Judges must make these life-changing calls, mustering all their wisdom and insights into humans, and hope that they 'do the right thing.'

Justice is 'what the judge ate for breakfast', an apocryphal statement attributed to Jerome Frank to caricature the judicial function, has spawned new realist theories – the 'gastrointestinal theory of judicial decision',[690] 'digestive realism', and 'law suffers from indeterminacy and judges from breakfast biases that manifest themselves in unconscious emotions'.[691] Theories about 'breakfast biased judges', 'unmindful' of how their own breakfasts, impact on their 'victims in court', resulted in research into Freudian theories 'to explain feelings that have no obvious organic cause' but which found explanations in 'the theory of repressed emotion.'[692] Is this meant to be a humorous stab at the judiciary or has the academy found a new angle to study the judicial function?

Normative theorists argue that justice is blind, hence human passions, emotions, feelings and sensations – the technical definitions of each of which

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[689] Judge Mize 'Brave Jenny' in *Tough Cases* at 112.
[690] Brian Leiter 'Legal Realism and Legal Doctrine' (University of Chicago Public Law & Legal Theory Working Paper No. 528, 2015). https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1983&context=public_law_and_legal_theory (accessed 24 October 2018).
[691] Patricia Mindus 'The Wrath of Reason and The Grace of Sentiment: Vindicating Emotion in Law' http://ivr-sweden.com/onewebmedia/Mindus_IVR%20Paper.pdf (accessed 24 October 2018).
[692] Mindus 'The Wrath of Reason' http://ivr-sweden.com/onewebmedia/Mindus_IVR%20Paper.pdf at 23.

are irrelevant here – ought not to obscure rationality. Linking emotion with injustice arises from its association with bias, irrationality and unfairness. Mindus captures it under the rubric of 'the wrath of reason'.[693]

Realists and positive theorists hold the opposite because 'equity requires practical reasoning, where emotions are similar to skills.' [694] Emotions are 'intrinsically *social* phenomena'. Joy, sadness, despair, distress, anger, fear, surprise, love, guilt, shame, embarrassment, jealousy, pride, horror, disgust, etc make up the same basic 'emotional repertoire' of all humans. Different cultures exhibit emotion differently, subject to their own rules as to what are socially acceptable forms of expression. But emotion is not 'an add-on that a person may remove at will.' On the contrary, it is constitutive of 'a general mode of the mental system, one of which we are not able to undo ourselves at will.' [695] Under the rubric of 'emotive intelligence'[696] or 'The Grace of Sentiment', Mindus advocates a 'cognitivist approach', one that resists 'casting reason as the opposite of emotion in a rigid dichotomy;' instead, emotion is a 'form of knowledge, an instrument of information, a vehicle of inference.' [697] Emotions inform reasons which in turn explain actions, beliefs, judgments, decisions and resolutions, justified or not.[698] For judges this means that their decisions must be 'something more than an expression of individual personality' and emotions.[699]

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[693] Mindus 'The Wrath of Reason' http://ivr-sweden.com/onewebmedia/Mindus_IVR%20Paper.pdf at 21.
[694] Mindus 'The Wrath of Reason' http://ivr sweden.com/onewebmedia/Mindus_IVR%20Paper.pdf at 27.
[695] Mindus 'The Wrath of Reason' http://ivr-sweden.com/onewebmedia/Mindus_IVR%20Paper.pdf at 24.
[696]Mindus, 'The Wrath of Reason' http://ivr-sweden.com/onewebmedia/Mindus_IVR%20Paper.pdf at 27.
[697]Mindus 'The Wrath of Reason' http://ivr-sweden.com/onewebmedia/Mindus_IVR%20Paper.pdf at 24.
[698] Mindus 'The Wrath of Reason' http://ivr-sweden.com/onewebmedia/Mindus_IVR%20Paper.pdf at 25 (accessed 24 October 2018).
[699] Leiter 'Legal Realism and Legal Doctrine' (University of Chicago Public Law & Legal Theory Working Paper No. 528, 2015). https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1983&context=public_law_and_legal_theory (accessed 24 October 2018).

'Decisional fatigue' would resonate with many judges. 'Hard days in court, and long nights of soul searching' was how newly appointed Judge Michelle M. Ahnn described her first year on the Bench.[700] Socially, choosing off a large restaurant menu and what to do on weekends with family became overwhelming.[701] I can attest to responding similarly to most inconsequential social arrangements. When I cannot choose, I tend to opt for all or nothing. Furthermore, ever since I started presiding in criminal cases, I tend to avoid entertainment that involves violence and crime.

'Decisional fatigue' mollified breakfast bias theories following an empirical study over ten months in 2011 at Ben-Gurion University.[702] Eight Israeli judges' rulings on over 1,000 parole board applications for prisoners constituted the data. The study found that judges approved 65% of the applications at the beginning of the day. This number dropped steeply as the day wore on until it bottomed to zero but was restored abruptly after the two daily meal breaks. The meal-related pattern persisted despite the researchers controlling for other considerations that could have accounted for the decisions, such as recidivism of the prisoners and rehabilitation programmes. Although the rise in grumpiness was attributable in part to blood-sugar levels coinciding with the meals, it was in fact the number of cases the judges heard since their last break, and not the number of hours they had been sitting, that best matched the data.

Earlier research in other fields suggested that making repeated or sequential decisions that depleted individuals' executive function and mental resources, led to increases in intuitive decision and people's tendency to simplify decisions by retaining the status quo. These studies 'hint' and the researchers 'speculate' that judges making repeated and sequential decisions 'will be more likely to

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[700] Judge M M Ahnn 'Every case is a Tough Case for a New Judge' 114-127 at 126 in *Tough Cases*.
[701] Judge M M Ahnn 'Every case is a Tough Case for a New Judge' in *Tough Cases*.
[702] S Danziger, J Levav, and L Avnaim-Pesso 'Extraneous factors in judicial decisions' PNAS April 26, 2011 108 (17) 6889-6892; https://doi.org/10.1073/pnas.1018033108 http://www.pnas.org/content/108/17/6889 (accessed 25 October 2018); The Economist 'I think it's time we broke for lunch…*Court rulings depend partly on when the judge last had a snack'* Science and technology https://www.economist.com/science-and-technology/2011/04/14/i-think-its-time-we-broke-for-lunch. The science of justice April 14th 2011(accessed 24 October 2018).

accept the default, status quo outcome: [and] deny a prisoner's request.'[703] The researchers acknowledge that their study does not account for the impact of rest, mood and measurements of the judges' mental resources. However, based on human experience, what cannot be dismissed as speculation is that decision making is 'mentally taxing and that, if forced to keep deciding things, people get tired and start looking for easy answers.' [704] Under such circumstances maintaining the status quo by denying parole was the easy option. Additional statistics showed that the psychological load of decision-making weighed more heavily than other factors. Decisions unfavourable to prisoners were made in less time (5.2 vs 7.4 minutes) and in fewer words (47 vs 90 words).[705]

The results also exposed the indeterminacy and unpredictability of law by showing that 'legally irrelevant situational determinants'—a mere matter of meal breaks and overwhelming decisional fatigue—can lead judges to decide differently in similar cases. The study debunks legal formalist notions of judges rationally, mechanically, and deliberatively applying only legal reasons to the facts of a case. Instead, the study bolsters the legal realists' argument that applying rationality alone does not sufficiently explain the decisions of judges. Extraneous factors, ranging from basic human needs and wants, to collegial and other social and political relations, to psychological and physiological factors, influence judicial and other forms of decision-making.

These findings should not surprise. Instead, accounting for them and other sources of cognitive biases should trigger measures to manage them. Addressing human imperfections, tiredness in particular, is a standard safety practice in other activities such as piloting airplanes and driving heavy-duty vehicles. Judges also put the lives of others at risk. As caseloads escalate and

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[703] The Economist 'I think it's time we broke for lunch' Science and technology https://www.economist.com/science-and-technology/2011/04/14/i-think-its-time-we-broke-for-lunch The science of justice April 14th 2011 (accessed 24 October 2018).
[704] The Economist 'I think it's time we broke for lunch' Science and technology https://www.economist.com/science-and-technology/2011/04/14/i-think-its-time-we-broke-for-lunch. The science of justice April 14th 2011.
[705] The Economist 'I think it's time we broke for lunch' Science and technology https://www.economist.com/science-and-technology/2011/04/14/i-think-its-time-we-broke-for-lunch. The science of justice April 14th 2011.

budgets shrink, solutions will be harder to find to mitigate these extraneous physical influences. Judges should have institutional help to manage emotion and other elements constitutive of the state of being human.[706] Counselling services, occupational therapy to cater for a sedentary work-life, and proper ventilation free of vermin typically prevalent in old historic court buildings, are a few basics to free judges to get on with their tasks in relative physical and psychological comfort.

### 2.7.6 Judicial Analytics

Using predictive judicial analytics, Chen confirms that extra-legal factors do influence decisions.[707] Published in 2018, Chen suggests that analytics promises efficiency and fairness of law as machine learning enables assessment of bias in law and theories about the consequences of legal change. Bloomberg Law offers 'Judge Analytics' using the Litigation Analytics tool to find and view judges' profiles to enable attorneys to prepare informed litigation strategies.[708] It provides analytics on over 100 000 attorneys and all federal judges.[709] Westlaw Edge also mines data-driven insights into judges, law firms and cases.[710] Technology companies that build models of judicial behaviour on particular issues or arguments enable law firms to optimise their

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[706] Catherine Baksi 'Top family judge Sir Andrew McFarlane warns of judicial breakdowns from rising stress' https://www.thetimes.co.uk/article/top-family-judge-sir-andrew-mcfarlane-warns-of-judicial-breakdowns-from-rising-stress-930jwb26d
Judicial Wellness, Judicial College of Victoria https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&cad=rja&uact=8&ved=2ahUKEwiw1KaNmrfIAhWJEMAKHahJDmQQFjABegQIAhAB&url=http%3A%2F%2Fwww.judicialcollege.vic.edu.au%2Fjudicial-wellbeing%2Fjudicial stress%2Fliterature&usg=AOvVaw0LBZlavd68a6NEV7EZXgqd; Jennifer Bendery 'Federal Judges Are Burned Out, Overworked And Wondering Where Congress Is' https://www.huffpost.com/entry/judge-federal-courts vacancies_n_55d77721e4b0a40aa3aaf14b (accessed 25 October 2019).

[707] Daniel L. Chen 'Judicial Analytics and the Great Transformation of American Law http://users.nber.org/~dlchen/papers/Judicial_Analytics_and_the_Great_Transformation_of_American_Law.pdf (accessed 11 September 2019).

[708] Litigation Analytics Expansion Offers Greater insights into Attorneys, Judges, Corporations, and Law Firms. https://www.bloombergindustry.com/pr/litigation-analytics-expansion-offers-greater-insights-into-attorneys-judges-corporations-and-law-firms/(accessed 11 September 2019).

[709]Bob Ambrogi 'Bloomberg Law Says It Has 'Significantly' Expanded its Litigation Analytics https://www.lawsitesblog.com/2019/04/bloomberg-law-says-it-has-significantly-expanded-its-litigation-analytics.html (accessed 11 September 2019).

[710] https://legal.thomsonreuters.com/en/products/westlaw/edge/litigation-analytics (accessed 11 September 2019).

litigation strategies.[711] A company that represents the Canadian government and nine of the 10 largest accounting firms in Canada say that their algorithms are about 90 percent accurate in predicting the outcome of tax cases.[712] The scale of this information technology service should not be underestimated. Artificial intelligence technology substituting the judicial function is another topic falling beyond the scope of my research.[713] However, together, they should shake up complacency within and about the judiciary.

Closer to South Africa LexFutures, a legal data analytics provider, partnered with UCT Law@Work and Juta Law to launch in 2018 the Constitutional Court Fantasy Prediction League, a competition aimed at promoting awareness of CC decisions. Students are required to predict how the CC might rule in forthcoming cases.[714]

Lawyers may be reluctant to 'live up to the pressure of the algorithm' or being compared to others.[715] If the algorithms predict precisely and shows up how some extraneous factors influence particular judges more than others, the public might lose faith in the fairness of the legal system.[716] Some judges fear that their '"human subjectivity" will be revealed.'[717] Others appreciate the transparency. It would expose mediocrity, perhaps even bias and corruption.

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[711] Gregory Bufithis 'Understanding the French ban on judicial analytics' http://www.gregorybufithis.com/2019/06/09/understanding-the-french-ban-on-judicial-analytics/ (accessed 11 September 2019).
[712] Roy Strom 'Keep Judges and Lawyers Out of Legal Predictions, Tech CEO Says' https://news.bloomberglaw.com/us-law-week/keep-judges-and-lawyers-out-of-legal-predictions-tech-ceo-says (accessed 11 September 2019).
[713] Edwina L. Rissland 'Artificial Intelligence And Law: Stepping Stones To...,' 99 Yale L.J. 1957 at 2-3.
[714] https://www.golegal.co.za/constitutional-court-prediction-league/; UCT Faculty of Law Activities Updates News September 2018 http://www.law.uct.ac.za/sites/default/files/image_tool/images/99/UCT%20Law%20Faculty%20News%20September%202018_0.pdf; Tanya Farber 'Lawyer who can read judges minds' https://www.pressreader.com (accessed 11 September 2019).
[715] Strom 'Keep Judges and Lawyers Out of Legal Predictions, Tech CEO Says' https://news.bloomberglaw.com/us-law-week/keep-judges-and-lawyers-out-of-legal-predictions-tech-ceo-says (accessed 11 September 2019).
[716] Strom 'Keep Judges and Lawyers Out of Legal Predictions, Tech CEO Says' https://news.bloomberglaw.com/us-law-week/keep-judges-and-lawyers-out-of-legal-predictions-tech-ceo-says (accessed 11 September 2015).
[717] Bufithis 'Understanding the French ban on judicial analytics'(accessed 11 September 2019). http://www.gregorybufithis.com/2019/06/09/understanding-the-french-ban-on-judicial-analytics/

France restricts the use of legal and judicial analytics by banning technology companies for identifying judges in their analysis and predictions.[718] Five years imprisonment is prescribed for violators.[719] Will judges be enforcing this law? Analytics could disadvantage poor litigants unable to afford the costs of this service. Thus, the gap between rich and poor would widen and perhaps even limit access to justice. In my view, no matter what the pros and cons of judicial analytics are, trying to stop it would be as ineffective as King Canute commanding the tide to halt. As an industry barely 2 years old, its evolution will be monitored to assess whether and how it should be regulated.

Algorithms and analytics aside, the televising of court proceedings and commissions of enquiries gives the public access to how legal actors perform.[720] The public can store and study the proceedings. Televised recordings have obvious advantages over court transcripts. In addition to easy access, costs and other benefits, viewers observe the demeanour of the legal actors. Add the free access to online judgments, and legal actors have fewer places to hide. Since commencing this research, when all that was available in *Barnard* was a transcript and judgments, technology has revolutionised the study of litigation.

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[718] Sam Skolnik 'France's Judicial Analytics Ban Unlikely to Catch on in U.S.' https://biglawbusiness.com/frances-judicial-analytics-ban-unlikely-to-catch-on-in-u-s. (accessed 11 September 2019)

[719] Bufithis 'Understanding the French ban on judicial analytics' http://www.gregorybufithis.com/2019/06/09/understanding-the-french-ban-on-judicial-analytics/

[720] Alan Paterson *Final Judgment* at 3.

## 2.5 Part B: *Barnard*

'The first point to be made is that affirmative action must be rooted in principles of justice and equality.' Nelson Mandela, October 1991.[721]

### 2.8.1 Introduction

In Part A, I contextualise the objective and subjective conditions under which litigation is conducted. Neither the current state of our political economy nor our legal and political culture and consciousness are conducive to optimising the aspirations of the Constitution through litigation. I show how variable, unarticulated phenomena cumulatively influenced the choices of the legal actors, who shaped the reasoning and decisions of the courts in several discrimination and socio-economic rights cases. Ideology, defaulting to binaries, the performance of the judicial function and judges as humans,[722] top my list of interconnected phenomena influencing unpredictability in litigation. I emphasise the participation of the legal actors in Part A.

Part B is specifically about *Barnard* in order to include a critique of the contribution of the litigants and their lawyers to the quality and quantity of litigation, their impact on jurisprudence, conflict and racial reconciliation. My preoccupation is not with the 'correctness' or otherwise of the outcomes in any of the courts. If it were, I would run the same risk that the legal actors involved in *Barnard* did, that is, of finding some rule to apply to the facts to yield outcomes that suit my ideological disposition. My choice of rules may differ, but for as long as I apply appropriate legal rules to the facts, I would meet the baseline requirements for a valid judgment. Hence, to describe outcomes as correct or incorrect is a misnomer. Instead, describing a judgment as the best

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[721] Explanatory Memorandum to the Employment Equity Bill (1998) 19 ILJ 1345.

[722] E.g. report on judicial morale in Lord Chief Justices Report 2017 https://www.judiciary.uk/wp-content/uploads/2017/09/lcj-report-2017-final.pdf; and Cheryl Thomas 'Judicial Attitude Survey 2016 https://www.judiciary.uk/wp-content/uploads/2017/02/jas-2016-england-wales-court-uk-tribunals-7-february-2017.pdf (accessed 15 December 2018).

outcome for a litigated dispute comes closer to what we do when we test the quality of judgments.

Access to courts refers to the constitutional right of everyone to have 'any dispute' resolved by the application of law.[723] Disputes articulate conflict in ways that are justiciable. As a selection or definition of issues or causes of action for resolution, disputes are a subset of conflict. The source –> cause –> consequence of conflict axis illustrates the limitations of processing conflicts as disputes. For, if a source or cause of conflict does not fit within the form of litigation, the consequence is residual conflict, even if the dispute, which is some aspect of the conflict, is resolved. In contrast, if participants engage deliberatively, jurisgeneratively or agonistically[724] as the circumstances require, to carefully formulate issues in dispute, litigation could resolve conflict. For instance, litigation resolved the dispute about the right of a surviving spouse in customary marriages and her daughters to inherit; but getting the family of the deceased to accept her as his beneficiary reached into the depths of patriarchy as a source of the conflict.[725] Other sources could have been economic, cultural or religious. Much more than a declaration of rights was required organisationally to shift consciousness and culture towards transformative constitutionalism.

Functional, productive conflict contrasts with dysfunctional, destructive conflict. Paradoxically, conflict is a catalyst for unity when its resolution results in new rules, standards, practices and institutions binding on the protagonists. The conflict-cooperation dynamic induces change.[726] Change is welcomed. Participation intensifies. Hostilities abate. Interdependence and altruism trump factionalism and individualism. Agonism displaces antagonism. Problem solving, creativity and innovation are possible. Trust develops.[727] Social conflict is struggles over values, for status, power or resources. It is purposeful conduct

[723] Section 34 of the Constitution.
[724] Defined in Chapter 1.
[725] E.g. *Bhe*.
[726] M Anstey *Negotiating Conflict – Insights and Skills for Negotiators and Peacemakers* (1991) at 5.
[727] Anstey at 7-10.

aimed at defeating opposition by strategic use of power, collective action and enforcement.[728] In contrast, when irrationality in discourse sets in and mutual attacks intensify, dysfunctional conflict escalates.[729] This duality in conflict replicates itself in the twin aims of litigation as 'lawfare' as good when it advances accountability, transparency and transformation and bad when it is used to achieve the opposite.

I seek to link the phenomena identified in Part A with the process and ultimately the substantive outcomes in *Barnard*. My critique of the legal actors' rule choices is aimed at exposing different styles or patterns of thinking. Particular patterns incline towards preferring some rules over others. This in turn indicates ideology or some phenomenon additional to or other than the legal materials at work. So, Part B is a multifaceted critique that interweaves between the evidence, argument and judgments on the one hand, with the articulated and unarticulated phenomena on the other hand,[730] to explore the possible influence of the phenomena over the choice of process, rules and facts on the judgments. Whether the process is litigation instead of conciliation or an action instead of a review, the choice of form implicates substantive outcomes and relationships. In each of the four courts, I investigate the possibility of one or other extraneous phenomenon influencing some aspect of the judgments.

Historically, affirmative action has been controversial. In *A Court Divided: The Rehnquist Court and the Future of Constitutional Law* Tushnet renders a historical account of the evolution of affirmative action. Affirmative action is a term that originates in New Deal's labour laws in the USA in the sixties. A presidential directive required federal contractors to take affirmative action to ensure people were employed without regard to race. Subsequently, an office was established to monitor employment patterns and enforce affirmative action by threatening to withdraw federal contracts from employers. In 1969, construction contracts were stalled in Philadelphia on the instruction that

[728] Anstey at 2-3.
[729] Anstey at 7.
[730] Anstey at 2.

employers and unions should agree to set and meet goals for employing African Americans. Affirmative action then spread to college admissions. Its aims were to prevent racial discrimination, remedy societal discrimination and encourage diversity to benefit learning from other racial groups. Its programmes could set 'goals' but prohibited the use of strict numerical targets. No one was quite sure about how to distinguish between goals and targets in practice,[731] a difficulty that *Barnard* was meant to resolve.

Liberals cited Justice Harlan's dissent in *Plessey*[732] that the 'Constitution was color-blind'. Opportunistically, conservatives took advantage of Martin Luther King's exhortation that no one would be judged 'by the color of their skin but by the content of their character.' *Brown* [733] set the Court against racial classification. A 'strict scrutiny' test for discrimination applied to affirmative action programmes. Such programmes had to meet 'a compelling state interest' to pass muster.[734] In the nineties the US Supreme Court upheld not a single affirmative action program. Fearing that the Court would shut out affirmative action altogether, supporters of affirmative action raised the funds to pay out a 'victim' of affirmative action.[735] With *Barnard* slamming the door to 'victims' of affirmative action, wither the jurisprudence in South Africa?

Unsurprisingly, *Barnard* raised questions far bigger than the parochiality of the case. It was a hotbed in which law clashed head-on with politics and social issues, a fermentation of competing rights, values and ideologies. *Barnard* excited both sides of the ligation fence, and beyond, about the prospect of the courts setting precedents for the application of affirmative action.[736] Not since *Van Heerden*,[737] decided ten years earlier, did the CC have an opportunity to revisit affirmative action as a measure to achieve equality. Never before did the

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[731] Mark Tushnet *A Court Divided: The Rehnquist Court and the Future of Constitutional Law* at 226-230.
[732] Ples*sey v Ferguson* 163 U.S.537.
[733] As history would have it, Justice Harlan's grandson presided in *Brown v Board of Education* 347 U.S. 483. Tushnet *A Court Divided* at 226.
[734] Tushnet *A Court Divided* at 228.
[735] Tushnet *A Court Divided* at 229-230.
[736] Chris McConachie 'Affirmative Action and Intensity of Review: South African Police Service v Solidarity obo Barnard, 7 Const. Ct. Rev. 163 (2015).
[737] *Minister of Finance and Others v Van Heerden* (CCT 63/03) [2004] ZACC 3; 2004 (6) SA 121 (CC); 2004 (11) BCLR 1125 (CC); [2004] 12 BLLR 1181 (CC).

CC have to consider affirmative action in the context of the Employment Equity Act (EEA)[738] to pronounce on the difference between targets and quotas, or about how affirmative action measures should be implemented to achieve targets, not quotas, projected in an employment equity plan (EEP). *Barnard* was also an opportunity for converting polarised positions about race discrimination into something new and different. The values of equality, dignity, accountability and the public interest stood out as key elements of substance in the mix in which emotions were not far from the surface of rationality.

However, *Barnard* exposes the banal level to which the complaint of a 'victim' of affirmative action has slid. Her complaint was that she was not appointed because she was white, even though she was by far the best candidate. If a suitable African had been appointed she would have accepted the result.[739] However, she also testified that the short-listed African candidate chose not to pursue a grievance because, as 'second best', he no longer wanted the appointment.[740] Excavating further into this evidence exposes a fundamental source of discontent generated by the manner in which affirmative action is applied. Dignity cuts both ways when affirmative action applies. Appointees have no cause to celebrate when their elevation is on the ladder of race or gender alone. Nelson Mandela would have abhorred such a practice as a 'handout', 'a black skin' substituting 'a white skin' as a passport to privilege.[741]

But *Barnard* disappoints on all fronts. Not a single response from the academy commends it. Racial reconciliation hit the wall. Lost was Langa CJ's 'desire to bring all South Africans into this constitutional project.' Langa CJ is characterised as a jurist who 'set his face against exclusion and disadvantage, whether based on race, ethnicity or gender. He recognised the common humanity in all and the need to build a common South African solidarity and citizenship across difference.'[742] Would he have brought to bear on *Barnard*

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[738] Employment Equity Act, 55 of 1998.
[739] *Barnard* LC cross-examination transcript p301 l10-12.
[740] *Barnard* LC cross-examination transcript p296 l17.
[741] Nelson Mandela, October 1991. Sandra Fredman 'Reimagining power relations: Hierarchies of disadvantage and affirmative action' (2017) *Acta Juridica* 124.
[742] Catherine Albertyn and Sandra Fredman 'Equality beyond Dignity: Multi-Dimensional Equality and Justice Langa's Judgments' 2015 Acta Juridica 430 (2015).

'his "instinct" for recognizing vulnerable people, including white people as a potentially vulnerable political minority … deserving of equal concern and respect in the proper application of the rule of law…'? Why did race politics degenerate in *Barnard*?

### 2.8.2 Ideological dispositions

A background to the litigants distinguishes *Barnard* from other discrimination cases. Solidarity is a trade union that has predominantly white members. Its beliefs included promoting a 'Christian foundation', 'collective bargaining', 'the fair implementation of affirmative action', 'Afrikaans', 'free market economy, responsible job relationships', 'self-employment and sustainable development', 'connect[ing] South Africa and the Constitution', 'independen[ce] from party politics' and 'protection of minorities and democracy'.[743] On affirmative action, it believed that 'imbalances should be corrected without creating new forms of imbalance.' It disapproved of the way in which affirmative action was being implemented because it created 'new forms of discrimination' and 'the white race [is] seriously disadvantaged. Solidarity acts on behalf of people who are unfairly disadvantaged by affirmative action.'[744] Notwithstanding its professed apolitical, unaligned stance, Solidarity established AfriForum, a non-profit civil-rights organisation 'that strives to counteract what it sees as the active and passive withdrawal of minorities from public affairs in South Africa'. [745] However, observers describe AfriForum 'as the unapologetic emissary of an emerging form of Afrikaner nationalism, antagonistic towards the post-1994 project, dismissive of efforts to seek middle-ground and opting for confrontation as a method of advancing its cause.'[746]

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[743] https://solidariteit.co.za/en/who-are-we/ (accessed 12 August 2019).
[744] https://solidariteit.co.za/en/who-are-we/(accessed 12 August 2019).
[745] https://everipedia.org/wiki/lang_en/Solidarity_%28South_African_trade_union%29/ (accessed 12 August 2019); 'Solidarity' http://www.self.gutenberg.org/article/WHEBN0019424900/Solidarity%20(South%20African%20trade%20union).
[746] Pieter Du Toit, 'Verwoerd, apartheid and race: How AfriForum's lineage shaped its ideas' https://www.news24.com/Columnists/Pieter_du_Toit/verwoerd-apartheid-and-race-how-afriforums-lineage-shaped-its-ideas-20190326 (accessed 20 May 2019).

Solidarity claims to represent 'minorities in South Africa in public fora'[747] and to have a current national membership of 140 000. It professes to have a historical connection to the Transvaal Miners' Association founded on 22 June 1902[748] which became the Mine Workers Union (MWU) in 1913.[749] MWU's historical roots run deep into Afrikaner nationalism. During apartheid, Solidarity abandoned loyalty to the governing National Party, in favour of the Herstigte Nasionale Party (HNP), a political party of racists who believed in the supremacy of the Afrikaner. Then it turned to the unambiguously named Conservative Party, a stepping-stone to the outright neo-Nazi Afrikaner Weerstandsbeweging (AWB). During the 2019 national and provincial elections, AfriForum was considered the ideological stablemate of the FF Plus, an amalgam of the former Conservative Party.[750]

From this description of its agenda, Solidarity's ideological outlook was fundamentally to protect conservative, Afrikaner interests in employment, through AfriForum, and wherever such interests existed. *Barnard* was a perfect case on the facts to test the judicial waters on affirmative action. Ms Barnard was an ideal candidate; her work record was flawless; she was highly favoured by her peers, who included senior black officers. However, Solidarity's strategic political agenda was not lost on its opponents.

Neither was the other side to the conflict politically neutral. The National Commissioner had been a member of the ANC's National Executive Committee and a Member of Parliament in 1994;[751] President Mbeki, also from the ANC, appointed him. POPCRU, the amicus, was a COSATU affiliate, a member of the tripartite alliance with the ANC, the third member of the alliance being the

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747 https://everipedia.org/wiki/lang_en/Solidarity%28South_African_trade_union%29/ (accessed12 August 2019).

748 https://everipedia.org/wiki/lang_en/Solidarity_%28South_African_trade_union%29/ (accessed 12 August 2019).

749Du Toit 'Verwoerd, apartheid and race'. https://www.news24.com/Columnists/Pieter_du_Toit/verwoerd-apartheid-and-race-how-afriforums-lineage-shaped-its-ideas-20190326 (accessed 20 May 2019).

750P du Toit, 'Elections Briefs: Will FF Plus be AfriForum's parliamentary wing?' (accessed 12 August 2019). https://www.news24.com/elections/voices/elections-briefs-will-ff-plus-be-afriforums-parliamentary-wing-20190516 (accessed 2 June 2019).

751 https://en.wikipedia.org/wiki/Jackie_Selebi (accessed 5 February 2020)

Communist Party of South Africa.[752] Solidarity also had strategic alliances, but with conservative right-wing ideological groups.[753] Manifestly, this alignment of 'progressive' left wing and conservative right wing forces set the scene for an ideological showdown, a battle royale in the on-going war against and for white supremacy or apartheid. Or was it about black supremacy or the supremacy of a majority party?

For SAPS, appointing Ms Barnard meant capitulating to or acquiescing in Solidarity's agenda. Promoting Afrikaner interests was quite the opposite of what SAPS sought to achieve via its EEP. For Solidarity, winning cases like Barnard would have earned it support amongst anti-government and anti-ANC forces, and strengthened its membership, perhaps even to the extent of securing a seat around the table for consultations about the EEP. SAPS was having none of this.

Although the source of the conflict was unarticulated, all the participants in the litigation had to be aware of the identity and political agendas of the litigants. Consequently, the articulated cause of action – race discrimination against Ms Barnard as a 'victim' of the application of affirmative action – elevated race politics and ideology right up there as large as a poster board. Undoubtedly, the source of the conflict was communal and ideological. Conservative white communities had lashed back angrily after the unbanning of the ANC, SACP and PAC, fearing that their claims to self-determination and privilege were at risk.[754] Employment equity and the way the ANC as the governing party implemented it was grist to the mill.

Differing goals implicit between and amongst left- and right-wingers about affirmative action, and ambiguity about what constitutional transformation means, would have compounded the sources of conflict. Typically, political transitions escalate uncertainty and ambiguity, creating space for mobilisation

[752] Luli Callinicos *Oliver Tambo – Beyond the Engeli Mountains* (2004) at 528.
[753] https://solidariteit.co.za/en/who-are-we/ (accessed 12 August 2019).
[754] Anstey at 4 and 32.

for or against particular ideological positions.[755] Did this influence SAPS's ideological disposition to resist Solidarity's agenda? Is there another explanation for SAPS issuing controversial reasons for Ms Barnard's non-appointment, for advertising the posts three times as 'non-designated', meaning that anyone who met the requirements could apply, when that was not SAPS's plan; or for failing to respond to her requests for grievance meetings and conciliations? Were institutional inefficiencies a phenomenon, especially within SAPS? Did ideology induce the inefficiencies? Or were the inefficiencies structural and endemic? What other unarticulated premises influenced the litigants and legal actors? Were binary forms of adjudication conducive to problem solving? What questions did the litigants pose to the courts? What questions did the litigants really want the court to answer? Did the courts answer the questions that would resolve or manage the sources of conflict? In all the ramifications of this intensely emotional conflict, would 'the bridge' of (re)conciliation[756] have mediated the tensions? Is the final outcome a gain for individualism or altruism, for retaining the status quo or for transformation, for rule-centricity or substance, or some permutation of these binaries?

As the obvious source of conflict was ideological, the primary questions for legal actors concerned about conflict resolution and problem solving should have been to delve into a deeper layer: Was consensus voluntary and genuine about constitutionalising affirmative action to remedy the political and socio-economic ravages of apartheid, and foster a non-racial democratic country based on the values of dignity, equality and freedom? Or was it a façade, a time-based concession, a temporary retreat to fight another day? Was *Barnard* intended to turn the Constitution as a weapon of choice of black people against them, calling the constitutional bluff of non-racialism, so to say? Was there antagonism against white people using the Constitution to enforce rights when, under apartheid, they fought against the establishment of a constitutional democracy? On the other side, for black people and democrats, was affirmative

[755] Anstey at 15; 40-42.
[756] Etienne Mureinik 'Bridge to Where? Introducing the Interim Bill of Rights' 10 S. Afr. J. on Hum. Rts. 31 1994.

action a threat, a weapon or a shield against discrimination? Did they genuinely extend olive branches of reconciliation to achieve democracy? If so, did *Barnard* signal their change of heart? Without confronting hard, uncomfortable, destabilising questions like these, is transformative constitutionalism through litigation possible?

The answers to these questions target the sources of the conflict. They were precursors to framing the causes of action for litigation if it had to ensue. However, they were more appropriate for a building Relationships by Objectives (RbO) process.[757] If this had been done then the causes and processes might have been better aligned to respond to their ideological, structural and other sources of conflict. The litigants might have opted for processes more conducive to reconciliation. Instead, the adversarial nature of litigation submerged their anxieties and ideological differences beneath the surface of the forms and limits of litigation. Still, 'lots and lots of signs on the surface'[758] of the evidence spawned the underlying doctrinal questions: Are affirmative action measures and its redistributive aims subordinate to an individual's rights to equality and dignity? Are equality and dignity mutually exclusive?

Instead of debating these questions that went to the source of the ideological conflict, the litigants framed a series of binaries for the courts' decisions. Was Ms Barnard discriminated against? Did the National Commissioner give adequate reasons for his decision not to appoint Ms Barnard or any other suitable candidate? Did the non-appointment of Ms Barnard and any of the African males promote representivity? Was service delivery critical? These binaries flowed direct from the National Commissioner's reasons.

SAPS management wanted guidance about reconciling affirmative action with service delivery and efficiency.[759] Solidarity had another six cases waiting in the

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[757] Anstey at 292. This process was designed to tackle 'deeply fractured' relations. Imported from the USA into SA in 1984, RbO's combine mediation, organisation development and Management by Objectives techniques to target joint solutions to relationship problems.
[758] Kennedy 'Phenomenology' at 545.
[759] *Barnard* SCA para 28.

pipeline. Court watchers anxiously awaited a deliberative, dialogical and even a jurisgenerative, agonistic showdown. But disappointment lay in the wake. Instead, new tensions emerged. Are the aims of racial reconciliation and racial representation mutually exclusive? Can they be managed through effective conflict management processes?

The courts responded to only the binaries articulated in the litigation despite the unarticulated ideological contestation being ever present. Getting around SAPS's institutional inefficiencies or organisational dysfunctionality got in the way for judges wanting to find for SAPS's disposition. For those wanting to find for Ms Barnard and Solidarity, inefficiencies were readymade headstones to denounce SAPS.

Despite their manifest dispositions – Ms Barnard and Solidarity to the conservative to liberal right and SAPS to the social democratic-communist left – both litigants were coy about their ideological preferences. First, I examine the evidence and arguments to discover how this coyness exposed ambiguity about affirmative action on both sides of the line. Second, I expose inefficiencies on both sides in the prosecution of their respective cases. However, SAPS's institutional dysfunctionality was instrumental in not only impeding racial reconciliation but it also generated bad law. Each side and each judgment hung on to particular rule choices that skirted the difficult questions. For the LC and the SCA the issues were resolved according to the rules of evidence as disputes of fact. For the LAC and the CC formalism, process, rules and tools such as deference, served their purpose. Third, I investigate what collateral damage the litigants and legal actors caused to jurisprudence and relationships. Last, I invoke the hermeneutic of suspicion to revel in the freedom of academia to speculate, as readers of judgments are wont to do, about extraneous phenomena that might have underpinned the judgments. Speculation serves the purpose not of divining truth, but rather of demonstrating that judges exercise choice. Choice is informed by a plethora of predictable, unpredictable, articulated and unarticulated phenomena. That is the reality I seek to address in my recommendations.

A few more background facts in *Barnard* are necessary for analysing the conduct of the litigants and their representatives to show how they largely contributed, on the one hand, to the malleability of the reasoning, but, ironically on the other hand, to the predictability of the substantive results of the litigation in the four courts. Analysing the contributions of the legal representatives to the reasoning and judgments, links the litigants and their representatives as co-responsible for the collateral damage to the jurisprudence emanating from our courts. Understandably, commentators target judges for criticism of their reasoning and decisions; after all, judgments are more accessible publicly than court records. However, judgments do not disclose the whole story. Court records reveal what the participants pleaded and submitted in the litigation. Reverting to the definition of litigation, it must follow that whatever is put into the process as evidence and argument is processed out as judgments. Scrutinising the court records exposes the conduct of the litigants and their representatives as a direct link to the quality of the jurisprudence in *Barnard*.

Thus, any solutions to improve the quality of our jurisprudence must be aimed not only at the judiciary but also the lawyers and the litigants they represent. If we are genuine about constitutional transformation, then managing the malleability of legal reasoning and decisions in order to calibrate litigation towards problem solving and egalitarian ends, must start long before the litigation begins. Litigants who are accountable for their own choices, should, as clients, institutions and affected members of the public, be able or empowered to hold the legal actors accountable for theirs. They should participate in moulding their legal representatives to be accountable members of the profession. After all, judges are appointed from the pool of practising lawyers. To accomplish this depth of accountability and empowerment, transformation of the judiciary should be rooted amongst people engaged in the struggles of communities striving for a better life.

The reliability of my thesis rests on the authenticity of my sources. There are few sources of empirical, oral data more reliable than evidence under oath. Reliability for my purposes is fortified by the rule that a copy of a record of any Superior Court, of which the Labour Court is one, is certified as such by the

Registrar of that court. Its seal is *prima facie* evidence of authenticity.[760] No record would serve before the appellate courts without such authentication. Given the sensitivities of my critiquing the legal actors, I quote the evidence extensively from the transcription of the record of the trial in the LC. As far as possible, I want the lawyers and their clients to speak for themselves, for their voices to be heard, in order to minimise the risk of misrepresenting them with my paraphrasing. Occasionally, I refer to the pleadings and heads of argument in the four courts. What would have added to the authenticity is the tone and demeanour of all the actors through a video. That luxury is not available to our courts.

### 2.8.3 A few more facts

In 2005, SAPS advertised Post 6903 as 'non-designated', meaning that it was open to anyone who met the requirements of the job to apply for appointment. Ms Barnard applied. A panel consisting of six senior police officials from racially diverse dispositions interviewed and gave Ms Barnard a score of 86.67%, the highest from amongst all the candidates. The difference between her score and that of the only black male candidate shortlisted was 17.5%.[761] In order not to compromise service delivery, the panel recommended her, instead of the black male who ranked fourth and the coloured female who ranked third on the list of recommended candidates.[762] The Divisional Commissioner rejected the panel's nomination on the basis that black men and women were under-represented in the division.[763] Post 6903 was withdrawn.[764]

In May 2006, the post was re-advertised again as 'non-designated' Post 4701.[765] Once again, a racially diverse panel recommended her instead of the highest scoring African male at 7.33% lower than her score.[766] The panel

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[760] Section 34 of the Superior Courts Act 10 of 2013 and its predecessor in s 18 of the Supreme Court Act 1959.
[761] *Barnard* LC para 24.8.
[762] *Barnard* CC (Moseneke ACJ) para 8; *Barnard* LC para 24.7- 24.8.
[763] *Barnard* LC para 24.9.
[764] *Barnard* LC para 24.10.
[765] *Barnard* LC para 24.13.
[766] *Barnard* LC para 24.16; *Barnard* LC transcript p113; l1

reasoned that promoting her to salary level 9 would neither enhance nor aggravate racial representivity in the division as she was already part of the division; but it would enhance representivity at level 8 where women were over-represented.[767] Concerned that not promoting her after two processes would 'really send a wrong signal to the candidate' the Divisional Commissioner agreed with the panel that Ms Barnard should be promoted,[768] especially as she was 'the only candidate that during the interview displayed a unique blend of passion and enthusiasm to deal with members of the community that are unsatisfied with the services' (*sic*), and so her appointment would also have advanced service delivery.[769] Representivity and service delivery informed the panel's recommendation. Subsequently, a meeting of provincial and divisional commissioners endorsed the recommendation.[770] However, at the final tier of internal decision-making, the erstwhile National Commissioner, Jacob (Jackie) Sello Selebi,[771] rejected the recommendation.[772] Neither Ms Barnard nor the best African candidate was promoted.

The National Commissioner decided 'not to approve the recommendation for Post 4701' because 'the recommendation did not address representivity; and the post is not critical and the non-filling of the post will not affect service delivery.'[773] Eventually the post was withdrawn.[774] Inexplicably, it was advertised for the third time but was again withdrawn.[775] Ms Barnard did not reapply.

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[767] *Barnard* LC para 24.16. I digress to mention that the EEA requires affirmative action measures implemented in employment equity plans to provide for representivity of underrepresented groups 'within each occupational category and level in the workforce.' (Sections 15(2)(d) and 20(2)(c) of the EEA.) The Employment Equity Regulations, 2014 and the EEA's Code of good practice: Preparation, implementation and monitoring of employment equity plans No. R. 1394 23 November 1999 and subsequent amendments reinforce these demarcations.
[768] *Barnard* CC (Moseneke ACJ) para13 *Barnard* LC 24.17, 24.19.
[769] *Barnard* LC para 24.16- 24.17.
[770] *Barnard* LC para 24.20.
[771] Jackie Selebi https://en.wikipedia.org/wiki/Jackie_Selebi (accessed 2 June 2019).
[772] *Barnard* LC para 24.20.
[773] *Barnard* CC (Moseneke ACJ et al) para 14; *Barnard* LC para 24.20.
[774] *Barnard* CC (Moseneke ACJ) para 14; *Barnard* LC para 24.20.
[775] *Barnard* CC Moseneke ACJ) para 15.

Dissatisfied, Ms Barnard referred both non-appointment grievances to an internal grievance process. Thereafter, she referred the second grievance to statutory conciliation.[776] As her remedy, she requested promotion backdated to 1 December 2005. The SAPS failed to respond to the grievances. It also ignored the invitation to conciliation.[777] Solidarity turned to the LC for orders declaring that Ms Barnard suffered unfair discrimination on the grounds of her colour and race and directing the SAPS to appoint her retrospectively to the rank of superintendent.[778]

Against this factual background, there was no dispute that the National Commissioner had the final discretion to approve recommendations for appointment to level 9 and higher posts; that he had to exercise this discretion in accordance with the SAPS's EEP and policy, the EEA, the Public Service Act, 1994 (PSA) and the Constitution;[779] that decisions of selection panels were non-binding recommendations presented to the National Commissioner; that affirmative action was necessary, justifiable and constitutionally enshrined;[780] that the SAPS had to report to Parliament on progress with implementing its EEP;[781] that SAPS applied the point system and the National Instruction 1 of 2004 (the Instruction) in ranking candidates for appointment; and that employees' past performance counted for promotion.[782] Generally, by agreeing on material facts, litigants not only help the courts to focus on that which they disagree on, but they also limit the scope for judicial error on findings of fact. Manifestly, from this comprehensive list of agreements, even on policy, very little was left in dispute. Or so it seemed.

### 2.8.4 Exposing Ms Barnard's ambiguity

Despite the litigants accepting the need for affirmative action, cracks in the

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[776] *Barnard* CC (Moseneke ACJ) para 17; *Barnard* LC para 24.23.
[777] Section 10 of the EEA.
[778] *Barnard* CC (Moseneke ACJ) para 18-19; *Barnard* LC para 43.2.
[779] *Barnard* LC transcript p108 l2; SAPS's Notice of Appeal to the LAC para 10-11.
[780] *Barnard* LC para 28.
[781] Section 22 of the EEA.
[782] *Barnard* LC transcript p113- 5 l20.

evidence emerged. In extract A below, ostensibly, Ms Barnard accepted the implementation of affirmative action. But she did not say that she supported it. Instead, her remark that she waited for three years to be invited to an interview hints at her underlying discontent.

Extract A: Cross-examination of Ms Barnard by Mr Mokhari:

'Now I understand your evidence now to be that had any candidate been appointed to that post you would not have complained, is that still your evidence? That is still my evidence.

So … it does not matter who occupies it as long as it is occupied, …? If it is a suitable candidate, yes. … … in three years' time I was invited to one interview, this in the beginning of this year. I went for the interview and an African female was appointed in that position and I never grieved about it.'[783]

Unsolicited, she volunteered information about the lapse of three years before being interviewed for the first time. Unsurprisingly, she lamented her non-appointed, even though she did not lodge a grievance on that occasion. Her ambiguity, if not resistance to affirmative action is more explicit in extract B below where her responses were liberally littered with 'but…'.

Extract B: Cross-examination of Ms Barnard by Mr Mokhari:

'And you know that the Employment Equity Act is a law of the country? That is correct, but I am also aware of the fact that there is a Constitution. [784]

And you know that the Employment Equity Act requires that equitable representation at all occupational levels and categories must be achieved, you know as well, not so? I am aware of that but also there is service delivery needs that also have to be taken into account.

And you know that before 1994 there was a section of the population who was excluded from having opportunities, black people, and you know that, am I right? Presumably, yes.

It is not presumably. When I joined the people... (intervenes)

How old were you in 1994? In 1994 I was 24 years old. I can just add when I joined the police in 1989 the people had the same opportunities that I had. I went to

[783] *Barnard* LC cross-examination transcript p301 l10-12.
[784] *Barnard* cross-examination transcript p295 l1.

college. We had different colleges by then, but the training I undergone, the Child Protection Unit I went, course I went to, the detective course I went to, were attended by people from all race groups by then.
Why did you have to go to different colleges if you are one people in one country? I cannot explain that, I was not part of the system, I was a person as a member of this country, I cannot explain that.
Will you agree with me that in a country like South Africa where black people were excluded from opportunities before 1994 that there is a need for them to be given an opportunity to advance their careers? Do you agree with me? I definitely agree with that. But if I can add, not to the disadvantage of other people, two wrongs do not make a right, and therefore I cannot, I am not in a discussion with regard to politics or whatever, but the purpose of the police is to protect and to serve irrespective of race or colour, and my duties at Complaints Investigation, we are the last resort for people that is dissatisfied with the service they get from the local police station and as I explained, 85% of my complainants were people from other race groups, complaining about their own people.[785]
Are you here to speak on behalf of black people? I am here to speak on behalf of my experience as a police officer, five years serving at a place like Complaints Investigation, dealing with complaints over the whole spectrum of South Africa. I am not a racist, I am a police officer dedicated to protect and to serve irrespective of colour.' [786]

Immediately striking about Extract B is that although Ms Barnard had acknowledged as common cause the implementation of the EEP and affirmative action as necessary, justifiable and constitutionally enshrined, and under cross-examination had further agreed on the need to advance black people, her responses suggested that she had not genuinely internalised the depth and scope of apartheid's destruction of black people and their communities, that until a better alternative presented affirmative action was a reasonable remedy for achieving transformation sooner than later. Instead, for her, affirmative action was one of two wrongs. She was unapologetic, unsympathetic and insensitive to victims of apartheid. She failed to recognise that she had benefitted in myriad ways at the expense of black people simply

[785] *Barnard* cross-examination transcript p291 l10; p292 l5.
[786] *Barnard* cross-examination transcript p294 l1-5.

because she was white. Irrespective of her personal, subjective views about equality, objective conditions positioned her as a member of a privileged group. For this, for the hardships such conditions ricocheted on black people, she was not prepared to atone indefinitely. At least, not beyond the three or so years for which she had already 'sacrificed' her career in favour of black people being preferred for appointment.

Her priority as a young person in the new democracy was to assert a claim not only for herself but also for other members of Solidarity and white people generally. Although she disavowed politics, the issues were intensely political. The legal, political, and constitutional culture and consciousness advanced on her behalf was consistent with conservative, centre-to-right-wing tendencies, exposing an anti-transformative ideological disposition. She and her representatives would vigorously disavow this observation because post-apartheid it is embarrassing to be characterised as someone who merely professes support for our constitutional democracy. Ambiguity, perhaps even the duplicity about constitutional transformation deepened.

Counsel for SAPS, an African man, himself a victim of apartheid, a late comer to the bar because he had to study law through a correspondence university while working full time as a teacher, was predictably incensed. Ms Barnard's remark about black people 'presumably' being excluded from opportunities prior to 1994 was flippant. Her lack of acknowledgment and atonement riled him. So did her sense of superiority that she served mainly black people who complained about 'their own people'. She might also have lost sympathy amongst judges in the LAC and the CC who expressed little sensitivity for her as a 'victim of affirmative action.'

Ms Barnard's ideological ambiguity about affirmative action is replicated in Vice's response in 'Dignity and Equality in *Barnard*'. Courageously and frankly, Vice advances the case for the reaction of white people to affirmative action, particularly their fears of competing with blacks for jobs and the moral and

political instability of their privileged positions.[787] Unsurprisingly, few commentators are able to engage dispassionately about an ideologically loaded topic like affirmative action without revealing our own tendencies.

Vice, a philosopher, discloses her tendencies and ambiguity subtly at first by distinguishing 'conflict between the dignity and moral equality of individual [white] persons, and the ideal of realising social and economic equality for those [black people] disadvantaged by apartheid.'[788] I read into her text 'white' and 'black people' for clarity. Vice could not have been referring to any other comparators or races in the context of a case about race based affirmative action. In the rest of her article, she applies this distinction to her analysis of the judgments in *Barnard* to suggest that 'dignity must be quantified and weighed against equality, and sometimes the dignity of one person must be weighed against the dignity of those people disadvantaged by apartheid.'[789] How would we attribute values for quantification as she suggests? Would this mean that a white individual would attract a higher value than a group of black people? In my view distinguishing between dignity, and moral and socio-economic equality, as if they are divisible, hierarchical and capable of existing independently of each other, finds no support in either our Constitution or morality. Individually or collectively, no one can legitimately claim moral equality for as long as socio-economic inequality persists. Nor is there dignity without equality, and vice versa. There! This is my ideological take on these matters of enormous practical complexity.

Less subtly, Vice distinguishes between 'respecting the dignity of unique, valuable [white] persons, on the one hand, and on the other, realising structural reforms that would compensate a group of [black] people for past injustices and ameliorate their current situation.'[790] Again, this distinction invites a reading into her text of the words 'white' and 'black'. Defining (white) 'persons' as unique and valuable and (black) 'people' in relation to 'past injustices', and attributing

[787] Vice 'Dignity and Equality' CCRVII 2015 at 135.
[788] Vice at 137.
[789] Vice at 150.
[790] Vice at 137.

dignity to the former and not to the latter is unfortunate, patronising and revealing of a liberal to right wing ideological disposition that reinforces apartheid's plan to elevate whites as a superior race. An impartial, though not neutral comparison would be between beneficiaries and victims of past injustices. Injustices are the common denominator – the comparator – that renders comparison meaningful. Not only race-based but class and gender-based injustices fall under the spotlight. After elevating white people thus, Vice advocates that 'all of us can and ought to think of ourselves as both unique individuals and members of socially and politically significant groups.' This exposes her ambiguity about affirmative action, equality, dignity and ultimately, constitutional transformation.

Vice acknowledges that whites were '(and some would say, still are) the beneficiaries of that injustice,' but cautions against a 'dismissive response', on account of 'practical and political considerations'. She holds up for consideration whites' economic power and their attachment to South Africa as their home. She suggests that understanding them in their position in a racially charged atmosphere seems 'ethically and psychologically required.' Vice identifies herself as a white person; her contribution is neither a neutral nor impartial account of affirmative action. Rather, it is advocacy in the interests of white people. Missing from her analysis is an appreciation of the dramatic bifurcation of political and economic power. White people retain economic power while black people exercise political power. The predominantly white economic power of the mining houses depends on the holders of black political power to adopt a 'business/investment friendly' Mining Charter. In contrast, the struggle of marginalised, mainly black communities for 'livelihood rights'[791] against black political and white economic power, reconfigures the contenders for redistribution of both political and economic capital. What Vice fails to factor into her deliberations is how the preservation of the interests of whites would 'tether the beast,' i.e. remedy the livelihood needs of the disadvantaged

[791] Frank I Michelman 'Foreword: On Protecting the Poor through the Fourteenth Amendment' 83 *Harv. L. R.* 7 (1969); William E. Forbath 'Not So Simple Justice: Frank Michelman on Social Rights' 1969-Present, 39 *Tulsa L. Rev.* 597 (2013). D Brand 'The South African Constitutional Court and Livelihood Rights' Chapter 20 at 414, 426-428.

masses. However, her caution against white capital flight is a countervailing consideration that further exacerbates the complexity of applying remedies for racial discrimination.

### 2.8.5 Exposing SAPS's ambiguity

SAPS exposed its ambiguity about affirmative action from the outset through its institutional inefficiencies. It advertised the post as 'non-designated', when its EEP provided for the appointment of a black person, preferably a coloured woman. To compound the ambiguity, SAPS advertised the post three times despite refusing to appoint Ms Barnard on the first two occasions on account of her being a white person. What was the purpose of misrepresenting that white candidates could apply, if there was no prospect of them being appointed? Were the adverts intended to create a paper trail professing a non-racial system of inviting candidates in order to camouflage the opposite? Or were the advertisements sheer mindless administrative inefficiencies? SAPS tendered no explanation. Nor did anyone ask SAPS for one.

Similarly, ambiguity proliferated in SAPS's literature on affirmative action and employment equity, with altruistic assertions about diversity, dignity and service delivery, e.g:

'The transformation process will help to expedite the promotion of diversity and the successful implementation of the Employment Equity Plan based on equal dignity and respect for all, … with the objective of achieving service delivery improvement which permeates across all sectors of Human Resource practices.'[792]

These contradictions between the literature and reality, between theory and practice and between altruism and individualism necessitated jurisgenerative dialogue to pummel out a constitutionally transformative resolution. Instead, the legal representatives glossed over the ambiguity. The LAC and the CC, which found for SAPS made no issue of them. For the LC and the SCA, they informed the courts' conclusions. Typically, the judges chose the rules and facts that

[792] Executive Summary of EEP cited in *Barnard* LC para 19.

best fitted their preferred outcomes.

Despite its opposition to appointing Ms Barnard, SAPS expected her to not only perform at the higher post level 9 but also to be willing to accept remuneration at the lower level 8. Under cross-examination, Mr Mokhari tackled her ego, her sense of self-worth and her willingness to deliver services irrespective of her pay and position in the following extract:

Extract C

'Would service delivery only be enhanced when you are promoted, but when you remain a captain doing the same job then it is not enhanced, is that how I am supposed to understand your evidence? I again said the post was not filled irrespective whether it is by myself or by any other person, the post was not filled and therefore service delivery was definitely hampered.'[793]

'But is it not correct, Captain Barnard that you are here because you wanted promotion? That is correct, and I think every human being in this court do have that same desire, if you work hard, if you keep your record clean and you bring your side then I think everybody desires to be acknowledged and to get promoted, definitely.'[794]

'So you can still make your contribution in the police then where you are, am I right? But why can I not be promoted?

No, I mean, you do not have to ask me questions, just answer them. So I am saying that are you still able to make an impact in the Police Service where you are? I can definitely make an impact and I never, ever as I explained, my performance actually improved because I wanted to prove to people I can do the job, I work hard, I am not lazy and I did not say now I am going to sit back because I am not promoted, never, ever. That again I think every person needs to get acknowledgement for good work done.'[795]

These questions probed Ms Barnard's willingness to atone for apartheid, and her willingness to sacrifice in order to advance victims of apartheid by expediting transformation in the SAPS. Mr Mokhari hit hard to drive home that

[793] *Barnard* Transcript p310 l 18.
[794] *Barnard* Transcript p314 l 21.
[795] *Barnard* Transcript p319 l 13.

race based affirmative action was necessary to reverse apartheid's job reservation for whites, which retarded black peoples' development immeasurably for decades. For him and SAPS, her avowed commitment to public service and her personal ambition were irrelevant, her claim for equality provocative, if not offensive, in the historical context. Manifestly the battle lines had been drawn long before the trial commenced. Beneath the veneer of national reconciliation, the litigation elicited deep racial animosity. So much so that consensus seeking processes were not even on the radar.[796] For both sides, tension between their obligations to espouse constitutional values and their aspirations, unravelled their ambiguity about affirmative action, transformation and reconciliation.

### 2.8.6 Exposing inefficiencies

By 'inefficiencies' I mean the constitutive elements that define the quality of management of an institution or entity. They include the entire gamut of activities, institutional arrangements, organisation, co-ordination, policies and practices that together collaborate across administrative, technological, financial and human capabilities, and the like. The legal materials reveal deep institutional malaise in the management of the administration of SAPS and its human resources. This in turn contaminated the litigation. Jurisprudence ensuing from the litigation confounds rather than comforts those affected. Society has to wait until next time for clarity on the issues that proved controversial throughout *Barnard*. Singularly, the National Commissioner's reasons for not appointing Ms Barnard threads through the inefficiencies implicating a. the administration, b. rule of law and due processes, c. the standard of evidence and d. the dispute system design (DSD).

#### 2.8.6.1 Administration compromised

Decision-making in public administration is a formidable, multi-layered bureaucracy. Predictably, ministers, heads of departments and accounting officers depend on subordinates for recommendations on which to base their

[796] Discussed below.

decisions. Such recommendations have to be supported by reliable information. As a general rule a decision-maker may not fetter his discretion.[797] However, depending on the empowering provisions, he could be bound by a recommendation.[798] This was not the position in *Barnard*, where it was common cause that the National Commissioner could reject the recommendation.

However, interviewing panels were constituted in the SAPS precisely to serve the purpose of being a conduit for credible information from the ground up.[799] They were not only sensible but also essential management tools in a bureaucracy. Senior police officers constituted the panels to assist the National Commissioner, signalling the importance of the panel and their task. Three lower layers of management compiled the recommendation after painstaking deliberation during which they recognized that representivity would not be addressed. The panels struggled to reconcile conflicting policy about implementing affirmative action, with the Instructions that directed service delivery should not be compromised. Involving Regional and Divisional Commissioners added layers for quality assurance of the recommendation. After all, if anyone was knowledgeable about the division, it had to be the Divisional Commissioner. So, although it was common cause that the National Commissioner was not bound by a panel's recommendation, at least he had to 'engage with' what they put before him.[800]

When the National Commissioner made his final decision on filling a vacancy, it was as an officer exercising public power purportedly in the public interest. The National Commissioner's conclusion that the posts were not critical, and

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[797] *Minister of Environmental Affairs and Tourism & another v Scenematic Fourteen (Pty) Ltd (Pty) Ltd* 2005 (6) SA 182 (SCA) para 20G; *Hofmeyr v Minister of Justice*1992 (3) SA 108 (C) at 117F Baxter *Administrative Law* at 443. *Glencore v Minister of Mineral Resources* [2016] ZALCJHB 31; (2016) 37 ILJ 966 (LC) para 129.

[798] *Paola v Jeeva NO and others* [2003] 4 All SA 433 (SCA); *Minister of Health v New Clicks South Africa (Pty) Ltd & others* 2006 (2) SA 311 (CC); Hoexter *Administrative Law in South Africa* (2012)) at 273 – 276.

[799] *EFF v Speaker of National Assembly & others* 2016 (3) SA 580 (CC) para 74: 'No binding and constitutionally or statutorily sourced decision may be disregarded willy-nilly …. To achieve the opposite outcome lawfully, an order of court would have to be obtained.' *Head, Western Cape Education Department & others v Governing Body, Point High School &* others 2008 (5) SA 18 (SCA) at 25C-G; *Walele v City of Cape Town & others* 2008 (6) SA 129 (CC); Hoexter *Administrative Law in South Africa* at 272, 276; *Paola*; *New Clicks.*

[800] *Barnard* SCA para 60-61; *Barnard* LC para 24.5 to 24.20.

service delivery would not be affected, contradicted the facts that the panels presented to him. Rejecting the recommendation without cause or on insubstantial or false premises meant rejecting the validity of the recommendation, as well as the information motivating for implementation of the recommendation. Impliedly he reneged on the established system of decision-making. Representivity was one part of the reason for his decision about which there was no dispute. The other was service delivery not being compromised. Service delivery was an unresolved question of fact.[801] He had to put up much more than his bald conclusion that the delivery of services to the people in the division would not be compromised if he did not fill the post.

However, the reasons for the National Commissioner's decision signalled the conundrum beneath the surface.[802] Conceding that by not appointing her he compromised service delivery, would have contradicted his Instructions about prioritising service delivery. He could have been criticised for preferring the politics of representivity over the peoples' need for services. However, his reasons empathetically invoked the terminology of transformation in the LAC:

'The over representivity of whites in level 9 is a stark reminder of our past and indeed the present and yet another wake-up call to decisively break from these practices. These are practices that can be effectively broken by embracing the restitutionary spirit of the Constitution.[803]

Opponents of transformation might argue that by appointing Ms Barnard he would have thwarted his ideologically driven agenda of replacing apartheid's state apparatchiks with those of his own party.

In rejecting the recommendation, the National Commissioner had to say something about service delivery because that weighed heavily in the Divisional

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[801] *Barnard* SCA para 58: 'To determine whether the discrimination was fair, the facts in this case require closer and scrupulous scrutiny. Regrettably, this is not an exercise that the LAC embarked on. This appeal turns on the facts and it would be presumptuous to assert and foolish to assume that this decision will be a Merlin-like incantation to address the varied cases likely to come before courts in relation to the application of the EEA. In *Van Heerden*, as stated above, the assessment of fairness is said to require a flexible but 'situation sensitive' approach.'
[802] Kennedy 'Phenomenology' above.
[803] *Barnard* CC para 38.

Commissioner's recommendation of Ms Barnard.[804] Conflict about service delivery needs between the National Commissioner and his subordinates exposed another layer of contradictions and ambiguities within SAPS. This is also a consequence of the complexities that arise when applying affirmative action. Theoretically, affirmative action encounters few headwinds; it is in implementation and its polycentric impact that unravels the theory. Additionally, the National Commissioner's subsequent failure to testify about his decision, when the decision was his alone, impugned not only the credibility of his reasons but also the efficiency of the administration. His reasons, the unaccountable way in which SAPS litigates, were instrumental in spawning the shaky foundation on which our jurisprudence on affirmative action now stands.

#### 2.8.6.2 Litigants' failure to follow due process

By issuing 'opaque' and 'sparse' reasons, SAPS escalated administrative inefficiencies to human resource management failures. It failed to convene grievance hearings and attend conciliation. These prescribed procedures were built into the labour DSD to minimise conflict at the earliest. It was the opportunity to share information and clarify issues. During these processes SAPS should have been able to produce, as required of all managers of efficient services, statistical or like evidence to prove that it had reliable systems in place to monitor and measure service delivery needs.[805] Having missed that opportunity, another emerged in the form of a pretrial conference. Disclosures usually occur through discovery and pre-trial preparations. Inexplicably, the SAPS failed to even attend the pre-trial conference.[806]

If SAPS had statistics about service delivery, they did not share it as they should have, both as a litigant and as is expected of an accountable and transparent provider of an essential public service.[807] None of the courts finding in favour of SAPS reprimanded its officials responsible for its breaches with regard to pre-

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[804] *Barnard* SCA para 34 -35.
[805] *Barnard* SCA para 22.
[806] *Barnard* LC transcript p 388: MR GROGAN: 'Well it goes further and I can say because it will be a matter for the record that they did not bother to attend the pre-trial conference either, but be that as it may.'
[807] Section 195(1)(f) and (g) of the Constitution.

trial processes, especially its constitutional obligation to disclose relevant and reliable information.

Like SAPS, Ms Barnard's team did her no favours either. They did not compel disclosure of the statistics as the rules of court allowed.[808] Consequently, the question whether service delivery was compromised, a factual dispute, bounced from one court to the next as each court tried to draw inferences that best suited its ideological disposition and preferred outcome. The factual conflict about service delivery should never have risen. Nevertheless, having arisen, they should have been resolved in the trial court, if not before.

The consequences of failing to hold pretrial conferences shored up inefficiencies midstream as an unexplained change of tack. In the CC, Ms Barnard's cause of conflict changed dramatically from the one she presented to the SCA. Despite the SCA's finding in her favour, in the CC 'she accepted, contrary to the finding of that Court, that the decision not to appoint her did not adversely affect service delivery.'[809]

Court watchers and communities concerned about service delivery were abandoned with Ms Barnard's team's concession. Her concession even contradicted the basis of her interviewing panel's recommendation to appoint her. Forsaking her victory in the SCA, she released the CC from deciding the service delivery dispute. Once conceded, the CC had little choice but to confine itself to the only remaining issue in dispute: representivity.

Why did she contest service delivery needs in the first place if all she and Solidarity were interested in was the politics of representivity? Was service delivery and the interests of the community merely a façade of altruism? Was it inefficiencies in their preparation for trial that caused them to change tack at the last minute in the final court? Or was it a reflection of their ideological

[808] Rule 35 of the Uniform Rules on discovery.
[809] *Barnard* CC para 64.

disposition all along to centralise race-based discrimination in the application of affirmative action?

#### 2.8.6.3 Quality of evidence compromised

At the trial, SAPS produced no statistical or other evidence of service delivery needs. Three undisputed facts supported the inference that filling the post was critical for service delivery: i. The post was advertised three times in short succession. ii. SAPS transferred a white male laterally to fill the vacancy in the interim while the post was being filled. iii. The Divisional Commissioner included the need for service delivery as motivation for appointing Ms Barnard. Furthermore, the general proposition that the more police officers there are, the better the delivery of services, could hardly be refuted. In the South African context of a large population and inadequate police officers, the high crime rates, productivity theories that advocate less is more would not have applied.[810] The courts might justifiably have taken judicial notice of this fact. SAPS offered nothing other than a bald denial that service delivery would not have been compromised.

The onus to prove that the post was not critical, and that service delivery was not compromised rested on SAPS. As the employer, as the party who was privy to service delivery information, as the party asserting that service delivery was not critical and having reversed a finding of the panel recommending Ms Barnard's appointment, SAPS bore the onus. Almost smugly and suggestive of Ms Barnard bearing the onus of proving service delivery needs, SAPS's heads of argument in the SCA read:

'Given the paucity of evidence in this respect, it cannot be argued that the failure to appoint Mrs Barnard prejudiced the interests of the SAPS.'[811]

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[810] E.g. Robert Dorfman 'Theory of production' https://www.britannica.com/topic/theory-of-production (accessed 10 February 2019); Tobias van Schneider The psychological theory that explains why you're better off working solo "the Ringelmann effect," or social loafing that suggests people working in a group exert less effort than if they work on their own https://qz.com/848267/the-ringelmann-effect-productivity-increases-when-youre-working-solo-rather-than-on-a-team/November 30, 2016 (accessed 10 February 2019).

[811] *Barnard* SCA para 75.

Upholding the LC, the SCA described the evidence of 'the only witness who testified in support of the SAPS' case in the Labour Court', as 'peculiar'. This description was not exaggerated. The transcript of the evidence bears out the SCA's evaluation that Senior Superintendent Johannes Ramathoka:

'had no first-hand knowledge of the case or of the various documents such as the EEP and the National Instruction which were put before him. He thus merely confirmed and sought to explain their contents, and often appropriated to himself the right to interpret those documents. … He was presented with the minutes of the meetings … and their contents were read to him. It is difficult to discern the purpose of leading the evidence in this manner. Much of his evidence was plainly inadmissible. And that which was admissible carried little, if any, evidential weight. What is clear is that apart from the cryptic statement in the letter signed on behalf of the National Commissioner and the minutes of the meeting at which he was present which mirrored that statement, we have no insight into the National Commissioner's reasoning and for his failure to respond fully to the motivation by the interviewing panel and Divisional Commissioner Rasegatla.'[812]

Finding no assistance from the National Commissioner 'in relation to his motivation and reasoning beyond the cryptic note signed on his behalf', 'no explanation provided for his failure to tender any other evidence', and consequently, 'no indication that he grappled with all of the issues raised by the recommendation panel and Commissioner Rasegatla', ineluctably, the SCA concluded that the National Commissioner 'did not engage with what his own management team had put before him.'[813]

The SCA was unflinching in its criticism of the quality and quantity of evidence for SAPS. Its rule choice, i.e. the rules of evidence, was unassailable. Predictably, its choice anticipated its finding against SAPS. Stripping down SAPS's case entirely to a dispute of fact about service delivery, freed the SCA to look favourably on Ms Barnard as a vulnerable minority,[814] enabling it find in

[812] *Barnard* SCA para 44.
[813] *Barnard* SCA para 67.
[814] *Barnard* SCA para 54.

her favour:

'Failure to appoint Barnard to a position which, in terms of the regulatory constitutional and statutory framework must have been necessary leads ineluctably to the conclusion that service delivery must have been affected.'[815]

Similarly, Cameron J criticised the SAPS's inadequate evidence for offering little else to justify the decision of the National Commissioner, who had not deposed to an affidavit explaining his decision, or his reasons for making it, and for SAPS failing to elaborate on his stated reasons in the lower courts and in its arguments in the CC. Cameron J agreed with the SCA, as I do, that the National Commissioner's reasons for his decision were, 'at best, opaque'. [816] So intense was his criticism that he warned against decision-makers giving inadequate evidence and reasons for their decisions. But unlike the SCA, he reserved his warning for another case.

#### 2.8.6.4 Dispute system design (DSD) sacrificed

The DSD for labour and employment disputes suffered serious setbacks on several fronts. Grievance and conciliation hearings were designed to resolve conflict consensually, as far as possible. Ms Barnard referred two grievances for resolution internally. A grievance hearing is bilateral, internal negotiation between employer and employee. Receiving no response from SAPS she referred one of the two grievances to conciliation. A conciliation or mediation is an external process before a mediator.[817] Conciliation failed. Before detailing the significance of these non-events for conflict management, a detour down history lane explains the importance of the policy underpinning the necessity of these processes in labour DSD. Furthermore, best practices in labour DSD has lessons for conflict management in other areas.

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[815] *Barnard* SCA para 76.
[816] *Barnard* CC (Cameron J) para 107.
[817] The International Labour Organization (ILO) distinguishes a conciliator as more interventionist than a mediator. For more differences between conciliation and mediation see http://www.cmap.fr/faq/what-is-the-difference-between-mediation-and-conciliation/?lang=en. (accessed 15 August 2019) The difference is immaterial for present purposes.

Following an ILO Fact Finding and Conciliation Commission (FFCC) Report, the newly established Cabinet in democratic South Africa approved, in July 1994, the establishment of a Ministerial Legal Task Team to overhaul the laws regulating labour relations.[818] The Labour Relations Act 66 of 1995 (LRA) was the result. A new DSD came into force. One of the policy options underpinning the LRA's DSD was to prioritise conciliation as the primary method of dispute resolution. The Task Team noted in its Explanatory Memorandum of 1995:

'It is widely acknowledged that the dispute resolution processes in the existing laws do not function effectively. Independent mediation services inside South Africa have a success rate of over 70%. Comparative research shows that independent conciliation, mediation and arbitration services can have a high success rate in resolving disputes. Advisory, Conciliation and Arbitration Service (ACAS) in the United Kingdom has a 75% rate of success, and the Federal Conciliation Commission in Australia a success rate of over 90%.'[819]

The Explanatory Memorandum accompanying the LRA recognised the importance of non-adversarial forms of dispute resolution as a foundation upon which to build a DSD. Grievance procedures were conceived as the first level of formally articulating a dispute for negotiating a settlement.[820] As an internal process, employer and employee (with or without a trade union or fellow employee representative) are meant to share information, clarify

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[818] 2 Explanatory Memorandum (LRA) 1995 *ILJ* at 279: 'On 8 August 1994 the Minister of Labour appointed a Ministerial Legal Task Team comprising the following members: Professor H Cheadle (Convenor); Mr R Zondo; Ms A Armstrong; Ms D Pillay; Mr A van Niekerk; Associate Professor W le Roux; Professor A Landman (President of the Industrial Court); Mr D van Zyl (State Law Adviser seconded to the team).' 'Its brief was to draft a Labour Relations Bill which would include the following:
-give effect to government policy as reflected in the Reconstruction and Development Programme (RDP);
-give effect to public statements and decisions of the President and the Minister of Labour, which commit the government to International Labour Organization (ILO) Conventions 87, 98 and 111, among others, and the findings of the ILO's Fact Finding and Conciliation Commission (FFCC);
-comply with the Constitution;
-provide simple procedures for the resolution of disputes through statutory conciliation, mediation and arbitration and the licensing of independent alternative dispute resolution services;
-provide a system of labour courts to determine disputes of right in a way which would be accessible, speedy and inexpensive, with only one tier of appeal; …'(my underlying).

[819] Explanatory Memorandum (LRA) at 326.

[820] The Explanatory Memorandum (LRA) at 297: 'The draft Bill provides for the right to elect trade union representatives to represent employees in grievance and disciplinary proceedings and to monitor compliance with the law.'

misunderstandings, articulate anxieties, express aspirations, all with a view to solving problems on mutually acceptable terms. They may agree on some issues but also agree to disagree on others.

If negotiations failed, the employee could externalise the dispute by referring it to conciliation or mediation before the CCMA or a bargaining council having jurisdiction. Again, the policy consideration was that employers and employees should engage sensibly to find solutions that best suited their particular service, industry or workplace. But an effective DSD has grander ambitions than peace in the workplace.

Macro-economic implications were contemplated for an effective DSD:
'Comprehensive research has shown that the financial performance of companies is enhanced where the following exist: … information sharing … and formal grievance procedures.'[821]

Reliable, empirical and comparative evidence bolstered the case for conciliation.[822] Replacing the unworkable conditions in the old Industrial Court system had to be fixed urgently. Hence:
'The Commission's main function is actively to attempt to resolve disputes by conciliation so as to reduce the incidence of industrial action and litigation.'[823]

So high a value was placed on conciliation that even if a dispute was before adjudicators, the LC could return litigants to conciliation (as Pretorius AJ contemplated doing) [824]:

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[821] Explanatory Memorandum (LRA) at 311. Although this quotation appears in the motivation for establishing workplace forums, which have not won favour in our intensely adversarial industrial relations, these observations about grievance procedures is simply common sense.
[822] Explanatory Memorandum (LRA) at 327-8:
'The Commission is designed as a one-stop shop for resolving disputes. Its commissioners will attempt in the first place to resolve disputes by conciliation, mediating where appropriate. A commissioner will be empowered to attempt other means of resolving the dispute, such as fact-finding, making recommendations and commissioning expert reports. Only where these attempts fail will the commissioner determine certain disputes by arbitration. Where disputes are to be adjudicated by the Labour Court, the Commission will first seek actively to engage the parties in an attempt to resolve disputes to avoid unnecessary litigation.'
[823] Explanatory Memorandum (LRA) at 330.
[824] *Barnard* transcript p 286 l18.

'The emphasis in the draft Bill on conciliation as the primary means of dispute resolution is echoed in this section. The Labour Court is entitled to decline to hear a matter unless it is reasonably satisfied that the dispute has been referred to conciliation and that the parties have attempted to resolve the dispute.'[825]

Dispute resolution under the EEA straddled the LRA. The Explanatory Memorandum to the Employment Equity Bill provided:

'The Bill adopts the conciliation, arbitration and adjudication model of the Labour Relations Act. It uses the existing mechanisms established under the Labour Relations Act, i.e. the CCMA and Labour Court, to resolve disputes arising under the Bill. Disputes concerning unfair discrimination or protection of rights that are unresolved after conciliation may be referred to the Labour Court. Disputes concerning affirmative action and employment equity measures are resolved through conciliation and failing that, through arbitration.'[826]

Shifting the emphasis to conciliation was a 'no-brainer'. It was a cost savings to the economy,[827] to employers and to trade unions by avoiding strikes, boosting worker morale, expedited resolution of labour disputes and capacitating employers, workers and unions to represent themselves without having to rely on lawyers. The grievance and conciliation procedures were indispensable conflict management tools. Pragmatism advocated in the LRA and EEA fitted in with all the promises in the Constitution of reconciliation through dialogue. Renovating the DSD rightfully instated democracy in the workplace as a much-coveted consequence of constitutional and statutory reform.

Grievance procedures and conciliation were measures about empowering employees to be active participants in decision making about matters that

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[825] Explanatory Memorandum (LRA) at 330.

[826] Explanatory Memorandum to the Employment Equity Bill (1998) 19 *ILJ* at 1345 Explanatory Memorandum (EEA).

[827] Explanatory Memorandum (LRA) at 328.
'Providing a professional, expert and effective conciliation service may well require a budgetary allocation exceeding the present one, but the Task Team is persuaded that the investment will have a multiplier effect in savings to government and the economy. The service is designed to promote labour peace which, in turn, will reduce the incidence of industrial action and promote a favourable climate for investment. …The statutory conciliation procedures have been streamlined and simplified.'

affected them, individually and collectively, to devolve democracy to the most accessible level, i.e. the workplace. The model was also structured on the premise that bona fide employers and employees would know or seek out what the best outcomes were to suit their particular circumstances. This objective was all the more poignant in a nascent democracy, taking tentative steps on new pathways that ramified in multiple directions, testing as it went along, discovering what worked and quickly fixing what did not.

Implementing affirmative action is just such a poignant issue. No one involved in conflict management or dispute resolution in South Africa can ignore discrimination on the grounds of race; it is a high probability source of conflict. Manifestly, cases about equality and affirmative action are ineluctably fraught with conflicting interests and ideologies across the spectrum of people directly affected and armchair critics alike.

From the perspective of macro-economics, the LRA DSD skewed investment and budgetary allocations to favour conciliation more than adjudication. If conciliation failed to be the primary process for resolving disputes, then the DSD would collapse.[828] Dysfunctional grievance and conciliation systems would overload adjudication in institutions like the CCMA, the LC, the LAC, the SCA and the CC,[829] not to mention the escalation of industrial action. Such dysfunctionality would herald the bad old days of the apartheid era industrial relations system. This time the onslaught would be worse. With the Constitution offering a more expansive approach to rights to enforce the right to strike,

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[828] Paul Benjamin and Carola Gruen 'The Regulatory Efficiency of the CCMA: A Statistical Analysis of the CCMA's CMS Database' https://open.uct.ac.za/bitstream/handle/11427/7351/DPRU_WP06-110.pdf (accessed 19 December 2018); CCMA annual Report 2006-7; Office of Chief Justice Annual Report I Budget Vote 22 I 2017/18; Commission for Conciliation Mediation and Arbitration | Annual Report 2017/18 at 35; Colleen Blignaut 'The effectiveness of conciliation as an alternative dispute resolution process in unfair dismissal disputes A mini dissertation in partial fulfilment of the degree LLM Labour Law, Faculty of Law University of Pretoria Supervisor: Prof Monray Marsellus Botha https://repository.up.ac.za/bitstream/handle/2263/65692/Blignaut_Effectiveness_2018.pdf?sequence=1 (accessed 19 December 2018).

[829] Statistics in the report from the Office of the Chief Justice/DOL expose the Labour Court as one of two jurisdictions which has the most reserved judgments outstanding for more than six months. https://www.judiciary.org.za/images/news/2019/Reserved_Judgment_Report_for_the_Chief_Justice 28_February_2019_final_002.pdf (accessed 15 August 2019).

freedom of expression, the right to pursue one's economic activity and career, the number and nature of disputes would escalate. Expanding access to court and other services would strain many public services.

This was the institutional milieu in which *Barnard* germinated. The following extracts from the transcripts of the trial court reveal i. how Ms Barnard felt about not being promoted; ii. her attempts at processing her grievance; iii. her attempts at conciliation; and iv. the attitude of the legal actors to conciliation.

#### 2.8.6.4.1 Processing the Grievance

What Ms Barnard did to process her grievance is best captured in Extract B in her evidence in chief. Cross-examination failed to dent her evidence.

Extract D

'[Mr Grogan] Could you just tell us very briefly the sequence of that grievance and how it unfolded? When I became aware of the fact that post 6903 was withdrawn and not filled I wanted to know what the reasons there for was.

Therefore I lodged an application in terms of the Access to Information Act requesting the reasons for the post withdrawal.[830]

…

you must remember I am coming out of a police officer's house[831] and to lodge a grievance, again now as well, it is a very negative experience, and I did not want to be classified as a problem child or whatever, a problem maker, so it was a difficult decision for me [to] take, to register a grievance and then later on as I explained that I heard that the post is going to be re-advertised, so I decided to leave it at that and just to reapply again. But I was still within the timeframes of, the prescribed timeframes in which a grievance must be dealt with. At that stage it was 180 days from the date that you are, that you became aware of the problem ever since the grievance procedure will be expiring.

You decided not to pursue it because of the new vacancy. That is correct.[832]

So I drove the process with regard to the first grievance and then afterwards I lodged

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[830] *Barnard* LC transcript p280 l16.
[831] *Barnard* transcript p282 l20; Ms Barnard's father had been a senior police officer – p288 l14.
[832] *Barnard* transcript p283 l12.

the second grievance. So the first grievance was mainly dealt with, but the second grievance for post 4701, they never adhered to their own instructions. After six months they decided, no, I requested them several times because I have got the proof thereof, to give me feedback because it had to go to the Joint Resolution Meeting and thereafter there must be mediation, so then I got the person that assisted me in this process was Superintendent van Wyk and then she decided that we must just inform them that we are going to take that grievance seeing that they are not adhering to their own policies, we are going to take that grievance together with 6903, because they could not, or not could not, they did not want to resolve the matter, so we referred it to the CCMA. … that particular person was working with me in the same section, so he assisted me in dealing with this grievance, so we went up with the Joint Resolution Meeting and everything up until mediation.'[833]

The SAPS ignored Ms Barnard's grievances. Indifferent to the reconciliatory spirit and purpose of the Constitutional Law and Labour Laws to provide relevant information to resolve disputes, and her manifest interest in the reasons for her non-appointment, it unconscionably obliged her to apply for disclosure under the Promotion of Access to Information Act. SAPS was obliged to give information relevant for the trial via discovery. Ironically, in latter day apartheid, a request for reasons for administrative decisions required little more than a letter to the decision-maker who caused workers to be retrenched[834] or activists to be detained.[835] In and of itself, resisting disclosure amounted to passive aggression. Furthermore, this was not a private dispute between the National Commissioner and Ms Barnard and Solidarity. It was of public interest involving personnel who served the public administration of police services. The DSD and inevitably the public purse were implicated. Institutions like the SAPS have huge human resource (HR) departments whose staff are regularly exposed to training on the job. Their training is not only about Labour Law and Contract Law.[836] It includes psychological, medical and all

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[833] *Barnard* transcript p284 l4.
[834] *Adminstrator of Natal and Another v Sibiya and Another* (100/91) [1992] ZASCA 115; 1992 (4) SA 532 (AD); [1992] 2 All SA 442 (A) (20 August 1992).
[835] *State President and Others v Tsenoli Kerchoff and Another v Minister of Law and Order and Others* (124/86) [1986] ZASCA 118 (30 September 1986).
[836] White Paper on Human Resource Management in the Public Service http://www.dpsa.gov.za/dpsa2g/documents/acts&regulations/frameworks/white-papers/pservicedec.pdf (accessed 19 December 2018)

other aspects that go to rendering humans resourceful. The SAPS's HR had to know that it had an obligation to process grievances and what the implications were for its relations with employees and for national reconciliation.

Irrespective of the motives of Ms Barnard and Solidarity about testing the law on affirmative action, the SAPS was the responsible party for giving effect to Labour Laws and policies, to govern, manage and lead on behalf of the people of South Africa. The LC singled out the National Commissioner as the person responsible not only for implementing the EEP but also managing and championing it. Bestowing such a mandate upon him elevated the importance of both the EEP and the processes underpinning it to ensure efficiency. Efficiency in the context implied consciousness that an unresolved grievance carried costs, some as insidious as low morale, excessive sick leave and depression. But there is a far bigger structural cost.

Unresolved internally, the grievance would gel into a dispute for conciliation by another state institution, the CCMA. The CCMA falls under the Department of Labour. Unresolved at conciliation, the dispute would escalate to litigation. Yet another state department would be burdened. In *Barnard*, all four tiers of the judiciary expended the resources of the Department of Justice and Constitutional Development and the Office of the Chief Justice. So the contagion of inefficiency that germinated in the failure to respond at all to a grievance, spread from the SAPS into two other state departments, consuming tax payers' resources that could have been better spent on providing health, education, water and housing. Litigation would have been far more efficient

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https://www.westerncape.gov.za/assets/departments/social-development/white_paper_on_human_resource_management_in_the_public_service_1997.pdf (accessed 19 December 2018); http://unpan1.un.org/intradoc/groups/public/documents/cpsi/unpan029366.pdf (accessed 19 December 2018): 'Managing conduct and grievances 28. The Code of Conduct for Public Servants issued by the Public Service Commission requires departments/administrations to develop supplementary codes of conduct to suit their own circumstances. Managers will have a particular duty to be exemplary to their staff. Procedures to deal with breaches of conduct will be streamlined and speeded up. National departments and provincial administrations will be required to develop procedures that are aimed at settling grievances promptly, amicably, fairly and objectively and, as far as possible, at the point of origin.'

after the parties shared information, exchanged concerns, engaged in good faith in grievance proceedings, searched for common ground and reciprocity, and then carefully identified unresolved issues for adjudication.

The SAPS offered no explanation whatsoever as to whether and, if so, why it failed to respond to the grievance. If the SAPS's HR did not know how to process a grievance and dispute through mediation this would also count as further evidence of institutional inefficiency. Its inability or unwillingness to account in the LC to Pretorius's pointed questions about not complying with its Labour Law obligations regarding grievance processing is another layer of unaccountability. In the absence of an explanation, characterising the SAPS as inefficient is an understatement. SAPS's failure propelled Ms Barnard's grievance to the next level – mediation or conciliation before the CCMA.

#### 2.8.6.4.2 At mediation

Extract E captures Ms Barnard's uncontested evidence in chief about what transpired at mediation.

Extract E

'[Ms Barnard]: and then when mediation took place the first time we had the meeting with the mediator they [SAPS] blew my cover totally because they said this person that represent me is an advocate that has got access to the High Court and he is there as an advocate and not as a fellow colleague. So I disagreed and he also "argumented" [argued] to that effect to say but he is there as my rep and not as a practicing advocate.

[Mr Grogan]: He is also a police officer? A police officer, a senior superintendent, so their reasoning was that the playing field at that stage was not levelled, but the playing field was never levelled because I am a captain and the Commissioner attended that mediation dressed in full uniform with his insignia, the mediator [?] is a senior superintendent, so I felt the playing field was never levelled and then they refuses that person to represent me and they told me that I must just get out and get someone in the hallway to represent me for that particular mediation process at that time. So I refused and I said to them I need proper time to get me a new representative, and later on we also requested a legal opinion with regard to this

and up to date I am still waiting for that legal opinion.'[837]

Ms Barnard's unchallenged account of the SAPS's conduct at the mediation is a far cry from what our constitutional democracy, the LRA, its aspirations, policies and practices anticipate. Unconscionably, the Commissioner[838] was instrumental in subverting mediation by raising a technical objection that had in my view no legal foundation. Even if the objection had substance, mediation was not the moment to raise technicalities. Belligerence, passive aggression and insensitivity characterised the SAPS's response and management style from grievance to mediation. While Ms Barnard and Solidarity were provocative in pressing their claims, as the leadership entrusted by the public to represent their interests efficiently, more was expected of the SAPS.

#### 2.8.6.4.3 How the legal actors responded

Extract F

COURT: Has mediation taken place? At the end the lady, as I mentioned, Superintendent van Wyk, she came and assisted me then and then there was a problem with the mediator, he was off sick, so the third time the process was being postponed for the third mediation to take place, then they [SAPS] say, no, they cannot come up with a solution, and then she said to them we must sign this so that we can take the matter to the CCMA [Labour Court?]. …

No, but did mediation take place? In effect we never really discussed it, they say they are not in a position, ja, maybe that is, they are not in a position to discuss the matter or to settle the matter, so it was referred.

Are you making an issue of this in your argument?

MR GROGAN: My Lord, I was about inform you that the witness took the question a lot further than I anticipated. That is not part of our case in these proceedings.

COURT: Well it may, you know that there is authority both in the United Kingdom and in South Africa that where mediation ought to be held and particularly where it is part of a process the failure to adhere to the process and the failure to attempt to settle a matter through mediation may result in adverse cost orders.

MR GROGAN: Well My Lord, those were internal... (intervenes)

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[837] *Barnard* transcript p284 l26.

[838] It is not clear from the transcript whether this was the National or Divisional Commissioner.

COURT: But that is not an issue that has been raised on these pleadings.
MR GROGAN: No, it is not an issue that is raised.
COURT: It is an issue that may be raised *mero motu* by my me. I will see what is put in cross-examination.[839]
MR GROGAN: Thank you, My Lord. Well on that score perhaps I can ask this question, when you got to the CCMA for the conciliation who appeared? For me or for the SAPS?
Who was there? There was a Commissioner obviously. I served the whole document according to the prescribed prescriptions to the police, it was faxed to the Legal Services, I got a fax report to the effect that it was sent to them, and the day that was set out for the CCMA discussion or trial or whatever you call it, I was there with my representative and the police were absent. So they were called several times and they did not appear, so then the CCMA issued a certificate that I can take the matter further to the Labour Court.'[840] (my underlining)

Later Pretorius AJ reminded counsel for the SAPS, Adv Mokari SC:
Extract F continued
'COURT:(Indistinct) noted that you will give me full instructions tomorrow on what occurred, both at the grievance stage and at the conciliation stage.'

By the last day of the trial,[841] when Mr Mokhari had still not responded to the Court's query, Pretorius AJ repeated his question at the end of Mr Mokhari's address.
Extract G
'COURT: … will you make any submissions regarding the procedures followed and particularly the absence of any conciliation and the allegation that the mediation process was not properly fulfilled?
MR MOKHARI: I heard about the allegation of mediation but I tried to canvass it with my clients yesterday. They are also not clear about that issue and we have decided not to really pursue that line. As the Court pleases.[842] (my underlining)

Stonewalled by Mr Mokhari and SAPS, Pretorius AJ turned to Mr Grogan:
Extract H

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[839] *Barnard* transcript p286 l18.
[840] *Barnard* LC transcript p285 l19.
[841] *Barnard* LC transcript p325 l1.
[842] *Barnard* LC transcript p334 l15.

'COURT: What do you say about the procedural aspect? It seems to me that quite apart from the substantive issue which I will consider and make a decision on, that there must be a procedural element especially where people find themselves aggrieved that the processes provided for in the grievance procedure which was utilised and by the legislation the conciliation ought to be properly used so that people can be properly informed as to what the reasons were for the action, questions can be asked and answered and if necessary, only if necessary, concessions can be made, but there is a value to the procedure in allowing parties to come to a greater and deeper understanding of the reasons for a particular action and an explanation for the consequences and why the consequences should be accepted.

That has not really been addressed, but it does appear and it has been conceded by Mr Mokhari that there is a procedural element to fairness as well. Now I raised the issue yesterday, what submissions do you make in that regard?

MR GROGAN: My Lord, the first response to the issue that you raised is that I felt terribly remiss when Your Lordship left in not actually asking what it was that you wished us to respond to, because I up to the point that Your Lordship left had misconstrued your observation in relation to that procedure and I thought you were heading in the direction of exhaustion of external, of internal remedies and so on.

COURT: No.

MR GROGAN: But then I had immediately gathered that that was not the case, and I racked my brains last night, My Lord... (intervenes)

COURT: Just what happened, what, the evidence of Mrs Barnard was that the grievance procedure mediation effectively did not take place.

MR GROGAN: Yes.

COURT: Insofar as it did not take place it was not adequately pursued and it is common cause that at conciliation the respondent was not present.

MR GROGAN: Well it goes further and I can say because it will be a matter for the record that they did not bother to attend the pre-trial conference either, but be that as it may.

COURT: Well that is...

MR GROGAN: It is all indicative of the manner in which it is...

COURT: Yes, but that is different.

MR GROGAN: Yes.

COURT: Now I have invited both parties to address me on that. Those are the facts

that I must assume are the correct facts.'[843]

Further:

'COURT: Why does the statute say that you must conciliate these disputes before coming to court?

MR GROGAN: Exactly, My Lord, there is... Sorry. Sorry, My Lord, there is a reference in the Act, I will find it in a moment, to the fact that certain inferences can be drawn from a failure by an employer to attend a conciliation.

COURT: Well you cannot ask me to draw those inferences without putting them before the respondent to answer.

MR GROGAN: No, I only take it this far.

COURT: I can only assume that it did not take place.

MR GROGAN: It just says...

COURT: What section are you referring to?

MR GROGAN: It is section 53 of the Labour Relations Act, which deals with the power of the Labour Court and it says:

> "The Labour Court in making an order may take into account any delay..."

No, no, sorry, this is not the provision that I was thinking of. Any delay in processing... I think this would relate, this would be a costs issue.

COURT: Well perhaps I have ambushed both parties on this point.

MR GROGAN: No, I think perhaps I was handed the wrong example.

COURT: All right, thank you, Mr Grogan.'[844] (my underlining)

Pretorius AJ clearly caught both counsel off-guard. Unlike the judge, both representatives and SAPS had failed altogether to appreciate the significance of consensual forms of dispute resolution, their purpose in a DSD and the domino effect of non-compliance. Such processes played no part in the preparation and presentation of Ms Barnard's case. Worse still, SAPS, whose business is as employer to know the value of process in state administration showed no appreciation for the usefulness of mediation. Manifestly, both parties were preoccupied with the formalism of litigation with no concern whatsoever for the economic policy and political context underpinning the law, litigation and its place in the DSD.

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[843] *Barnard* LC transcript p387 l9 - p388 l23.
[844] *Barnard* LC transcript p389 l12 - p390 l19.

Only one of the four courts took issue with the SAPS for failing 'to engage effectively in the mediation and conciliation procedures provided.' It was the LC. [845] Why did Pretorius AJ find mediation so vital that by refusing to mediate, he found that SAPS had compounded its problems by its 'serious procedural lapses'?[846] If anyone should have taken issue with the refusal to both negotiate the grievance and mediate the dispute it should have been counsel for Ms Barnard. And if anyone should have conceded the procedural slip, it should have been counsel for the SAPS. Legal actors and litigants have to be conscious of transformative policies underpinning legislation and the practice of law for a sea change to occur in the management of conflict. Why did Ms Barnard and her team fail to stake a claim on procedural unfairness either when they launched the action or when Pretorius AJ invited them to during the trial? Did they appreciate the import of staking such a claim in so far as it implicates the rights of all workers? Were they concerned about setting precedents to stop highly litigious institutions such as SAPS in which office bearers were indemnified from paying costs? Or were they single minded about race based representivity?

#### 2.8.6.5 Collateral Damage

Fault for the shortcomings in *Barnard* rested on both litigants. The POPCRU, the predominantly black trade union *amicus* played no definitive role other than to support the SAPS. Ambiguity about affirmative action, inefficiencies in SAPS and the practice of law, and reckless disregard for Labour Law DSD caused collateral damage to jurisprudence and to litigation as an institution. Evidential deficits created fertile conditions for judges to search for other rules to enable them to make the case come out as their ideological disposition preferred. Deference stepped up to fill the breach. Precedents were forgotten, ignored and, in one instance only, distinguished. Consequently, collateral damage lay in the wake of *Barnard*.

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[845] *Barnard* LC para 38-40.
[846] *Barnard* LC para 38-40.

#### 2.8.6.5.1 Rules of evidence undermined

The first casualty was the rules of evidence. The LAC chose to gloss over service delivery. The National Commissioner's reason was not 'open to a court to "second guess"' 'his decision', and 'his prerogative'.[847] Unsurprisingly, meeting Ms Barnard's claim head on, the LAC made representivity its headstone. By invoking the EEA, the EEP, the Instructions, precedents set in the CC and the support of the *amicus*, it laid the foundation for a finding favourable to SAPS.

The majority in the CC also opted for deference thus avoiding any analysis of the evidence. Unable to refute the SCA's assessment of the evidence of the witness for SAPS, the CC reasoned:

'It is so that the post was filled on an interim basis and later re-advertised. This does suggest that the position was needed. But, then again, the post was listed as noncritical, and the facts show that it was never ultimately filled. The National Commissioner chose to reconfigure the division concerned. There is no valid cause to reject the National Commissioner's operational assessment that service delivery would not have suffered from not appointing Ms Barnard.'[848]

Tossed between a series of binaries, Cameron J was not merely 'hesitant' but agonised. Despite lamenting that the evidence was 'sparse', he found the National Commissioner's decision was fair. Notwithstanding the intensity of his criticism, reserved his warning for 'another case'.[849] For this case, he nevertheless found that the National Commissioner's failure to testify was not fatal. Furthermore, Ms Barnard presented no evidence to cast doubt upon the National Commissioner's explanation 'that the division was being restructured and that the post did not need to be filled until restructuring was complete.' Finding no evidence from Ms Barnard to the contrary, it was to him 'thus not clear that her promotion would have achieved the service delivery gains the Divisional Commissioner sought.'[850] Consequently, Cameron J concluded that

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[847] *Barnard* LAC para 46.
[848] *Barnard* CC (Moseneke ACJ) para 64.
[849] *Barnard* CC (Cameron J) para 104-105.
[850] *Barnard* CC (Cameron J) para 122-121.

in 'the absence of a proper challenge and argument', the CC could not 'undercut the decision-maker's stated reasons on this point.'[851]

In contrast to the LAC and the CC, the SCA approached the case as a dispute of facts. It considered 'all the circumstances' including that 'the onus that rest[ed] on the SAPS.' It concluded that the SAPS had failed to establish that the discrimination was fair because there was 'no factual foundation given the dearth of evidence'.[852] Drawing on the LC's reasoning, the SCA hinged its decision on the onus and the sufficiency of the evidence for the SAPS.[853]

Unlike Nelson Mandela who was unwavering in his resolve to testify in *SARFU*,[854] decision-makers lacking the courage of their convictions and unnerved at the prospect of being cross-examined, tend to instruct junior officials to substitute for them, resulting in the kind of 'peculiar' evidence that witnesses for the SAPS gave on behalf of the National Commissioner. Such 'testimony' amounts to explanations about what documents mean. This is not evidence but interpretation, which is the function of the judges. The decision-maker being singularly the National Commissioner had to testify. Only he could attest to why he found that filling the post was not critical and service delivery would not be compromised. After all, it was he who reversed the findings and recommendations of the panel.

If Ms Barnard's team had protested at the trial about the failure of the National Commissioner to testify, and if the CC had picked up her baton to endorse the SCA's analysis of the poor quality of the evidence for SAPS, together, they would have put the brakes on the unwholesome, arrogant practice of decision-makers uncaringly rendering deficient reasons. However, in order to come out

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[851] *Barnard* CC (Cameron J) para 122.
[852] *Barnard* SCA para 79.
[853] *Barnard* SCA para 26.
[854] *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* (CCT16/98) [1999] ZACC 11; 2000 (1) SA 1; 1999 (10) BCLR 1059 (10 September 1999) para 20-22 at 22: 'The President gave evidence on 19 and 20 March 1998. His evidence-in-chief takes up half a page of the record and his cross-examination 150 pages.'

in favour of racial representivity espoused by SAPS, the LAC and the CC had to find a basis to overcome the evidential deficit. Ms Barnard's concession that her non-appointment did not affect service delivery enabled the CC to bypass this obstacle. Responsibility for this undermining of the rules of evidence rested squarely with the SAPS, and upon Ms Barnard who, in the CC, took her foot off the peddle in holding SAPS accountable, transparent and efficient in implementing its systems. Why did she do so? Had she lost her passion for service delivery that she displayed at her interviews for appointment?

#### 2.8.6.5.2 Evidential deficits – a gateway for deference

The LAC and the CC majority uncritical of the National Commissioner's decision, settled for deference as its rule choice. Disavowing any power of a court to '"second guess"'[855] his decision the LAC articulated the trust that society placed on him thus:

'[T]he National Commissioner was the only person well-placed to determine if service delivery would be compromised by the failure to fill the post and his decision that this would not be so is unassailable. Frankly speaking, that is his prerogative and should he be incorrect in so deciding and imperil service delivery as a result, he is answerable to his accounting authority, being the Minister and ultimately to Parliament. The National Commissioner is similarly answerable in that manner should he fail to achieve the targets set out in the Employment Equity Plan. Our role as courts is to determine if any conduct, alleged to be based on an Employment Equity Plan, for instance, is justifiable in terms of that plan such as we have here. It is not open to a court to dictate to the National Commissioner that he is compromising service delivery and should fill a post.'[856]

The hermeneutic of suspicion suggests to me that if the majority in the CC or the LAC said anything at all about the reasons, it would not have favoured the National Commissioner. Unless they were able to excuse his decision on some basis as Cameron J did, such a finding would have obstructed them from making the case come out the way they wanted to, that is in favour of a

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[855] *Barnard* LAC para 46.
[856] *Barnard* LAC para 46.

transformative instead of a conservative agenda. Far better to be silent and uncritical about the quality of the reasons and opt for deference, a permissible choice on the spectrum of rules. Or so it seemed.

Now, if the evidence was sufficient, relevant and reliable, deference would have been a respectable choice. However, deference layered over deficient evidence raises readers' antenna. Something does not add up. And the hermeneutic of suspicion is reactivated.

Deference would have been justifiable if the LAC could trust the National Commissioner and the SAPS. It would have had good reason to do so if the National Commissioner accounted fully and transparently for his decision. If he had testified, availed himself for and withstood cross-examination, that would have bolstered not only the case for the SAPS against Ms Barnard, but also the credibility and bona fides of the SAPS and its affirmative action programme implemented through its EEP. Taking the time to be available to testify would have showed that he cared, ratchetting racial reconciliation reminiscent of President Mandela testifying in *SARFU* above. However, the people had good reason not to trust the National Commissioner who ended his career serving a sentence of imprisonment for corruption on a charge unrelated to *Barnard*.[857]

Deference enabled inertia. Justifying the validity of EEPs is largely a fact-finding statistical exercise executed in consultation with representative trade unions. Once adopted, it is hardly cause for controversy. Unsurprisingly, therefore, the EEP was uncontroversial in *Barnard*. It is in implementation to humans, with all their emotions and aspirations, that the EEP hits the wall. Deference signalled that the courts were not the port of call to resolve disputes about EEPs that were valid in form but contested in implementation. A precedent was set for ousting judicial scrutiny over executive accountability and transparency in employment equity cases. Deference displaced truth, trust and reconciliation.

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[857] Jacob Sello (Jackie) Selebi https://www.sahistory.org.za/people/jacob-sello-jackie-selebi; The Selebi Saga https://mg.co.za/report/the-selebi-saga. (accessed 27 March 2019).

#### 2.8.6.5.3 Deference trumped precedent

All the legal actors, excluding Cameron J, failed to invoke precedent to impugn the National Commissioner's decision. McConnachie takes issue with the courts in *Barnard* for not applying *Van Heerden*.[858] However, the SCA and the CC distinguished it, as they justifiably could on the facts. Contextually, *Van Heerden* affirmed pension benefits to recently appointed, mainly black members to the first democratic Parliament. *Barnard* was not a claim for but against race-based affirmation. *Van Heerden* is not the precedent that troubles me. *Nkondo* is.[859] Only Cameron J referred to it, albeit its citation appears once only along with other references in the obscurity of footnote 116. He approved of it. But he did not apply it.[860] None of the counsel appearing in any of the courts, including the CC referred to it.[861] Apparently liberated thus, none of the other judges in the CC or in the previous three courts were obliged to refer to *Nkondo*. Post-apartheid, *Nkondo* remained good law. Disconcertingly, the omission – but in the case of the CC, the failure of the judges who had to be aware of it once Cameron referred to it – undermined a rich precedent.

*Nkondo* was the binding precedent on the acceptable standard for official reasons. It remained the authority for giving informative reasons not only for arrests and detentions, which was the context in which it originated, but for all administrative decisions. [862] Vitally, *Nkondo* distinguished between 'information', 'reasons' and 'conclusions'.[863] Decisions are made on the basis

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[858] *Van Heerden* 2004 (6) SA 121 (CC); McConnachie, 'Affirmative Action and Intensity of Review' CCR (Constitutional Court Review) 163-197.

[859] *Nkondo and others v Minister of Law and Order and another; Gumede and others v Minister of Law and Order and another; Minister of Law and Order v Gumede and others* [1986] ZASCA 20; 1986 (2) SA 756 (A) at 772I–773B.

[860] *Barnard* CC (Cameron J) para 104 fn 116.

[861] At least, they did not cite *Nkondo* in their heads of argument.

[862] Hoexter *Administrative Law in South Africa* at 461 states that '[r]easons are not really reasons unless they are properly informative. They must explain why action was taken or not taken; otherwise they are better described as findings or other information.' (Footnote omitted.) See also *Judicial Service Commission and another v Cape Bar Council (Centre for Constitutional Rights as amicus curiae*) [2012] ZASCA 115; 2013 (1) SA 170 (SCA); 2012 (11) BCLR 1239 (SCA) at para 46; Baxter Administrative Law (Juta & Co Ltd, Cape Town 1984) at 228.

[863] Cora Hoexter 'Clearing the Intersection? Administrative Law and Labour Law in The Constitutional Court' (2008) 1 *(2008) 1 Constitutional Court Review*. Distinguishing between administrative and employment decisions is unimportant in the context of this discussion in which the virtue of informative reasons is compared to the opposite.

of information available to the decision-maker.[864] Reasons must disclose sufficient information to enable a person affected to know why a decision was taken and to be able to engage the decision-maker about the reasons.[865] Reasons must also inform the conclusions.[866] By clarifying what good quality reasons would be, *Nkondo* commendably elevated the level of accountability and transparency of decision-makers. Against this objective, sensible standard, this binding precedent of what qualifies as reasons, the National Commissioner's decision had to be adjudicated.

The National Commissioner's reasons, namely that 'the recommendation did not address representivity; and the post is not critical, and the non-filling of the post will not affect service delivery,' [867] were manifestly conclusions unsupported by any information or reasons. Even though it was common cause that 'the recommendation did not address representivity', his further reasons were unsupported by any evidence. In fact, they widened the scope of the dispute beyond representivity. If the post was not critical and service delivery was unaffected, three questions recur: Why was it advertised three times? Why was it filled temporarily despite Ms Barnard and African candidates being found to be suitable? What was the effect of the non-appointment on suitable African candidates and the implementation of affirmative action in future? As it transpired, these questions remained unanswered, even after SAPS led evidence during the trial. Again, the hermeneutic of suspicion inspires searches to fill the gaps in the reasoning in the judgments that discounted the quality the evidence in favour of deference.

Ms Barnard's concession in the CC threw a spanner in the works. If from the outset, her lawyers had relied on the precedent set in *Nkondo*, the courts would have had less wriggle room to avoid criticising the National Commissioner's 'reasons'. Representatives for the National Commissioner also had an ethical duty to bring *Nkondo*, a precedent apparently unfavourable to their cause, to

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[864] *Nkondo* at 18.
[865] *Nkondo* at 19-20.
[866] *Nkondo* at 24, citing *Sachs* v *Minister of Justice* 1933 T.P.D. 141 Tindall J at 162.
[867] *Barnard* CC (Moseneke ACJ) para 14; *Barnard* LC para 24, 20.

the attention of the courts and, if possible, distinguish it from *Barnard*. But neither side referred to it. Why? An inadvertent omission? Unlikely. Ms Barnard's counsel was experienced in the practice of public sector employment and administrative law. Rather, the omission signalled something that lay beneath the surface of Ms Barnard's concession. What was it?

Cameron J devoted almost 20 paragraphs [868] to criticising the National Commissioner's decision. Over these paragraphs he belaboured the constitutional obligation of decision-makers to furnish adequate reasons to give effect to the values of accountability, transparency and openness; [869] he criticized the SAPS for offering little else to justify the National Commissioner's decision; he even warned against decision-makers giving inadequate evidence and reasons for their decisions; but the intensity of these sentiments wilted with the warnings being reserved for 'another case'.[870] In this case the decision passed the fairness standard:

'So the National Commissioner's stated reasons, on their own, provide sparse evidence that he implemented the Plan fairly. Despite this, we conclude the National Commissioner's decision not to promote Ms Barnard was fair. Our reason is this: neither the National Commissioner's failure to address adequately the question of service delivery, nor his failure to mention gender representivity, is on the facts before us a sufficiently compelling indication of unfairness.'[871]

Like van der Westhuizen, Cameron J also discussed the potential impairment of the dignity of both beneficiaries and 'victims' of affirmative action,[872] service delivery, representivity, [873] intersectionality of grounds of discrimination, [874] numerical targets and impermissible quotas. [875] However, unlike van der Westhuizen J, Cameron J viewed these constitutive issues through the prism of fairness of the National Commissioners decision. His approach was destined

[868] *Barnard* CC (Cameron J) para 103-121.
[869] *Barnard* CC (Cameron J) para 105.
[870] *Barnard* CC (Cameron J) para 104-5.
[871] *Barnard* CC (Cameron J) para 121; 123.
[872] *Barnard* CC (Cameron J) para 110.
[873] *Barnard* CC (Cameron J) para 110.
[874] *Barnard* CC (Cameron J) para 116.
[875] *Barnard* CC (Cameron J) para 119.

for controversy from the outset. To find the National Commissioner's reasons to be opaque and the SAPS's evidence to be sparse, was, at first blush, irreconcilable with his finding that the decision was fair and consistent with *Nkondo*.[876] However, his search for 'sufficient external facts' struck the path he chose to fairness and ultimately deference.

In contrast, van der Westhuizen deftly navigated around the deficient reasons by confining his judgment to the narrow mandate set by the litigants: representivity. For that limited purpose, van der Westhuizen J found the National Commissioner's reasons to be 'adequate'.

None of this explains why Cameron J wrote separately, why Froneman J and Madjiet AJ who concurred with him did not join van der Westhuizen J's judgment, which, in my view was the best outcome of all the judgments for this litigated conflict in the circumstances. I would have tweaked his judgment with a few observations I make at the end of this Chapter about the unarticulated agendas of both litigants that shifts the litigation into the realm of lawfare. I am able to do so only with the benefit of hindsight. A clue to Cameron J's dilemma and his reasons for writing separately anchors in *Nkondo.* Cameron J approved of *Nkondo* but refused to apply it, apparently because *Barnard* was distinguishable as 'there [were] sufficient external facts' to determine the fairness of the reasons.[877] Then why did he refer to *Nkondo* at all, especially when no one else did? And why did he and not any other legal actors refer to it?

#### 2.8.6.5.4 Deference triggered process choices

Remarkably, the debate about process emerged for the first time in the CC. Until then *Barnard's* genesis as an action in the LC put it beyond controversy that it was an action, not an application for review. Whether *Barnard* was a review or an action was a crucial debate about process that implicated substance profoundly, an observation I expatiated on in Part A. If it were a

[876] *Barnard* CC (Cameron J) para 121.
[877] *Barnard* CC (Cameron J para 104).

review, then a court would be bound by the record of evidence before it; the 'external facts' relied on by Cameron J would have been beyond his reach.

An action is a trial of facts adduced by witnesses giving oral evidence, being cross-examined and it ends with the judge issuing a reasoned judgment. The record in Barnard shows that this is how the matter proceeded in the LC. A review is more strictly formulaic than a trial. Evidence in the form of affidavits is adduced. Unlike an action which is forward-looking in terms of the remedies the judge might award, a review is just that: a retrospective look at what was decided to determine whether it should stand or fall. It should now be obvious that an action opens multiple options for remedies whereas reviews invite binaries. The action was more appropriate for dialogue about navigating the unchartered waters of affirmative action than a review. Answering her question within the confines of a review or the breadth of an action would have yielded diametrically different results. Ms Barnard and her team chose wisely when they opted for an action.

The form of process was not raised in the submissions for the SAPS. The majority raised it of its own accord thus:

> '[58] The gut of the complaint is that in declining to appoint her, the National Commissioner made an unlawful and unreasonable decision which must be set aside. … The impugned decision was unreasonable because he furnished inadequate reasons for it. His letter in response to the recommendation of the interviewing panel was silent on the factors he weighed. That showed that he did not consider relevant factors other than those reflected in the rejection letter. Relying on *WC Greyling*,[878] the respondent contended that where a decision maker exercises his power with a closed mind, he will reach an unreasonable decision.
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> [59] This is a new cause of action that departs from the respondent's averments in the statement of claim in the Labour Court. It is directed, not at unfair discrimination based on race under section 6(1) of the Act, but at

[878] *WC Greyling and Erasmus (Pty) Ltd* v *Johannesburg Local Road Transportation Board and others* [1982] 2 All SA 350 1212 (1982 (4) SA 427) (A).

reviewing and setting aside the National Commissioner's decision not to appoint her. It will be remembered that before the Labour Court, the National Commissioner decried the fact that no relief was sought to review his decision. Ms Barnard did not adjust her statement of claim to meet the response of the National Commissioner. Her present complaint amounts to a review of an impugned decision. It is urged upon us at the final appellate stage and as a new line of attack. This is impermissible.

[60] The bid to review and set aside the decision of the National Commissioner is not properly before us.'

The majority and Jafta J adopted the alleged incorrect choice of process as their headstone. They invoked rule-centricity in order to apply deference to dismiss the discrimination claim on its merits. Similarly, the LAC invoked deference, but skirted any analysis of the adequacy of the reasons, choosing representivity as the core of its judgment. None of these options struck a path to the real sources and causes of conflict or indeed the questions the litigation was intended to answer, namely: What is the test for implementing affirmative action lawfully? Did SAPS apply quotas or targets?

The 'mainstay of Ms Barnard's contentions'[879] was whether the National Commissioner's decision was unreasonable and consequently unlawful. Her contentions were not abstractions but contextualised in her grievance that evolved into a dispute and ultimately intense racial conflict about her non-appointment as a white person. *Barnard* was not a review, at least not so in the opinions of Cameron J and van der Westhuizen J, which I share.

However, Cameron J had to find that it was not a review in order to search beyond the National Commissioner's stated reasons for justification of the decision not to appoint Ms Barnard. He found justification in the 'external facts', which were twofold: the pronounced over-representation of white women and Ms Barnard's eventual promotion.[880] What caused him to choose these two external facts to trump other equally compelling findings? Earlier, he had found

[879] *Barnard* CC (Moseneke ACJ) para 65.
[880] *Barnard* CC (Cameron J) para 123.

that the National Commissioner had failed to 'even mention that Ms Barnard was a member of a designated group'.[881] So gender representivity was not on the National Commissioner's radar when he made the decision not to appoint her. Neither did Ms Barnard press the gender argument.[882] Why then did Cameron J ponder over gender representivity when neither litigant had raised it? Do the rules governing litigation permit judges to look to material extraneous to the evidence and arguments, and if so under what circumstances? Cameron J's judgment intrigues me.

#### 2.8.6.5.5 Deference trumped dialogical constitutionalism

Typically, reasons or lack of them, are the starting point for interrogating any decision, be it administrative, executive, judicial or even corporate. Underlying this practice are theories of legality, reasonableness, accountability and transparency. Reasons enable people affected to accept or reject the decision. Ultimately, they can assess whether they should litigate. And if they opt for litigation, reasons would enable them to proceed strategically.

The constitutional duty to act fairly imports a duty to give reasons for decisions that are sufficient in and of themselves, when they are given.[883] If 'sufficient external facts' become available only during litigation, it does not validate a prior decision. Decisions must be assessed on the basis of the information available to the decision-maker when they are made. Giving after-the-fact reasons could cover up deficiencies in the initial decision. Furthermore, it is of no help to a litigant in deciding whether to litigate or not, if full reasons are not tendered upfront. Even if 'sufficient external facts' were available when the decision was issued, how would the person(s) affected by the decision know which 'external facts' informed the decision? Another anomaly would arise if an employee chose to review the decision instead of instituting a discrimination action.

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[881] *Barnard* CC (Cameron J) para 120-121.
[882] *Barnard* CC (Cameron J) para 122.
[883] *National Lotteries Board and others* v *South African Education and Environment Project* 2012 (4) SA 504 (SCA) para 27: The duty to give reasons for an administrative decision is a central element of the constitutional duty to act fairly. And the failure to give reasons, which includes proper or adequate reasons, should ordinarily render the disputed decision reviewable.

External facts not constituting the information or the reasons for the decision would have no showing in a review. Precisely to avoid guessing and speculation, *Nkondo* fixed the formula for responsive decisions to: information > findings > conclusions = reasons for decisions. Decisions, thus constructed, constituted the rules of engagement for the litigation, if it ensued at all.

I do not suggest that external facts are irrelevant. On the contrary, all the evidence in an action must be considered, then accepted or rejected. Facts external to a record on review would be inadmissible to test the validity of the decision. However, as reality, they may inform the substantive remedies flowing from both actions and reviews. For instance, undoing an irregularly awarded tender might be impractical once the goods or services have been rendered. However, the inherent power to take into account the interests of justice, [884] allows superior courts to exercise discretion to say, award compensation or cost orders, or even direct that the record be referred to the prosecuting authorities to consider seizing the proceeds of a crime. However, all the caveats of assessing ex post facto reasoning should persist in determining the validity of the impugned decision, irrespective of whether the context is a review or an action. Why then did Cameron J look to 'external facts'?

#### 2.8.6.5.6 Deference trumped reconciliation

Beyond the LC, none of the courts mentioned the failure by the SAPS to use consensus- seeking processes like SAPS's internal grievance hearings and the CCMA's conciliation services. Nor did they assess the impact of such failure on inter-personal relations, conflict management and national reconciliation. Non-appointment grievances are intensely personal and emotive. Adding affirmative action into the mix rachets the intensity. *Barnard* was no exception.

Extract I: Ms Barnard's evidence in chief

[884] Section 173 of the Constitution.

'[Mr Grogan] When you were told that you would not get that post explain what feelings you had unless you were entirely indifferent. Definitely disappointment. I felt very disappointed because I know I had a good interview and I know I am doing my job to the best of my ability. I am, at that stage I was a Level 4 PEP candidate, that is above average, … I felt that I am, I actually felt useless because I thought what is wrong with me that I could not have this opportunity to be promoted, … '[885]

Later, after the Court questioned whether conciliation or mediation had occurred:

Extract I continued:

'[Mr Grogan] Having heard that evidence how do you feel now about your future in the Police Service? As I explained previously, I joined the police to have a career and I love my job and I am proud to be a member of the South African Police Service. [Emotional]. But there is one question I want to ask Career Management and that is what must I do to be promoted? I am a top performer, ever since the first post, 6903 was withdrawn up until the second post were advertised my performance increased, as you can see in my application form I went up from a 4 to a 5, a 5 is a top performer. I sacrificed my family... [emotional]... to do my job well. So the question I am asking is what must I do more to be promoted?'[886]

Feelings matter. Extract I reveals the typical emotions that many capable, young people would experience when they are refused promotion. Grievance proceedings were built into the DSD to respond to human aspects of employment, to access places where the law does not reach. They were the ideal forum for addressing feelings, which, if left unattended, could slide into the more insidious expressions of simmering discontent, like 'go slow', 'work to rule' and even sabotage. A grievance hearing was the moment for reconciliation. For an affirmative action grievance, it was also a time for bridge building from a horrific past, to a future based on mutual understanding. It was time for institutional leadership, as the LC pointed out:

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[885] *Barnard* transcript p278 l3.
[886] *Barnard* LC transcript p287 l18.

'In terms of the plan it is the national commissioner who "is responsible for the championing of the Employment Equity Plan as well as the overall management and implementation of the plan."'[887]

Instead, the National Commissioner spurred the conflict on by giving reasons that showed indifference, bordering on arrogance rather than leadership.

### 2.8.7 Unarticulated Factors and Phenomena?

In the process of probing or deferring to the National Commissioner's reasons, the legal actors exposed other possible, extraneous, unarticulated phenomena. I ventilate them not as fact but as suggestions, not as criticism of my colleagues but as tools for observing what goes on in litigation. Constrained by resources and especially by time, legal actors do the best we can with what we have. Equally, I am vulnerable to the influences of unarticulated phenomena and institutional inefficiencies. I am just as susceptible to the observations I make of others. Holding up such reflections for me and other legal actors to ponder, generates self-consciousness about what we put into and what we expect out of litigation. Knowing that legal actors and litigants are open to scrutiny beyond the surface of the text of judgments and submissions in court would, hopefully, also induce improvements in the quality of our participation in litigation.

As sheer speculation, I proffer an example from each court, starting with the CC, to suggest some extraneous, underlying explanation for something manifesting in its judgment. Judgments that are not self-explanatory invite their readers to search for explanations elsewhere. Speculative or not, explanations beyond the legal materials do arise. In the following segment I set out to 'prove' the possibility that extraneous factors did influence some of the judgments.

#### 2.8.7.1 CC: Cameron J's conundrum

Why did Cameron J introduce *Nkondo* into the decisional equation when he had no intention of applying it? Applying *Nkondo* would not have led to the result he sought. Why raise a precedent that none of the litigants relied on?

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[887] *Barnard* LC para 20.

There was no indication that the litigants were invited to address the CC on *Nkondo*. Disarmingly, however, Cameron J disclosed that his finding that the National Commissioner's decision passed 'the fairness standard' was a 'close call'.[888] Paterson defines 'close call' as 'a case in which two or more judges in the final court dissent from the majority outcome'.[889] Kennedy elucidates that 'compromises [and] the cases close to the line on either side have been disposed of arbitrarily in order to have a line. This makes it implausible that precedent or "legal reasoning" were the only elements entering into the decision.'[890]

Cameron J's close call exposed the intellectual conflict he must have experienced between his preference for the case to come out in support of affirmative action and his unavoidable criticisms of the National Commissioner's reasons. A possible explanation for referring to *Nkondo* is that the SAPS's singular, immutable stance that the reasons were adequate, was provocative. Cameron J set out to show that they were not adequate. Under our constitutional democracy, a leader such as the National Commissioner, could not be allowed to issue decisions that were so deficient that even judges under apartheid would have rejected them. But having invoked *Nkondo* he had to distinguish it so that he could reach into the 'external facts' which *Nkondo*, as a review, would not have allowed him to do.

Historically, the reasons for decisions by officials were the fulcrum on which human rights litigation turned. Under apartheid, such litigation or 'lawfare' was the proxy for vibrant political struggles. In the eighties, establishing the principle that people have a right to a hearing before adverse decisions are taken against them was a protracted struggle yielding incremental gains on many fronts on which the exercise of public power was challenged. Eventually the principle became ingrained in human rights law.[891] Human rights lawyers, including

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[888] *Barnard* CC (Cameron J) para 123.
[889] Paterson *Final Judgment* at 10.
[890] Kennedy 'Form and Substance', 89 *Harv. L. R.* 1685 at 13.
[891] *Attorney-General, Eastern Cape* v *Blom and others* 1988 (4) SA 645 (A) at 660H – 662I; *Staatspresident en Andere* v *United Democratic Front en ander* 1988 (4) SA 830 (A) at 871H – 872E; *Administrator, Transvaal, and others* v *Traub and others* 1989 SA 731 (A) at 754; *The*

those from the Centre for Applied Legal Studies (CALS) at the University of Witwatersrand, stepped up the struggle to demand reasons for official decisions.

Often, the reasons were the only weapon in the hands of lawyers to challenge the lawfulness of executive and administrative action, such as the arrest and detention of political activists, which is what *Nkondo* was. Without access to security detainees held in solitary confinement, lawyers had to turn to families of the detainees for secondary evidence to impugn the credibility of an official's stated reasons.[892] As hearsay, an affidavit from a mother about her detainee son's non-violent, pious devotions, would be no match for the direct 'evidence' of nameless, faceless police informers of his membership of the military wing of a banned political organisation.[893] And so the lawfare attacked the inadequacy and irrationality of the stated reasons for the decisions. Reasons were quintessential to lawfare against the abuse of public power.

Litigation to attack the reasons was tactical. Success on this front helped to push back the security establishment, constraining its arbitrary and indiscriminate arrests of activists. The security police had to work quickly. Otherwise, the decision-makers would have had to attest to opposing affidavits. Or the courts could order the release of detainees. Rather than risk having a court set aside an arrest and detention, or worse still, having ministers or other senior officials resorting to perjury, officials strove to produce reasons that were facially rational and sufficiently informative to pass judicial scrutiny. Officials also tended to expedite their investigations in order to release or charge detainees. Progressively, skirmishes about the right to reasons and to a

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*South African Roads Board* v *City Council of Johannesburg* Case 485/89 (24 May 1991) p27-28 (unreported).

[892] For instance, Edith Gumede launched one of the applications in *Nkondo* (*Gumede and Others* v *Minister of Law and Order and Another*, 1984(4) S.A. 915 (N)) on behalf of her husband Archibald Gumede. Curtis Nkondo and Archiebald Gumede soon found themselves as co-accused in the political treason trial of *Ramgobin and others* 1986 (1) S.A. 68 (N.P.D.). After the charges were withdrawn Gumede joined our practice, Yunus Mahomed and Associates as a consultant. He helped to render legal and pastoral support to many youths detained under the various states of emergency in the eighties.

[893] Archbishop Hurley applied for the release of Patrick (Paddy) Kearney in *Minister of Law and Order and Others v Hurley and another* (59/86) [1986] ZASCA 53; [1986] 2 All SA 428 (A) (26 May 1986).

hearing eventuated in *Nkondo* on 20 March 1986. By the time *Nkondo* was heard, Mr Nkondo and his fellow detainees had long been released.

*Nkondo* was a celebration of a long and hard struggle. The human right to reasons and a fair hearing before being subjected to adverse decisions filtered into our Labour Law. Eventually, these rules acquired constitutional recognition in the right to just administrative action and fair labour practices. For Cameron J, like many of us who practised human rights law under apartheid, the right to reasons and relatedly, the right to be heard were precious milestones in the struggle for democracy. Resurrecting *Nkondo* from apartheid era jurisprudence to achieve the imprimatur of constitutional recognition was probably, for Cameron J, an opportunity not be missed. But he stopped short of applying it because, if he did, he would have had to reject the National Commissioner's reasons. A close call indeed.

There was another reason to celebrate in 1986. CALS, which had participated in waging the lawfare for the right to reasons in many of the cases, awarded the erstwhile Adv Edwin Cameron a personal professorship in law. [894] Unsurprisingly, therefore, with victory in *Nkondo* coinciding with his personal elevation, *Nkondo* had to be a judgment ever etched in Cameron J's memory. As it is in mine. Precisely why *Nkondo* alerted my antenna to excavate further.[895] I would not have noticed *Nkondo* ensconced in the obscurity of a footnote if I did not feel an emotional connection to it. I suspect Cameron J felt the same. For him not to have acknowledged *Nkondo* at all would have been a betrayal of those who made legal history.

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[894] https://www.concourt.org.za/index.php/13-current-judges/179-justice-cameron-2 (accessed 4 October 2018).

[895] Yunus Mahomed and Associates, my law firm, was involved as political consultants in the Natal Provincial Division for *Gumede and Others v Minister of Law and Order*, 1985(2) S.A. 529 (N); we were attorneys of record in *Gumede and Others v. Minister of Law and Order and Another*, 1984(4) S.A. 915 (N). In the Appellate Division, these cases were consolidated with *Nkondo and Others v. Minister of Law and Order and Another* 1985 (2) SA 720 (W) which originated in the Witwatersrand. In 1985, CALS launched the South African Journal on Human Rights. CALS, formed in 1978, a year before I started practice, fortified our theory and strategic practice as a collective of human rights lawyers against apartheid. Memorable moments in legal history.

### 2.8.7.2 SCA: Unarticulated and unidentifiable phenomena?

In reversing the LAC, the SCA was intensely scathing. It did not stop at criticizing the SAPS. Inexplicably, it digressed in the following paragraph to suggest that Mlambo JP, who scribed for the LAC, had contradicted himself:

'[51] In my view, the LAC's conclusion that Barnard was not discriminated against – contradicted in a later paragraph of its judgment – because the vacancy had not been filled, is flawed. In *Gordon v Department of Health: KwaZulu-Natal* [2008] 11 BLLR 1023 (SCA) Mlambo JA, as he then was, in considering the position where a black candidate was appointed ahead of a white candidate recommended by a selection panel, stated that: '"It can hardly be contested that the appellant was discriminated against on the basis of his colour and race"'. (*sic*)

It is not clear what the contradiction was as the SCA did not identify the paragraph in which it apparently appeared. However, I assume that the SCA was referring to the paragraph in which the LAC found that there had been no 'differentiation' because no one was appointed. However, Mlambo JP had rounded off his musings about differentiation and discrimination in *Barnard* with the following:

'This statement illustrates the point I have already made that when one talks of discrimination; that one is in fact alleging that a differentiation of some sorts between and/amongst people has taken place. On the facts of the case before us, there is no evidence of such differentiation. We are here dealing with a matter where no action by way of appointment took place, meaning that no overt differentiation occurred. The discriminatory conduct accepted by the Labour Court is not the conventional type in the *Harksen* sense, i.e. of preferring someone over another(s). It is the omission, *per se*, to appoint Barnard on the basis that she is a white person. It is not necessary to decide this particular issue and I express no firm view either way. However, for purposes of this matter I am prepared to accept that it is possible to discriminate by failing to appoint a person where preference or differentiation is not at issue. I consider that the important issue is to determine if such discrimination was unfair within the contemplation of section 6 of the Employment Equity Act as found by the Labour Court.[896]

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[896] *Barnard* LAC para 22.

From the above I understand Mlambo JP to have been positing, *obiter*, that without comparators (in this instance, the appointment of another person) there was no basis to differentiate; without differentiation it was possible that no discrimination arose. This was the SAPS's argument from the outset. His concession in favour of Ms Barnard that he was 'prepared to accept that it is possible to discriminate' without differentiating, was his response to the SAPS. In any case, discourse about discrimination was already moving beyond comparators towards recognising impact as the springboard for assessing discrimination.[897] Unlike the SCA, I do not see any contradiction in the LAC's para 22 quoted above with any of its later paragraphs. If a contradiction could be inferred, then Mlambo JP's concession that Ms Barnard was discriminated against, cured it.

Perhaps the SCA saw a contradiction between Mlambo JA's substantive stance in *Gordon*[898] and *Barnard*. Both cases were similar in that the discrimination was on the grounds of race and colour. But that is as far as the similarity went. In *Gordon*, Mlambo JA upheld the appeal on the basis that the Department of Health had no policy or plan in place for the implementation of affirmative action measures and that consequently, the discrimination complained of was unfair. In *Barnard*, Mlambo JP took the view that the application of the EEA and the

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[897] *MEC for Education: Kwazulu-Natal and Others* v *Pillay* (CCT 51/06) [2007] ZACC 21; 2008 (1) SA 474 (CC); 2008 (2) BCLR 99 (CC) (5 October 2007) para 28, 42-44, 164-165.

[898] *Gordon v Department of Health: KwaZulu-Natal* [2008] 11 BLLR 1023 (SCA)I had presided as the judge of first instance in the LC in *Gordon* reported as *Gordon* v *Department of Health, KwaZulu-Natal* (2004) 25 *ILJ* 1431 (LC) and *Gordon* v *Department of Health, KwaZulu-Natal* (2004) 7 BLLR 708 (LC). http://www.saflii.org/za/cases/ZALC/2004/38.html (accessed 23 December 2018). I had found as suitable the appointment of a young, local, African man with potential, to a rural hospital in his area, instead of an urban based aging white man. I relied on ss 8 (equality) and 212 (public administration) (para 50-51) of the Constitution, 1993, the LRA, the Public Service Act of 1984 (para 52) case law, and rationality (para 48) as the tests when no employment equity plan was in the offing. *Gordon* (SCA) para 5 summarises the history of the case: 'The Labour Court concluded that the failure to appoint the appellant did not amount to unfair discrimination and consequently dismissed his claim. The appellant's claim and the basis upon which it was dealt with by the Labour Court were not considered by the Labour Appeal Court (LAC) [(Zondo JP, Jappie and Basson AJJA sitting on appeal from the Labour Court)] as that court, having invited the parties to address it on the non-joinder of Mr Mkongwa in the proceedings, reasoned that in the event of the appellant's contention being upheld, ie that he was more suitable for appointment than Mr Mkongwa, this would have amounted to Mr Mkongwa's appointment being 'a wrong appointment'. This, concluded the LAC, meant that Mr Mkongwa had an interest in the proceedings and that the failure to join him deprived him of the opportunity to also have his say. This led the LAC to conclude that the appellant's failure to join Mr Mkongwa was fatal and it dismissed the appeal.' In other words, the LAC used the rule-choice of non-joinder to leave Mr Mkongwa in the job as I had.

EEP justified Barnard's non-appointment.[899] Consequently, *Barnard* was distinguishable from *Gordon* on the applicable rules and facts. In my view, Mlambo JP was consistent in hinging his decision on the existence or otherwise of an EEP.

What the SCA's reasons were for referring to *Gordon* remain obscure. The SCA itself recognized that the cases were distinguishable. Perhaps the SCA was referring to the contradiction in Mlambo JP's choice of rules. In *Barnard* (LAC) he chose deference for the National Commissioner's decision but in *Gordon* he spurned deference for the Member of the Executive Council, KwaZulu-Natal. Facially unprincipled, perhaps Mlambo JP's deference in *Barnard* triggered suspicion when it reached the SCA. Rules such as deference, are not absolute principles. Something beneath the surface instigates their usage. On the surface, the explanation was articulated as the difference between the existence of an EEP in *Barnard* and the lack of one in *Gordon*. But there was a lot more going on beneath the surface than the mere existence of an EEP. Excavating *Barnard* would have shored up the inadequacies in the National Commissioner's decision, the lack of evidence about service delivery, and the peculiar evidence for SAPS. What was visible to the SCA differed from what the LAC chose to see. What the LAC saw governed its rule choice. Rules such as deference, used flexibly as the legal actors choose, are an invitation to the intrigued to excavate in search of what lies beneath.

Studying a rule in abstract is little help in discerning why it was used. Digging into context shores up circumstances that guided the choice. The deeper we dig, the wider the choice becomes. Whether to stop digging once the existence of an EEP was uncovered, how much deeper to dig, what to choose from the excavation, and finally, whether to apply deference at all were ideological. Or they were influenced by something external to the legal materials. So, beneath the superficiality of every rule-choice thrives ideological biases or some phenomenon extraneous to the reasons given or to law itself. Acknowledging

[899] *Barnard* SCA para 51. Regrettably, the SCA does not specify the paragraphs where the contradictions in the LAC judgment were.

such biases and accounting for them by giving reasoned decisions of public and private importance, is an indicator of the strength of decision-makers and consequently of our democracy. Disclosure enables discourse and development at multiple levels on a solid foundation, rather than speculation and suspicion. Maximalism would promote accountability and transparency in cases in which reconciliation and nation building are critical. Minimalism should be reserved for cases when law and policy need to be developed cautiously and incrementally.[900]

What should readers make of the SCA's digression into Mlambo JP's alleged contradiction? What influenced the SCA's gratuitous and ambiguous criticism of Mlambo JP? I cannot tell. This is an example of unarticulated but also unidentifiable phenomena that surfaced for reasons not apparent to readers of the SCA judgment. Suspicion suggests that the SCA's reading of *Gordon* was jaded not by inattentiveness considering the amount of space the SCA devoted to its criticism but by something else. Its critique is anything but complimentary. Why would the SCA panel go to the extent of putting down one of its former colleagues in that Court? Whatever the unarticulated, unidentifiable phenomenon was, it shows that judges as humans are susceptible to them.

#### 2.5.7.3 LAC: Judicial juggling

What was odd about the judgment in the LAC was that Davis JA concurred. I cited him in Part A as a jurist who publicly and repeatedly disavowed deference, rule-centricity, 'necessity' and like strategems that avoid transformative outcomes. He is a solid jurist on constitutional and administrative law having practiced as a human rights advocate under apartheid and at CALS. Yet he acquiesced in deference this time. Why? Deference delivered the goods for him in *Barnard.* I suspect that once he concurred in the outcome, he paid little attention to how Mlambo JP got there. Davis JA is well known to juggle many balls simultaneously. At the time, he was a senior judge in the High Court, Western Cape, the Judge President of the Competition Appeal Court, a judge

[900] Cass Sunstein *One Case at a Time* (2001).

of the LAC, an academic with scheduled (and unscheduled![901]) teaching commitments and a prolific contributor to academic discourse.[902] I suspect that, if time allowed, he would probably have written along similar lines as van der Westhuizen J. *Barnard* is a ball that he let slip. This is an example of extraneous human and logistical impediments identified in Part A that creep into the execution of the judicial function.

#### 2.5.7.4 LC: Consensus-seeker extraordinaire

Why did Pretorius AJ, but none of the counsel press the issues of compliance with grievance procedures, conciliation and mediation? My excavations led me to the brief biographies of the three legal actors in the LC. All three of them were senior counsel. However, the opportunities for education and academic achievement were manifestly superior for the two white males[903] than they were for Adv Mokhari,[904] who joined the Bar long after the other two actors did. He had to overcome many of the adversities of apartheid that black advocates faced, especially the briefing patterns being skewed in favour of white

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[901] Legend has it that Davis JA was inadvertently double booked to teach two classes. Fortunately, they were in the same precinct.

[902] Dennis M Davis http://www.commerciallaw.uct.ac.za/claw/staff/academic/ddavis. (accessed 27 March 2019).

[903] 'Dr John Grogan has been a journalist, academic (he is a former professor of labour law at Rhodes University), labour consultant, advocate, arbitrator and acting Judge of the Labour Court. He is a prolific author, and his sharp and incisive analysis of new labour cases is increasingly sought after.' Dr John Grogan 'Labour Law Sibergramme' http://www.siberink.co.za/pSGLL1-10/Labour-Law-Sibergramme-Subscription.aspx (accessed 18 December 2018).

'Advocate William Mokhari SC formerly taught English and history. In 1991, he qualified as an educationist specialising in history and education. Studying law part-time, he was admitted as an advocate in 1999. In 2000, he received a scholarship to study Masters in International Business Law, LLM, in Amsterdam in the Netherlands. He specialised in International Business Law; International Tax Law; European Competition Law; Government Regulation of Business; International Contracts; and International Trade (specialising in WTO and IMF regimes). Returning from New York City, where he worked as a corporate lawyer in Wall Street at a 'prestigious' Law Firm called Cravath, Swain and More,[904] he started practice in Johannesburg, South Africa in March 2003 as an advocate. The Polokwane Society of Advocates profiled him thus: 'He is founding member and the first chairman of the newly established Polokwane Society of Advocates, the first Bar Association to have been established in June 2014, since the advent of constitutional democracy in South Africa in 1994. He is also the founding member and first Chairman of the Mpumalanga Society of Advocates which was also established in June 2014.

In his practice of the law, he specialises in administrative law, Labour Law, Contract Law and Regulatory Law. He is often involved in high profile cases of significant public interest which raise important yet complex issues of law and policy in South Africa including international law.' http://www.plkbar.co.za/index.php/adv-w-r-mokhari-sc/ (accessed 18 December 2018)

counsel.[905] Admitted to practice under the new constitutional order, he often represented the state in high profile cases.[906]

All three legal actors were knowledgeable and experienced in Labour Law. Furthermore, plain language facilitated access to the LRA and the EEA. So, knowledge and understanding the law were not the obstacles to appreciating the requirement of consensual forms of dispute resolution. Primarily, the legal culture and consciousness that their respective experiences spawned that set Pretorius AJ apart from the counsel appearing before him. For Pretorius AJ, consensus-seeking processes were more than a box-ticking exercise:

'[39] Particularly in cases such as the present, but also as a general rule, mediation and conciliation processes play an important role in preserving employment relationships and in fostering relationships based on dignity and mutual respect. It was incumbent upon the respondent in this case to make use at least of the conciliation procedures to explain fully to Barnard exactly why she was not promoted and to attempt to reach some common understanding and even consensus. This the respondent did not do.

[40] Mediation procedures which form part of agreed procedures between employer and employee and statutory conciliation procedures such as those provided for in the Employment Equity Act are there for a purpose. Quite apart from considerations of fairness, our law requires that they be utilised fully and properly and not merely regarded as matters of form.'

Cutting his political teeth as the President of NUSAS in the early seventies he navigated race relations amongst students. Sensitised by his life experiences he dedicated himself to mediation and appropriate dispute resolution.

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[905] Speech delivered by the chairman adv William Mokhari SC https://www.plkbar.co.za/index.php/2015/09/12/speech-delivered-by-the-chairman-adv-william-mokhari-sc/ (accessed 18 December 2018).

[906] HSF & FUL vs Nathi Nhleko Case Number: 23199/16 Date: 17 March 2017; http://www.derebus.org.za/sca-dismisses-al-bashir-appeal/; (accessed 18 December 2018) Lawyer will lay complaint against 'how dare you' judge 2013-10-25 17:54 City Press https://www.news24.com/Archives/City-Press/Lawyer-will-lay-complaint-against-how-dare-you-judge-20150429; Don Makatile 'Hlaudi gets the last laugh' *SUNDAY INDEPENDENT* / 20 December 2015, 07:00AM; Dinky Mkhize, Khalid Abdelaziz'As Bashir leaves, South African court calls for his arrest'; https://www.reuters.com/article/us-africa-summit-bashir-court/as-bashir-leaves-south-african-court-calls-for-his-arrest-idUSKBN0OV0UJ20150615; https://mg.co.za/tag/nhlanhla-mkhwanazi; Motsoeneng's Disciplinary Hearing Will Go Ahead https://www.georgeherald.com/News/Article/National/motsoeneng-s-disciplinary-hearing-will-go-ahead-20170711 (accessed 18 December 2018).

Unsurprisingly, Pretorius AJ's consternation about the litigants' indifference to conciliation is palpable.[907]

In contrast, counsel on both sides fell under the spell of litigation as lawfare. Mr Grogan, a regular contributor to the academy and often cited favourably in the field of public sector employment law, was at sea to appreciate the significance of conciliation and Pretorius AJ's probing in this regard. Additionally, in the case of Adv Mokhari, his encouragement that 'the aggressive nature of American litigation may help some to develop and improve their confidence'[908] underpinned his practice. Aggression, for instance, in the manner in which Mr Mokhari cross-examined Ms Barnard, was misplaced; the context called for sensitivity, solid arguments, persuasion and professional leadership.[909] A strong argument speaks for itself, without having to be shouted out.

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[907] Pretorius AJ: 'On completing his law degree he qualified as an advocate and joined the Legal Resources Centre, the first non-governmental organisation to advance public interest law. During his five-year term with the Legal Resources Centre, he cultivated an interest in alternative dispute resolution methods to eventually become one of its leading practitioners, especially in mediation and arbitration. He pursued study visits in this field in the United States and Britain, to explore ways to incorporate those experiences to South Africa circumstances. He was a member of the Independent Mediation Services of South Africa (IMSSA) which over the ten years of its existence introduced appropriate dispute resolution into the culture of conflict resolution. IMSSA laid the groundwork upon which the CCMA rests. He authored 'Dispute Resolution'. The website of his Bar describes him thus: '[He] is a member of the Singapore International Mediation of Advocates. He is a general commercial litigator with particular experience and specialisation in public law (administrative law, labour law, pensions law), contract law, commercial law, mediation and arbitration. He is the editor of Dispute Resolution, published by Juta's in 1993. Now in its 8th reprint. Paul is also the author of occasional papers and articles on labour law and dispute resolution, mediation and arbitration. Presented seminars and lectures on the same topic. He has also presented a number of papers, both in South Africa and overseas on dispute resolution, industrial relations law and human rights. He is an arbitrator and mediator on several tribunals and panels. Paul Pretorius https://www.ashoka.org/fellow/paul-pretorius (accessed 18 December 2018).

[908] See William Mokhari 'Practising Law in a Wall Street Law Firm: A personal experience' in Advocate December 2003.

[909] See e.g. the cross-examination of Ms Barnard:

'[MS BARNARD] …when I met him at Nelspruit Detective Services why did he not lodge a grievance, and then he clearly stated to me he thought about it and then he said he do not want to be the second-best candidate so he let it be.

MR GROGAN: My Lord, it could not possibly have been, excuse me, it could not have possibly have been put to Superintendent Mogadima because he has not testified.

MR MOKHARI: Well what I hear then is a witness testifying about hearsay

COURT: But it arises out of questions that you are putting in cross-examination

COURT: If it arises out of questions that you put in cross-examination the answer cannot be restricted simply because it is hearsay.

MR MOKHARI: Yes.

COURT: What you can do however is to take an opportunity to take instructions because

Why did none of the legal actors in the three appellate courts take issue with SAPS's refusal to respond to grievance and conciliation proceedings? Typically, judges appointed from a pool of practitioners schooled in rule-centricity are preoccupied with searching for the appropriate rules to apply to the particular facts. When confounded by complexities for which no clear rule emerges, judges cast wider for solutions. Enforcement of the right to housing is a classic example. The courts have built in as standard practice good faith, reasonable engagement as a precursor to litigation.[910] The CC engineered this consensus-seeking mechanism where, unlike in labour disputes, none was prescribed for housing claims.

Why do judges direct parties to engage meaningfully about socio-economic rights? Judges are faced with a binary. For or against the claimants? There is a plethora of rule and fact choices that cut both ways. Which to choose? Neither option strikes a path to how the judges want the case to come out. Neither side has a clear case. Each side should shift a bit. Something in between would be more suitable. But how to get there? Judges are not mediators. A few are skilled practitioners able to facilitate a meeting point of mutual interests. Mustering a majority opinion amongst panel judges for one or other position is also troublesome. Rather let the litigants have a go at working out what would be mutually doable. After meaningful engagement the parties would be better able to articulate the remedies they seek, even if they cannot agree on them. If the dispute (or what is still left of it) remains alive, the court would then step up with a decision.

Whether consensus seeking processes are prescribed or not, they are indispensable - if not for settling most disputes, then at least for refining the issues in dispute for the court to adjudicate. For it is the quality and quantity of the litigants' input in the form of the evidence and argument that firstly,

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that knowledge is available to you.
COURT: Hearsay evidence is not inadmissible if it is a reasonable answer to a question raised in cross-examination.

[910] Brian Ray *'Occupiers of 51 Olivia Road v City of Johannesburg:* Enforcing the Right to Adequate Housing through 'Engagement"' 8 Hum. Rts. L. Rev. 703 2008.

contributes to the acceptability of the judgments; secondly, minimises judicial error; and thirdly, minimises the risk of the judgment itself becoming a conflict aggravator.

Some litigants are averse to mediation. They want an adjudicated decision. The litigants and counsel in *Barnard* typified this attitude. Judges are wired to deliver on their adjudicative function. They hesitate to facilitate or direct litigants to settle. Litigation uses law but not necessarily to solve problems.

When legal actors get involved in disputes, consensus-seeking processes seem to fly out the window. Their legal culture and consciousness incline them towards establishing the facts, finding the rules that suit their particular cause and applying them. Winning matters. For the scribing judges in panel courts, winning means garnering majority support. Rule application matters. Feelings do not. Neither does relationship-building. Generally, rule-centricity is antithetical to conciliatory overtures. This is how law practice is taught, learnt and experienced, mostly. Unless legal actors are also mediators, they have no interest in consensus-seeking, problem-solving processes. On the contrary, problem-solving processes are an impediment to legal practices dependent on the revenue from litigation. Here lies the inherent contradiction, an obstacle to transformative constitutionalism.

### 2.8.8 Conclusion

*Barnard* leaves in its wake more problems than solutions. It turned out to be a conflict aggravator rather than a moderator, ramifying beyond the litigants. At the end of six procedural hoops, from grievance to final appeal covering ten years, diagnosis of what the sources of the conflict were remained unarticulated. The grievance and dispute were articulated as a refusal to promote Ms Barnard, but was that the cause of conflict or merely a manifestation of deeper anxieties, aspirations, animosities, arrogance, insecurities, and the like? One can speculate and theorise, as I do, about what the cause(s) of conflict were. But the opportunity for a deep analysis of race

relations vanished once litigation began. Returning to conciliation had to be by consensus of the litigants.

Litigation has its place in the dispute resolution pyramid.[911] Legal actors able to diagnose sources and causes of conflict, would recognise how they manifest in grievances and disputes and be able to match them with processes on the pyramid. Without this skill, with legal actors unmindful of what they do not know, litigation will continue be as awkward as forcing square pegs into round holes.

The primary damage arising from *Barnard* is that the profound question we all struggle with of pragmatically reconciling affirmative action with race discrimination, was left unanswered. Doctrinal questions remained unanswered. Solidarity's expectations of getting precedents set on the distinction between using targets and quotas, a question of enormous interest to the Labour Law and industrial relations community, attracted a passing reference. The majority found that the National Commissioner had not 'pursued the targets so rigidly as to amount to quotas.'[912] As Ms Barnard was subsequently promoted Cameron J inferred that the National Commissioner was not imposing an absolute bar of quotas but numerical targets.[913] What was needed was active engagement by the courts with the EEP and an assessment of the way in which the SAPS implemented it. That is the legal point that triggered, in the first place, the request for reasons, the subsequent referral of the dispute to litigation, which ultimately also harboured Solidarity's political weapon in lawfare.

Collateral damage radiated polycentrically beyond *Barnard* and employment equity cases. General principles of law – precedent, deference, rules of evidence, DSD – were sacrificed or diluted to avoid giving effect to Solidarity's conservative agenda. Mainly, the SAPS's inefficiencies caused this. The SAPS's refusal to conciliate and Ms Barnard's own enthusiasm for a litigated solution was a setback for both litigation and conciliation. When will the next opportunity arise to revisit affirmative action in employment, to undo the

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[911] Discussed in Chapter 4 'Recommendations'.
[912] *Barnard* CC (Moseneke ACJ) para 66.
[913] *Barnard* CC (Cameron J) para 123.

collateral damage caused in Barnard?

Returning to the questions about Ms Barnard with which I littered this Chapter, why did she not take issue with the SAPS's failure to conciliate and the National Commissioner's failure to testify and the peculiar quality of the evidence for SAPS? Why did she abandon the victory she secured in the SCA that service delivery was compromised once she was before the CC? And why was gender not one of her grounds of discrimination? In my view, race-based representivity was the singular reason for Solidarity instituting the action. *Barnard* was stripped down to bedrock by the time it reached the CC. Some judges finding against Ms Barnard might have perceived these political undertones without articulating them. They were not lost on the SAPS which responded by approaching the litigation as if it were a game of chess: to win at any cost.

Affirmative action is not a mechanical exercise of replacing white with black or men with women. Nelson Mandela emphasised that:

'The primary aims of affirmative action must be to redress the imbalances created by apartheid. We are not . . . asking for hand-outs for anyone nor are we saying that just as a white skin was a passport to privilege in the past, so a black skin should be the basis of privilege in the future. Nor . . . is it our aim to do away with qualifications. What we are against is not the upholding of standards as such but the sustaining of barriers to the attainment of standards; the special measures that we envisage to overcome the legacy of past discrimination are not intended to ensure the advancement of unqualified persons, but to see to it that those who have been denied access to qualifications in the past can become qualified now, and those who have been qualified all along but overlooked because of past discrimination, are at last given their due. The first point to be made is that affirmative action must be rooted in principles of justice and equality.' October 1991.[914]

[914] Explanatory Memorandum (EEA) at 1345.

# Chapter 3. Why care about litigation?

'If the ANC does to you what the Apartheid government did to you, then you must do to the ANC what you did to the Apartheid government.'

Nelson Mandela, Cosatu Conference, 1993[1]

## 3.1 Introduction

Why should we care about litigation as an institution? In Chapter 2 Part A I show how influences extraneous to legal materials conduce to decision-making by litigants and legal actors. Ideology, its subsets legal and political consciousness and culture, and binary styles of reasoning exert strong, consistent, often unconscious inducement that determine whether decisions are constitutionally transformative. Deconstructed, these constituent components are discernible as decision-makers exercising choice. Many judgments of the CC about discrimination on various grounds, but significantly on grounds of marital status, prove that as humans all participants in litigation are vulnerable to influences that swing reason and emotion. These swings are also evident in *Barnard*, a single case over four tiers of the judiciary that generated seven judgments for various reasons, for and against each side. Against this backdrop ten reasons emerge as to why we should care about litigation. Thereafter, choice and the thread it weaves in decision-making explored.

First, litigation is a form of decision-making to interpret and apply law to ever-changing circumstances in order to enable and enforce democracy. South Africans should be concerned about democracy wherever it is or ought to be practiced. Second, decision-making in litigation involves the complexities not only of law but also politics, economics and myriad fields of specialisation, for

[1] http://abahlali.org/node/14190/ (accessed 29 July 2019).

which the traditional training, knowledge and experience of legal actors are inadequate. Capabilities additional to law are needed to bolster litigation. Third, judicial precedents ramify; they have polycentric impact on non-litigants.

Fourth, the separation of powers between the legislature, executive and judiciary instates 'appropriate checks and balances to ensure accountability, responsiveness and openness.'[2] Misused separation of powers tends to put the brakes on transformation and accelerates the global trend towards juristocracy.[3] Participation as cooperation and collaboration through agonistic and jurisgenerative dialogue amongst the litigants, and the legal and institutional actors would check litigation against constitutional values in order to keep institutions functional, including the institution of litigation.

Fifth, when dysfunctional institutions inflame social disorder, litigation as a social institution buffers democratic society against not only chaos and anarchy but also abuse of state power. Sixth, consequently as a social institution, litigation itself is vulnerable to becoming dysfunctional through abuse and misuse of law, unless we safeguard it.[4] Thus when, why and how litigation is conducted matters. Seventh, social change outside courtrooms influences both the form and substance of what goes on inside them. So, strategies to innovate change from within the court must evolve in tandem with socio-economic and political changes outside in society. Eighth, no matter what forms litigation takes, how persuasive populist rhetoric turns out to be, however disorderly society becomes and, even when resistance assumes violent forms, dialogue is the primary, if not the only means of returning humanity to rationality. Internationally, ceasefires, settlement agreements and negotiated revolutions, including ours in 1994, evidence the human pursuit of peace as survival. Ninth,

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[2] Principle VI of the Founding Principles to the Constitution.
[3] John Smillie 'Who Wants Juristocracy' 11 Otago L. Rev. 183 (2005-2008); JAMES GRANT 'The Rise of Juristocracy' http://archive.wilsonquarterly.com/sites/default/files/articles/WQ_VOL34_SP_2010_Aricle_01.pdf (accessed 4 June 2019); Ran Hirschl 'Towards Juristocracy: The Origins and Consequences of the New Constitutionalism' http://www.hup.harvard.edu/results-list.php?author=7078.
[4] Michelle Le Roux and Dennis Davis 'Lawfare – Judging Politics in South Africa' (2019) p 47' xiii; 1- 21.

both legal and non-legal actors are capable of and responsible for engineering litigation to yield constitutionally transformative egalitarian ends. Tenth, if we do not care about litigation our young democracy would morph into a juristocracy in which the judiciary exercises more powers than it should. Democracy will harden into 'a dominating "bureaucracy", the humanist dimension of the struggle [will be] lost and it [will] no longer [be] possible to speak of liberation.'[5]

### 3.2. Choice

Democracy is an exercise in making choices not only during elections. Litigation is also a process during which all the participants exercise choice. Free choice is fabulous for the flexibility required for activating constitutions, which are the engine rooms of rights.[6] But choice is equally vulnerable to succumbing to the opposite. Tapping into choice means igniting the engines of consciousness. In Chapter 2 I show how choice, as the exercise of consciousness, is the nerve centre that determines how litigation turns out. Choice renders litigation much more than a process in which litigants and their legal actors produce evidence and arguments before an independent judge who renders an impartial judgment. This definition does not account fully for what actually goes on in litigation. Nor indeed, for litigation's role as one of several social institutions critical for maintaining and developing democracy. Judges exercise more power than they admit to having. The cases canvassed in Chapter 2 show how that power manifests in the choices they make in evaluating evidence, in separating such evidence as they consider to be core from that which they relegate as penumbral, and in selecting particular rules to apply to facts they find proven. Are judges conscious of what informs their choices?

Legal representatives make choices about what evidence they will adduce from all the information their clients proffer. When they choose to litigate instead of

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[5] Paul Freire 'Pedagogy of the oppressed' at 57.
[6] Roberto Gargarella 'Latin American Constitutionalism: Social Rights and the "Engine Room" of the Constitution' (2014) 4 *Notre Dame Journal of International & Comparative Law* http://scholarship.law.nd.edu/ndjicl/vol4/iss1/3 (accessed on 09/02/2017).

engaging in some other process, they also choose the form of litigation – action to claim for discrimination versus application for review in *Barnard* – and find the rules to fit their choice. Are legal representatives conscious of what informs their choices? Is the choice of defending the indefensible driven by the tactic of generating false narratives to support subversive, private agendas, by practitioners pursuing profit regardless of principle, or by something else? Are these the only process options for litigation or is there room for innovation? Should 'taking instructions' include a mandate to innovate? If so, innovate how?

Litigants are meant to mandate choices advanced by their representatives. However, they tend to trust in the relative expertise of the legal actors.[7] Are such mandates delegation, abdication or sharing of responsibility for their choices? Is the choice between acting to remedy a grievance, to enforce a right, and inertia that of the litigants or the legal actors? Theoretically, 'taking instructions' implies that these choices vest in the litigants. Could Ms Grootboom or Mr Harris have stopped the litigation instituted in their names if they wanted to change tack and find a mediated political solution to the conflicts? Are legal actors invested personally in the litigation? How do contingency fee arrangements influence choice?

This chain of choices from litigants to legal actors, spirals from decisions of individuals, to judgments, precedents and ultimately the common law. When litigants choose to vindicate rights, do they also consciously choose strategies to infuse constitutionalism into the common law? Do they link their claims to the public good or detriment, to altruism or individualism?

Choice is good when flexibility is needed to evaluate processes, forms, rules and facts that would generate outcomes and remedies that conduce most closely to achieving transformative constitutionalism. Ready-made rules are

[7] Le Roux and Davis *Lawfare* (2019) at 47. Ganief Harris lent his name to the famous Harris decisions referred to in my proposal (*Harris* & *others v Minister of the Interior & another* 1952 (2) SA 428 (A) *(Harris 1)*; *Minister of the Interior & another v Harris* & *others* 1952 (4) SA 769 (A) at 779 (*Harris 2)*), concerning the preservation of a common voters' role. But neither he nor his co-litigants played any significant role in the litigation. The same is true of many public interest cases, including *Grootboom,* in which the litigant is nominal.

not always available for application to new situations. In an ever-changing world, rule-making generally lags behind reality. Technology companies bargain hard but nevertheless cooperate amongst one another instead of litigating, primarily because they understand the technical issues better than judges.[8] Flexibility of choice enables decision-makers in the chain of choice to be imaginative, creative and developmental. However, even if there are ready-made rules, I show in Chapter 2 that decision-makers choose those rules that serve their purpose best. The freedom to choose anticipates that choices can be both supportive of or antithetical to constitutional transformation. Can this risk be mitigated? Influencing consciousness, the nerve centre and the entry point into the chain of choices, is a starting point for reengineering litigation. How can this be done? Froneman J suggests in the context of a property rights dispute:

'[115] Before we can make substantial and lasting progress in making the ideals of the Constitution a reality at least three things must happen:

(a) an honest and deep recognition of past injustice;

(b) a re-appraisal of our conception of the nature of ownership and property; and

(c) an acceptance, rather than avoidance or obfuscation, of the consequences of constitutional change.'[9]

If the reference to 'ownership and property' is substituted with any other right or value in the Constitution, paragraph 115 will remain a sound basis to kickstart dialogue afresh on what it means to be constitutional in the twenty-first century.[10] Will responses of those who lived through apartheid differ from those born post-apartheid? Will 'past injustice' emphasise race as it did in the anti-apartheid struggle? For the first time a judgment of the CC finds an explanation

[8] Satya Nadella *Hit Refresh – The Quest to Rediscover Microsoft's Soul and Imagine a Better Future for Everyone* (2017).
[9] *Daniels v Scribante and Another* 2017 ZACC 13 (*Daniels*).
[10] 'Le Roux and Davis *Lawfare* at 305.

in 'race or class discrimination.'[11] Is it time to revitalise class as a ground of discrimination in the on-going struggle for socio-economic rights?

### 3.3 Complexity

The common law is that 'vast body of judicial decisions' that evolves over time as 'judges decide present disputes by reference to past decisions and establish rules for future controversies'[12] The system of precedents 'produces certainty, allows reliance, curbs arbitrariness, effects equality, and encourages efficiency', all values not to be underestimated.[13] However, resorting to the past must not be a mechanical application of precedent.[14] Instead, it behoves judges to 'distil the principled spirit of the past and rely on it to develop the law in response to future new demands.'[15] In an ever-changing world the challenge for judges is to use precedents wisely, balancing the need for stability against the pressure for progress.[16] Notwithstanding the constraints of litigation, the chameleon-like capacity of the common law to respond to new challenges should be celebrated and championed.[17] As 'social artisans', judges apply their craft-skills with 'vision and imagination as well as technique and rigor to the fulfilment of their discipline.'[18] Instead of being a static body of rules, the common law is a 'living tradition of dispute resolution', 'an organic and hands-on practice that is never the complete or finished article', 'evanescent, dynamic, messy, productive, tantalising', 'always moving, never arriving',[19] 'a maze and not a motorway.'[20] However, the complexity of modern government, the escalating 'sophistication of legal issues and relationships, the demands of representative democracy, the growth of regulation and the ever-growing

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[11] *Daniels* (per Froneman J) para 114.
[12] Allan C Hutchinson *Is Eating People Wrong? – Great legal cases and how they shaped the world* at 3, 5.
[13] Hutchinson *Is Eating People Wrong?* at 5.
[14] Hutchinson *Is Eating People Wrong?* at 5.
[15] Hutchinson *Is Eating People Wrong?* at 5.
[16] Hutchinson *Is Eating People Wrong?* at 6.
[17] Hutchinson *Is Eating People Wrong?* at 6.
[18] Hutchinson *Is Eating People Wrong?* at 7.
[19] Hutchinson *Is Eating People Wrong?* at 7-8.
[20] David Pannick *I have to Move My Car – Tales of Unpersuasive Advocates and Injudicious Judges* at 4.

interdependence of national communities make it inconceivable and impracticable that the law should depend on the decisions of the judges alone.'[21] (my underlining)

Courts are constitutionally committed to resolving all disputes[22] substantively.[23] Difficult disputes are those that raise ethical or value questions for which no answer is forthcoming because data is lacking.[24] Complex disputes involve interconnected questions that relate to a system instead of a 'monad'.[25] Difficult questions are more easily solved than complex ones. One solution is to have 'a diverse judiciary imbued with a spirit of professionalism.'[26] Same-sex marriages is such a difficult, value laden though not complex question.

Posner distinguishes between external and internal complexity. Complexity external to the legal system are those over which judges have no control.[27] They include biochemistry, corporate governance, compensation, DNA evidence, economics, psychology, neuroscience, genetics, genomics, sociology and statistics, including multiple regression analysis.[28] Internal complexity refers to 'how detailed and complicated the law is or should be and why it is becoming more detailed and complicated.'[29] Examples of internal complexity include formalism, verbosity, and overly complex, vague, poorly written judgments.[30] As generalists, legal actors have to deal with

[21] Tom Bingham *The Business of Judging – Selected Essays and Speeches* at 383.
[22] S 34 of the Constitution.
[23] Danie Brand 'Judicial Deference and Democracy in Socio-economic Rights Cases in South Africa' in 'Law and Poverty' eds. Sandra Liebenberg and Geo Quinot (2013) 172 at 181-182. Brand bolsters this mandate with references to debates during the drafting of the 1996 Constitution at 183. The debates were less about counter-majoritarian concerns and deference and more about 'judicialising' politics to frustrate achieving substantive democracy. Solange Rosa 'Transformative Constitutionalism in a Democratic Developmental State' in 'Law and Poverty' eds. Liebenberg et al (2013) at 100: the very notion of transformative constitutionalism anticipates substantive justice. *Head Of Department, Mpumalanga Department Of Education and Another v Hoërskool Ermelo And Another* 2010 (2) SA 415 (CC) para 47; 97; *Premier, Mpumalanga, and Another v Executive Committee, Association of State-Aided Schools, Eastern Transvaal*, 1999 (2) SA 91 (CC) (1999 (2) BCLR 151; [1998] ZACC 20).
[24] Richard A Posner 'Reflections on Judging' (2013) at 3.
[25] Posner 'Reflections' (2013) at 55.
[26] Posner 'Reflections' (2013) at 54.
[27] Posner 'Reflections' (2013) at 58.
[28] Posner 'Reflections' (2013) at 14-16.
[29] Posner 'Reflections' (2013) at 59.
[30] Posner 'Reflections' (2013) at 17.

complexities.[31] A study of 'complexity theory' involving systems with many moving parts, falls outside the scope of my research. However, distinguishing between difficult and complex cases and between internal and external complexities is relevant for anticipating how judges might respond to them. For litigants, their lawyers and the communities they represent, being aware of these distinctions would enable them to be on guard as to what they include in their legal materials and how they manage the responses of the judges.

The mandate to resolve all disputes substantively imposes a huge onus on legal actors and litigants. For the debate is no longer about whether courts make law. They do make common law. Judge-made law is an important source of law.[32] Nor is the debate about what the aim of litigation is. Litigation is about both articulating public norms as well as settling disputes, in the private and public spheres,[33] for litigants and others similarly affected. Bedevilling litigation at a deeper and subtler level is disagreement on the particular kind of norms and public goods that the institution of litigation should create.[34] Litigation has a 'creative, moral dimension.' Judges engage in reasoning infused with complex, moral questions that lead to decisions that set general principles for similar future claims.[35] In so far as litigation can trump or limit 'the goal of maximizing aggregate welfare', greater care must then be taken about 'how a procedural system distributes the risk of error across different parties and different kinds of cases, with particular reference to the fairness and justice of the resulting distributional scheme.'[36] Legal actors, expert witnesses, other participants, and a matrix of intersecting organisational, technical and intellectual skills, experience and knowledge must underpin litigation, in order to balance competing values and to synchronise with other social and political institutions. Most of all, there must be individual and collective commitment to pursue constitutional democracy with a transformative agenda.[37] To unpack

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[31] Posner 'Reflections' (2013) at 55.
[32] Tom Bingham *The Business of Judging – Selected Essays and Speeches* at 380.
[33] Robert G. Bone 'Lon Fuller's Theory of Adjudication and the False Dichotomy between Dispute Resolution and Public Law Models of Litigation' (1995) 75 *Boston U. L.J.*1272 at 1276.
[34] Bone 'False Dichotomy' (1995) *Boston U. L.J.* at 1276.
[35] Bone 'False Dichotomy' (1995) *Boston U. L.J.* at 1324.
[36] Bone 'False Dichotomy' (1995) *Boston U. L.J.* at 1323.
[37] Bone 'False Dichotomy' (1995) *Boston U. L.J.* at 1322-3.

the complexity of conflicts, disputes are categorised as interests or rights, public or private, national or international, and so on. How useful are these binaries in resolving conflicts?

### 3.3.1 Interest or rights disputes

Litigation is a 'one size fits all' format into which disputes of rights and interests are constrained.[38] I commenced this study convinced of a redline between the two. Fuller's *Forms and Limits* reinforced my conviction. However, I find that choice dilutes the distinction.

Fuller argued that litigation should be limited to cases in which rights are asserted[39] because litigating the allocation of economic resources (disputes of interest) presented 'too strong a polycentric aspect to be suitable for adjudication.'[40] Assertions of interest are not easily justiciable until rights are recognised. Whatever interests are referred for litigation as the pre-eminent process to vindicate rights,[41] must be converted into claims of right.[42] So, Fuller endorsed a '"quasi-judicial" procedure' that would avoid compromises that result in ineffectual allocations.[43] Without compromising the integrity of litigation, technical experts or other ways should be used to accommodate disputes of interest in litigation.[44] Fuller's critique is overtaken by neo-constitutional recognition of political and socio-economic rights.

Adjudicating disputes of interest is not only doable but also constitutionally compelled. Socio-economic needs are elevated to constitutional rights but the substantive content of these rights have yet to be determined. For instance, the right of access to housing is constitutionally entrenched, but what kind of

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[38] Claims for access to and the distribution of socio-economic rights and remuneration increases are typical disputes of interest.
[39] Fuller 'Forms and limits' (1978) *Harv. L. Rev* at 368.
[40] Fuller 'Forms and limits' (1978) *Harv. L. Rev* at 400.
[41] Fuller 'Forms and limits' (1978) *Harv. L. Rev* at 368. Fuller at 368 summarises: 'The proper province of adjudication is to make an authoritative determination of questions raised by claims of right and accusations of guilt.'
[42] Fuller 'Forms and limits' (1978) *Harv. L. Rev* at 369.
[43] Fuller 'Forms and limits' (1978) *Harv. L. Rev* at 400-401.
[44] Fuller 'Forms and limits' (1978) *Harv. L. Rev* at 400-401.

housing, what it should cost, who should pay, whether it should be free, how, where and when the right should be accessed, are questions that have yet to be determined by competent political and administrative actors who rightfully assume and execute this function as their constitutional responsibility. When these actors fail to fulfil their responsibilities, then competent, politically astute legal actors should be ready to step up to the challenge. Disputes of interest are not limited to defining the content of socio-economic rights. For those rendering essential services, arbitration is compulsory as they are not allowed to strike or lockout without offering a minimum service.[45] Demarcation of geographical and political boundaries is terrain for intense struggle as politics, economics and social considerations intersect.[46] Should South Africa reform its electoral system from proportional representation to constituencies is another dispute of intense political interest looming on the horizon.[47]

The justiciability of socio-economic and political rights is less controversial once

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[45] Bernard Gernigon, Alberto Odero and Horacio Guido 'ILO Standards Concerning the Right to Strike' p26-28 https://www.ilo.org/wcmsp5/groups/public/@ed_norm/@normes/documents/publication/wcms_087987.pdf (accessed 11 November 2018).

[46] *Merafong Demarcation Forum and Others v President of the Republic of South Africa and Others* (CCT 41/07) [2008] ZACC 10; 2008 (5) SA 171 (CC); 2008 (10) BCLR 968 (CC) (13 June 2008); *Moutse Demarcation Forum and 15 Others and The President of the Republic of South Africa and 17 Others; Masia Traditional Council and Others v Municipal Demarcation Board and Others* (1256/2016) [2016] ZALMPPHC 1 (29 April 2016); *Matatiele Municipality and Others v President of the Republic of South Africa and Others* (1) (CCT73/05) [2006] ZACC 2; 2006 (5) BCLR 622 (CC); 2006 (5) SA 47 (CC) (27 February 2006); *Executive Council of the Province of the Western Cape v Minister for Provincial Affairs and Constitutional Development and Another, Executive Council of KwaZulu-Natal v President of the Republic of South Africa and Others* (CCT15/99,CCT18/99) [1999] ZACC 13; 2000 (1) SA 661; 1999 (12) BCLR 1360 (15 October 1999).

[47] In *My Vote Counts NPC v Minister Of Justice And Correctional Services And Others* [2018] ZACC 17 paragraph 29, the Constitutional Court (Mogoeng CJ presiding) remarked with reference to section 19(3)(b) of Constitution:

*'.... the section addresses the fundamental right every citizen has 'to stand for public office and, if elected, to hold office.' Our Constitution does not itself limit the enjoyment of this right to local government elections. The right to stand for public office is tied up to the right to 'vote in elections for any legislative body' that is constitutionally established. Meaning, every adult citizen may in terms of the Constitution stand as an independent candidate to be elected to municipalities, provincial legislatures or the national assembly. The enjoyment of this right is not and has not been proscribed by the Constitution. It is just not facilitated by legislation. But that does not mean that the right is not available to be enjoyed by whoever might have lost confidence in political parties. It does in my view, remain open to be exercised whenever so desired, regardless of whatever logistical constraints might exist'*

His comments inspired *New Nation Movement NPC and 3 others v The President of the Republic of South Africa and 4 others CC* case number: Case no.: CCT 110/19 to challenge the constitutionality of our electoral system.

they are constitutionally entrenched. What is intensely contested is the application and implementation in each case of the 'reasonableness standard' of 'the progressive realisation' of the rights. What standards must apply to socio-economic rights? Dignity? Affordability? Williams shows that exercising this choice yields different results in her comparison between *Mazibhuko* and *FCC*.[48] It is a choice that defines what our Constitution means, and in turn, who we are as a nation. Choosing and setting a standard would meet the baseline requirements for a rational decision. Would it also meet the higher standard of reasonableness?

All cases submitted for litigation are to be resolved by the 'institutional framework' in which litigants and legal actors must function,[49] taking account of the court's norm setting function and powers to make common law when no rules exist. Procedurally, rights disputes fit comfortably within the institutional framework of litigation; assertions of interests less so. Rights recognition cases have redistributive effects in cases such as the recognition of surviving spouses' right to maintenance in heterosexual relationships[50] and same-sex partnerships,[51]and the right to social welfare.[52] Whether interests should be recognised as rights depends on the consequences.

However, tailoring assertions of interests to fit the rights mould of litigation raises procedural challenges, which, if left unresolved, stand in the way of delivering substantive results. To adjudicate assertions of interests, some principle must support the claim in order to convert a bare demand into a justiciable right. In disputes about wages, workers have no right to increases other than what they bargain for and agree on, or what is awarded by an adjudicator. Wage disputes are not automatically justiciable unless the parties render essential services or agree to adjudication. This usually means forgoing

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[48] See Chapter 2 Part A.
[49] Fuller 'Forms and limits' (1978) *Harv. L. Rev* at 369.
[50] *Daniels v Campbell NO and others* 2004 (5) SA 331 (CC); *Volks NO v Robinson and Others* 2005 (5) BCLR 446 (CC).
[51] *Laubscher NO v Duplan and others* 2017 (2) SA 264 (CC).
[52] *Mashavha v President of the RSA and Others* 2005(2) SA 476 (CC); *Khosa v Minister of Social Development* 2004 (6) BCLR 569 (CC); *Mahlaule v. Minister of Social Development* 2004 (6) SA 505 (CC).

the right to strike and recourse to lockout. To adjudicate wage increases, benchmarks such as the rate of inflation, the cost of living, industry norms and averages, comparative rates and any combination of such standards are invoked. Some standard has to apply otherwise the decision would be arbitrary or irrational. And the integrity of litigation's norm setting role would be compromised.

Legal rules have evolved through litigation to give effect to a strong sense of community; shared notions of right and wrong mature into legal principles.[53] In this way the common law has evolved.[54] Mainstreaming the common law into principles can progressively transform interests into rights. *Grootboom* initiated this enterprise. It interpreted the Constitution to mean that, at a minimum, the state has a duty to provide temporary shelter to poor people desperate for housing.[55]

Disputes of interest anticipate a process, if not to determine the remedy itself then at least to agree on the rules, principles or roadmap for determining them. Negotiation, meaningful engagement, mediation or similar consensus seeking processes and balloting are better suited to assessing consequences and probabilities than litigation. Such processes create rights by agreement, by voting to show a critical mass of public opinion, or by some other dialogical decision-making process.[56] If negotiation or mediation does not result in agreement on the amount of the wage increase or the location and type of housing then, to guide the adjudicator, the litigants should agree on or prioritise benchmarks. Guiding the legal actors with benchmarks would give the litigants better control over the outcome than if they left it to legal actors to prioritise standards for them. In this way, litigation is less prone to extraneous, unarticulated and unidentifiable influences bearing upon the legal actors. Which pegs the litigants choose to advance to maximise gains and minimise losses, and which pegs the judge chooses to balance interests, are, in both

[53] Fuller 'Forms and limits' (1978) *Harv. L. Rev* at 374.
[54] Fuller 'Forms and limits' (1978) *Harv. L. Rev* at 373-374.
[55] *Grootboom* para 99; Wilson and Dugard 'Taking Poverty Seriously – The South African Constitutional Court and Socio-Economic Rights' *Stell LR* 2011 3 *667-672* at 688.
[56] Fuller 'Mediation its forms and functions' (1971) *S. Cal. L Rev.* at 305.

instances, combinations of ideology, economics, politics and other phenomena.

Socio-economic rights are litigated. Rarely are their substantive content matters for, mediation or some other rights defining process. Predictably, therefore, assertions of interests compel courts to innovate as the circumstances require in order to render such disputes about the application of recognised socio-economic justiciable.[57] Innovation would be to both process and substance. Stepping into the litigants' breach, courts induce procedural renovation in claims for access to housing by insisting on meaningful engagement. But this innovation is not enough. Nor is it necessarily appropriate for every case. Furthermore, its effectiveness would wane once litigants treat it as a mechanical, box-ticking prerequisite for litigation. Can engagement with corrupt officials who loot public resources for private gain be meaningful if the evidence shows that they should be dismissed from employment and prosecuted? *Ekurhuleni*[58] weaved its way up from the High Court to the SCA without the identity of corrupt officials being disclosed. No one explained how it came about that the applicants paid for land using their housing subsidies only to find that once their homes were ready, they found strangers occupying them.

Resolving the misfit of process to substance poses a direct and unavoidable challenge to litigation. The challenge is all the more acute when the opportunity to search for common aims and reciprocity has to be conducted in the adversarial, combative setting in which litigation usually occurs, notwithstanding that the state as the other party is meant to be caring. Additionally, treating litigation as a bipartisan process in pursuit and defence of private interests, misses the public interest implications of precedent and polycentricity. When all interests do not participate, the burden increases on litigation to do more than the work it is meant to.

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[57] Danie Brand 'Judicial Deference and Democracy in Socio-economic Rights Cases in South Africa' in 'Law and Poverty' eds. Liebenberg et al (2013) 172 at 192.
[58] *Ekurhuleni Metropolitan Municipality & others v Thupetji Alexander Thubakgale & 134 others* (125/2018) [2018] ZASCA 76 (31 May 2018).

Under such conditions, defaulting to proceduralising rights is an easier option for the courts than to have to engage with the substance of the rights in the context to unravel their scope and content.[59] In *Grootboom,*[60] the CC proceduralised the socio-economic right of access to housing.[61] In so doing, it also proceduralised poverty.[62] Although it instated dialogue in the form of meaningful engagement, which has since become standard practice in mass eviction cases,[63] this process innovation has not resulted in widespread substantive distribution of housing. Nor has the innovation led to 'a conversation about what a transformative constitution means for legal method',[64] and for enquiring into the common law as 'a routine step of analysis' even in first generation rights claims like *Carmichele*.[65]

An administrative law approach[66] is also inadequate for determining socio-economic claims because the purpose and need for socio-economic rights are not self-evident from the Constitution;[67] they must be interpreted contextually.[68] Administrative and executive decisions are tested against the standards of not

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[59] F D Brand 'Courts, socio-economic rights and transformative politics' (LLD Dissertation) (2009) Stellenbosch University chapter 3 http://scholar.sun.ac.za.

[60] *Grootboom* 2001 (1) SA 46 (CC).

[61] D Brand 'The proceduralisation of South African Socio-economic Rights Jurisprudence, "What are socio-economic rights for?"' *Rights and Democracy in a Transformative Constitution* eds. Henk Botha, Andries Johannes Van der Walt; FD Brand 'Courts, socio-economic rights and transformative politics' (LLD Dissertation) (2009) Stellenbosch University http://scholar.sun.ac.za.

[62] Danie Brand 'Proceduralisation' 619; 623-627; Wilson and Dugard 'Taking Poverty Seriously' *Stell LR* 2011 3 *667-672* at 666.

[63] *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg and others* 2008 (3) SA 208 (CC); *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and others* 2009 (9) SA 454 (CC); *Ngomane and others v Govan Mbeki Municipality* 2016 (12) BCLR 1528 (CC); *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and another* 2012 (2) SA 104 (CC); Brian Ray 'Occupiers of 51 Olivia Road v City of Johannesburg: Enforcing the Right to Adequate Housing through "Engagement" ' 8 Hum. Rts. L. Rev. 703 2008.

[64] Dennis M Davis and Karl Klare 'Transformative Constitutionalism and the Common and Customary Law' 26 *SAJHR*. 403 2010 466.

[65] Davis and Klare 'Common and customary law' 26 SAJHR. 403 2010 467; *Carmichele v Minister of Safety and Security and Another* 2004 (3) SA 305 (SCA); 2004 (2) BCLR 133 (SCA); *Carmichele v Minister of Safety and Security* 2001 (10) BCLR 995 (CC); 2001 (4) SA 938 (CC); *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA).

[66] See also DM Davis 'Socioeconomic rights: Do they deliver the goods?' Int J Constl Law (2008) 6 (3-4) 687.

[67] Wilson and Dugard (2011) 'Taking Poverty Seriously' *Stell LR* 2011 3 *667-672* http://www.seri-sa.org/images/stories/slrarticle_final.pdf.

[68] Wilson and Dugard (2011) 'Taking Poverty Seriously' *Stell LR* 2011 3 http://www.seri-sa.org/images/stories/slrarticle_final.pdf.

only rationality [69] and legality [70] but also the higher threshold of reasonableness.[71] Although the reasonableness standard has not gone far enough to respond substantively to poverty,[72] it reduces 'the possibility of a capricious, arbitrary decision'. [73] However, extending social benefits in Germany to permanent residents by valuing the rights of vulnerable persons to dignity and equality as almost absolute or non-negotiable in the context, ratchetted the test for reasonableness and administrative law standards.[74] Similarly, finding the state liable to fulfil its obligation to enable progressive access to housing or land for the homeless was substantive. [75] More substantive was the CC's award of compensation to the land owner and the entitlement of residents to remain in occupation of the land until the state availed alternative land to them.[76]

Nussbaum's 'capabilities approach' offers to mediate the binary between rights and interests to yield substantive results. She unravels contradictions in rights discourse as having 'moral resonance that makes it hard to avoid in contemporary political discourse', but as lacking in 'theoretical and conceptual clarity'. Different definitions and ways of thinking about rights, who are bearers of rights and obligations, do rights exist if there is no state to recognise them and do humans have certain entitlements irrespective of whether the state recognises them, are some of the theoretical questions that inspire her

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[69] *Pharmaceuticals Manufacturers Association of South Africa and another: In Re Ex Parte President of the Republic of South Africa and others* 2000 (2) SA 674 (CC) para 90.
[70] *South African Police Services v Solidarity o.b.o Barnard* 2014 (6) SA 123 (CC) para 141.
[71] Sandra Liebenberg and Katharine G. Young 'Adjudicating Social and Economic Rights: Can Democratic Experimentalism Help?' *Social and Economic Rights in Theory and Practice: Critical Inquiries* Helena Alviar Garcia et al eds., Routledge, 2015 (2015) 242; *Minister of Health and others v. Treatment Action Campaign and others (No 2*) 2002 (5) SA 721 (CC).
[72] Sandra Liebenberg 'Socio-Economic Rights: Revisiting the Reasonableness Reviews/ Minimum Core Debate' *Constitutional Conversations* 303,308 (Stu Woolman and Michael Bishop eds., 2008); Brian Ray 'Extending the Shadow of the Law: Using Hybrid Mechanisms to Develop Constitutional Norms in Socioeconomic Rights Cases' ULR 3 797 at 816-824.
[73] See also Davis 'Socioeconomic rights: Do they deliver the goods?' Int J Const Law (2008) 6 (4) at 687.
[74] *Khosa and Others v Minister of Social Development and Others; Mahlaule and Another v Minister of Social Development and Others* 2004 (6) BCLR 569 (CC)FD Brand 'Courts, socio-economic rights and transformative politics' (LLD Dissertation) (2009) Stellenbosch University 188 http://scholar.sun.ac.za.
[75] *President of the Republic of South Africa and another v Modderklip Boerdery (Pty) Ltd and others (AgriSA and others* amici curiae) 2005 (5) SA 3 (CC) (*Modderklip*) para 68.
[76] *Modderklip* para 68; F D Brand 'Courts, socio-economic rights and transformative politics' (LLD Dissertation) (2009) Stellenbosch University 188 http://scholar.sun.ac.za;

'capabilities approach'.[77] Her approach is a useful theoretical framework for assessing public policy not only in an international development context, where it is currently used.[78] It contrasts with approaches that focus on assessments of opulence, like GNP per capita, welfare and even distribution of resources.[79] The capabilities approach hooks into Sen's 'idea of a theory of justice',[80] which promotes some desired state of people; it enables 'comparisons between individuals and across nations as to how well they are doing.'[81] Sen's 'foundational view of development as freedom' pitches the substantive freedoms of political participation, health care and basic education as 'constituent components' as both the means and the ends of development.[82] Support for my first recommendation in Chapter 5 comes from Sen's case for intersecting forms of freedoms that sustain agency 'as a major engine of development.'[83]

Using rights as functional to the most important capabilities, Nussbaum has generated a list of 'separate and indispensable components' of 'the most central capabilities that should be the goal of public policy.'[84] It includes the ability to live a worthy life, in good bodily health and integrity, to be able to use senses, imagination and thought, to feel, to reason, to affiliate, to play, and to control one's political and material environment.[85] The capabilities approach applies flexibly to dilute the rigidity of the rights-interests binary. As an assessment tool used for the *Human Development Reports* of the United Nations Development Programme,[86] it is a respected, rational standard for assessing evidence in the enforcement of socio-economic rights. Can it be imported into jurisprudence as an objective, universal standard?

Irrespective of the nature of the dispute and what process is applied, politics is

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[77] Martha C. Nussbaum 'Capabilities and Human Rights' Fordham Law Review Vol.66 at 273-274.
[78] Nussbaum 'Capabilities' at 277.
[79] Nussbaum 'Capabilities' at 276.
[80] Amartya Sen *An Idea of a theory of justice*.
[81] Nussbaum 'Capabilities' at 279; Amartya Sen *Development as Freedom.*
[82] Amartya Sen *Development as Freedom* at 5.
[83] Amartya Sen *Development as Freedom* at 4.
[84] Nussbaum 'Capabilities' at 277.
[85] Nussbaum 'Capabilities' at 288.
[86] Nussbaum 'Capabilities' at 277.

not far from the surface of all disputes, especially those involving high stakes.[87] Claims of right do not exclude politics.[88] Nor is powerplay (strikes, demonstrations, etc) resorted to only in pursuit of claims of interest. Disparities in economic and political power exist between those asserting both claims of rights and interest and those resisting recognition and enforcement. So either could resort to powerplay if it suits its purpose, irrespective of the underlying cause of action. Boycotting the payment of e-tolls is such an instance. For, notwithstanding the legal obligation of road users to pay, their protest caused SANRAL to suspend its debt collection.[89] Demarcating between law and rights as efficient and rational on the one hand, and economics and politics as interests, distribution and irrational on the other hand is not constructive.[90] Efficiency and distribution are not mutually exclusive. In any dispute, circumstances will direct how efficient distribution should apply to deliver the preferred outcome. Politics as pragmatism imports an additional dimension to test law for the best outcome for a negotiated, mediated or litigated dispute. Friedman calls for a theory integrating law and politics without compromising our commitment to the rule of law.[91] Ultimately, litigation must rest on law for justification.

How the judiciary as an institution balances and checks power either accelerates or impedes constitutional transformation. Judges' responses to complexity matters. Posner identifies possible responses to external complexities: Judges delegate decision making to administrative agencies.[92] Judges 'duck, block, weave [and] change the subject.' They use 'evasive techniques' such as deference to administrative agencies.[93] Multi-factored

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[87]James R. Hackney 'Legal Intellectuals in Conversation: Reflections on the Construction of Contemporary American Legal Theory' Print publication date: 2012 Print ISBN-13: 9780814737071 Published to NYU Press Scholarship Online: March 2016 DOI: 10.18574/nyu/9780814737071.001.0001.

[88] Hackney 'Reflections' Published to NYU Press Scholarship Online: March 2016 DOI: 10.18574/nyu/9780814737071.001.0001.

[89] Sanral suspends process of pursuing e-toll debt https://www.news24.com/SouthAfrica/News/breaking-sanral-suspends-process-of-pursuing-e-toll-debt-20190327.

[90] Hackney 'Reflections' Published to NYU Press Scholarship Online: March 2016 DOI: 10.18574/nyu/9780814737071.001.0001 (accessed 11 November 2018).

[91] Barry Friedman 'The Politics of Judicial Review' 84 *Tex L Rev* 257 (2005) 269.

[92] Posner 'Reflections' (2013) at 17, 85-104.

[93] Posner 'Reflections' (2013) at 86.

tests are inclusive rather than exclusive without providing any weighting, thus widening judicial discretion without providing clear guidance.[94] Recasting issues with 'the semantic fig leaf' of the 'plain meaning' of text is a cover for not understanding the context.[95] Judges 'wing it, substituting a guess for data.'[96] Typically of professionals, judges too 'do not want to be transparent to the laity. They want their calling to be a mystery and one way to make it so is to complexify what they do.'[97] Formalism 'draws judges away from confronting the technological and other complexities of the environment that generates legal disputes.'[98] Employing theories of judicial restraint and constitutional and statutory interpretation, judges 'escape from complexity into complexity.'

Klare calls for candidness and self-consciousness about the politics of adjudication, and to 'make a *virtue* of what has traditionally been thought of as a dilemma.' For this, he asks 'South African lawyers to re-examine their analytical and argumentative methods and to attend to the burden their legal culture imposes on their work.' Klare argues that for law and legal practices to be 'a foundation of democratic and responsive social transformation,' we need 'to evolve an updated, politicized account of the rule of law.'[99]

As aspiring trainees in DSD we were taught that processes for resolving claims of interest and rights differ. Whereas adjudication is suitable for resolving disputes of rights, strikes, demonstrations and use of other forms of power are better suited to resolve disputes of interest, such as demands for wage increases for which rights have yet to be recognised or declared.[100] Consequently, I commenced these studies convinced of the importance of the distinction between rights and interest disputes. After reading for Chapter 2, I discovered that the distinction is substantively insignificant. Even procedurally, the distinction is porous. Irrespective of whether disputes are about rights or

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[94] Posner 'Reflections' (2013) at 87.
[95] Posner 'Reflections' (2013) at 87.
[96] Posner 'Reflections' (2013) at 88.
[97] Posner 'Reflections' (2013) at 13.
[98] Posner 'Reflections' (2013) at 14.
[99] Klare, Legal Culture and Transformative Constitutionalism, 14 S. Afr. J. on Hum. Rts. 146 (1998) 187-188; See Tom Bingham *The rule of law* for the evolution of the meaning of 'rule of law'.
[100] The DSD of the LRA, 1995 adopts this model.

interests, legal actors and litigants exercise substantive and process choices. However, their choices are driven by a range of influences unlimited by the distinction. Precedent and the principles of the separation of powers and deference apply as much to disputes of rights, which they did in *Barnard*, as they do in disputes of interests. Rarely does a single rule fit the facts of a particular rights dispute perfectly; conversely, in interest disputes the apparent breadth of possibilities is narrowed by the constraints of rules such as the separation of powers and precedent, and the reality of what is possible. What matters more is the range of legally permissible and constitutionally justifiable consequences of litigation. After reading about juristocracy, I am convinced: 'Nothing falls beyond the purview of judicial review. The world is filled with law; everything and anything is justiciable.'[101]

### 3.3.2 Public or private

Another bifurcation of disputes referred to litigation that recedes into insignificance is that between public and private law. A model of adjudication reserved for resolving private disputes and another for public law reserved for creating public law norms, is a false dichotomy.[102] Sabel and Simon's segmentation of private and public law disputes,[103] with the latter being regarded as suitable for experimentalist intervention is outdated. It fails to acknowledge the blurring of the public-private divide in law and fact. The private sector provides goods and services previously supplied by public services. Public-private partnerships are commonplace. Parliamentary sovereignty grounded in the notion that the king can do no wrong, is anachronistic in democracies in which constitutions are supreme. By opting for a constitutional democracy over a parliamentary or popular sovereignty South Africans accepted the Constitution as the supreme law.[104] Furthermore, decisions have precedential and polycentric impact irrespective of whether they

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[101] James Grant 'The Rise of Juristocracy 'WQ VOL34 SP 2010 Article 01 p17 citing Aharon Barak, president of the Israeli Supreme Court 1995-2006.
[102] Bone 'False Dichotomy' (1995) *Boston U. L.J.* at 1275.
[103] CF Sabel and WH Simon 'Destabilization rights: How public law litigation succeeds' (2004) 117 *Harv. L. Rev.* 1016.
[104] Karl Klare Self-Realisation, Human Rights, and Separation of Powers: A Democracy-seeking Approach *Stell LR* 2015 3 at 452.

arise in public or private disputes. *Rail Commuters Action Group*[105] is a classic example of public and private law intersecting through a single cause of action. In the slipstream of the precedent in *Carmichele*,[106] rail commuters succeeded against the Metrorail and the South African Rail Commuter Corporation in delict and contract for damages and under the constitutional duty to be accountable for the safety of commuters.

Hence, adopting a binary view of litigation would not only sacrifice insights into theories of participation, institutional design and the organization of society to overcome the limits of litigation, but would also miss the value of a multi-sectoral, multi-disciplinary, socio-legal account of litigation.[107] Admittedly, identifying the participants responsible for implementing and enforcing remedies is easier against public entities, because the constitutional obligations of the public sector to be accountable, transparent and responsive are explicit.[108] As the state is expected to have deeper pockets than private entities, it is also the preferred target for litigation. And, as players in the political space, public entities like Sanral, SABC and ESKOM are vulnerable to power play as an additional tactic to enforce rights.

### 3.3.3 National or international

An emerging frontier for innovation for law and practice is the dichotomy between national and international jurisdictions. Globalisation and the Internet revolution render geographical boundaries redundant for those seeking substantive, expeditious solutions to transnational disputes. Choice of forum disputes get in the way. The proliferation of international supervisory and adjudicative bodies, and international conventions and recommendations cumulatively trend towards borderless conflict resolution systems. The Internet Corporation for Assigned Names and Numbers (ICANN) set the trend for the

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[105] *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* (CCT 56/03) [2004] ZACC 20; 2005 (2) SA 359 (CC); 2005 (4) BCLR 301 (CC) (26 November 2004)
[106] *Carmichele* above. *Van Eeden v Minister of Safety and Security* 2003 (1) SA 389 (SCA); [2002] 4 All SA 346 (SCA).
[107] Bone 'False Dichotomy' (1995) *Boston U. L.J.* at 1275.
[108] Section 195 of the Constitution.

online resolution of disputes about domain names.[109] Online dispute resolution (ODR)[110] and conflict management services have since proliferated, mainly in the fields of Internet transactions and Consumer Law.[111] For public interest type conflicts deliberative global governance is an option.[112] How it will work in contexts as varied as managing financial crises, climate change, delimiting distribution of medicines[113] and poverty depends on a wide range of prevailing socio-economic and political conditions. Trade tariff wars between the East and West will have to simmer down before genuine dialogue takes effect. Concern about xenophobia being unfair discrimination would kickstart dialogue amongst nation states about fixing the causes and consequences of flight from trouble spots to unwelcoming destinations. Furthermore, an effective DSD must have efficient enforcement and deadlock breaking mechanisms to resolve the predictably high concentration of contradictions and contestations on international platforms. Most of all, it calls for quality and quantity of informed, competent and committed participation, liberally peppered with common aims and reciprocity.

### 3.4 Polycentricity

Fuller coined the term 'polycentricity' to illustrate how judgments in claims of interest, ramify like spider webs across people, policies and sectors that are not before the court. An order to pay damages or to provide housing has a domino effect on budgeting, other claimants awaiting recognition of their claims and other providers of goods and services. Providing housing implicates town

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[109] https://www.icann.org

[110] Also known as electronic ADR (eADR), online ADR (oADR) and Internet dispute resolution (iDR); K Mania 'Online dispute resolution: The future of justice' International Comparative Jurisprudence www.elsevier.com/locate/icj (accessed 17 August 2019).

[111] Using E-Mediation and Online Mediation Techniques for Conflict Resolution https://www.pon.harvard.edu/daily/mediation/dispute-resolution-using-online-mediation; O Rabinovich-Einy en E Katsh 'Digital Justice' https://www.elevenjournals.com/tijdschrift/ijodr/2014/1/IJODR_2014_001_001_002/fullscreen (accessed 17 August 2019).

[112] John S. Dryzek, Quinlan Bowman, Jonathan Kuyper, Jonathan Pickering, Jensen Sass and Hayley Stevenson 'Deliberative Global Governance' https://www.cambridge.org/core. IP address: 41.157.89.39, (accessed on 13 Jul 2019 at 11:25:25), subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781108762922

[113] E.g. Y A Vawda 'Access to Life-saving Medication in South Africa: The case for legislative reform' (unpublished LLD thesis) (2010).

planning, water and electricity reticulation, schooling, transport and health. Judgments also have polycentric impact when they set precedents.[114] Precedents may affect few or many people depending on the uniqueness or omnipresence of the problem. Fuller used the example of wage disputes to illustrate the limits of litigation from the angle of its tardiness in keeping up with economic change but more importantly, its polycentric effects on the economy.[115] The forms of adjudication are not geared to quickly access and absorb economic changes; nor can they factor in the complex consequences of a change in wages on other connected goods, services and people. Fuller acknowledged the inability of the forms of adjudication to encompass the polycentric impact of some decisions, as one of the limits of adjudication, that is, the inability to preserve participation by affected parties through proofs and arguments.[116] Polycentricity matters when the scale of its impact is 'so significant and predominant' that one must know 'that the proper limits of adjudication have been reached.'[117] The greater the polycentric impact is, the more compelling the case for broadening participation beyond the court and the litigants.

While litigation remains relevant for resolving all disputes, it is challenged as a medium for generating consensus about questions of morality, social and economic values, and a plethora of intractable conflicts in a complex, economically unequal and morally diverse society[118] in which common aims and reciprocity are ever elusive. Add polycentricity to the mix and the limits of litigation are further strained. Are dialogue theories capable of freeing litigation from its procedural constraints that limit who participates, and how, in litigation that leads to polycentric decisions?

Deference or majoritarianism is another binary. Notwithstanding the limits of litigation, it is the state-sponsored process for resolving all disputes. Polycentricity does not 'immunise allocative decisions from judicial review but

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[114] Fuller 'Forms and limits' (1978) *Harv. L. Rev* at 396.
[115] Fuller 'Forms and limits' (1978) *Harv. L. Rev* at 394.
[116] Fuller 'Forms and limits' (1978) *Harv. L. Rev* at 391 and 393.
[117] Fuller 'Forms and limits' (1978) *Harv. L. Rev* at at 397.
[118] Michael C. Dorf 'Legal Indeterminacy and Institutional Design' 78 N.Y.U. L. Rev. 2003 at 877.

may 'usefully be taken into account by judges in deciding upon the appropriate level of judicial deference . . . on an issue by issue basis.'[119] The majoritarian principle also has limitations. A majority may act undemocratically and unconstitutionally by preferring their party instead of the people. Furthermore, decision-making by voting for or against is manifestly binary, jettisoning the range of possibilities in between. Expanding participation through dialogue in litigation explores the range, thus mitigating the risks of over-stepping the separation of powers principle.[120]

### 3.5 Separation of powers

Underpinning the scheme of the Constitution, is Montesquieu's separation of powers principle. [121] The constitutional separation between state and institutional powers would be at risk[122] when either fails to exercise its powers progressively or at all. However, separation and judicial deference[123] are rule choices available to litigants and legal actors to apply either altruistically to prevent abuse of power or to frustrate substantive transformation and even 'the progressive realisation' [124] of socio-economic rights through litigation. [125] Choice invites unarticulated extraneous factors to intercede. This tension between the necessity for separation and its potential to impede transformation is fortified by commentators below. A dialogical approach would mitigate this binary. *Mwelase* shows how.

Brand's study of socio-economic rights cases in South Africa supports

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[119] Firoz Cachalia 'Separation of Powers, Active Liberty and the Allocation of Public Resources: The E-Tolling Case (2015) 132 SALJ at 307, 311.
[120] Cachalia 'The E-Tolling Case' at 308.
[121] Montesquieu *The Spirit of the Laws* (1748); Constitutional principle VI.
[122] Le Roux and Davis *Lawfare* at 45.
[123] Brand 'Judicial Deference and Democracy in Socio-economic Rights Cases in South Africa' in 'Law and Poverty' eds. Liebenberg et al 172 at 174.
[124] *Government Of The Republic Of South Africa And Others v Grootboom And Others* 2001 (1) SA 46 (CC) para 38, 45, 96 in which the Constitutional Court declared that the obligation upon the State to provide housing was 'not absolute or unqualified' but merely (a) 'to take reasonable legislative and other measures; *(b)* to achieve the progressive realisation of the right; and *(c)* within available resources.'
[125] Brand 'Deference' in 'Law and Poverty' eds Liebenberg et al *Stell LR* 172 at 179 and authorities cited there.

Williams's findings that the CC's deference in the application of the separation of powers principle in socio-economic rights cases is binary. Typically a deferential application of the principle of separation of powers to remedy institutional problems is a 'strategy' of the courts to leave difficult technical disputes in socio-economic rights cases to the other arms of government.[126] This strategy applies equally to institutional problems in other areas of constitutional and administrative law review.[127] Brand concludes that its effect has been to obstruct effective enforcement of socio-economic rights, resulting in, at best, attenuated remedies in 'successful' claims.[128]

Similarly, Davis laments that with politics delivering so little to so many, and lawfare becoming the default strategy, the plethora of cases descending on the courts is unlikely to abate.[129] Deputy Chief Justice Moseneke elaborates with *Moutse Demarcation Forum*.[130] When the community opposed policy decisions of their elected representatives, they turned to the courts instead of electing new leaders or trying to change their policies – a case of class struggles morphing into class actions.[131]

Drawing on Klare, van der Walt, van Marle and others Danie Brand is also critical of the CC's avoidance of politics.[132] In his unpublished thesis *Courts, Socio-Economic Rights and Transformative Politics* he laments the 'legalism of juridification' that tends to 'diminish the potential for political action.'[133] He advocates popular political activism and 'transformative politics'[134] to deliver on socio-economic rights.[135]

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[126] Brand 'Deference' *Stell LR* 2011 3 615, 618.
[127] Brand 'Deference' *Stell LR* 2011 3 619.
[128] Brand 'Deference' *Stell LR* 2011 3 614.
[129] Davis 'Twenty Years of Constitutional Democracy' (2015-2016) *N.Y.L. Sch. L. Rev*. at 54.
[130] *Moutse Demarcation Forum & others v President of the RSA & others v President of the RSA & others* 2011 (11) BCLR 1158 (CC).
[131] Dikgang Moseneke 'Remarks: The 32nd Annual Philip A. Hart Memorial Lecture: A Journey from the Heart of Apartheid Darkness Towards a Just Society: Salient Features of the Budding Constitutionalism and Jurisprudence of South Africa 101 Geo. L.J. 749 2012-2013 772 and fn 130 citing from Dennis Davis & Michelle Le Roux, 'Precedent & Possibility 185 (2009) (quoting 'Law & Disorder in the Postcolony' 26-27 (John Comaroff & Jean Comaroff eds., 2006).
[132]Chapter One of Brand J F D 'Courts, Socio-Economic Rights and Transformative Politics' (unpublished LLD thesis, University of Stellenbosch 2009) at 3.
[133] Brand 'Courts, Socio-Economic Rights and Transformative Politics' at 70.
[134] Brand 'Courts, Socio-Economic Rights and Transformative Politics' at 6.
[135] Contrast with Michelman F 'Law's Republic' (1987-1988) 97 *Yale L.J*. 1493 at 1498.

As for the separation of powers constraint [136] he answers the counter-majoritarian dilemma by treating litigation, as I do, as another opportunity beyond legislative and executive deliberation for all to participate 'in critical, transformative political action' [137] with continuing dialogical litigation being facilitative rather than constraining. [138]

Judicial deference is not synonymous with being 'neutral'. It is plainly partisan; refusing to intervene would mean rejecting the claims on one side in favour of another side. [139] Resorting to declaratory rather than directory remedies strategically avoids holding institutions to account for their problems.[140] These are not neutral choices but purposeful preferences aimed at achieving how the decision-maker wants the case to come out. What inspires a decision maker to prefer outcome X instead of Y, deference instead of interference, freedom instead of constraint? What lies in between these binaries? These should be recurring questions in every case in which more than one outcome is legally tenable.

Deference that proceduralises democracy has counter-democratic effect.[141] Similarly, the 'technicisation of poverty' as 'complex' sets up deference to depoliticize claims for rights in order to demobilise capacity for democratic political participation. [142] Dumbing down politics, dialogue, rationality and reasonableness are the very antithesis of deliberative, jurisgenerative, agonistic constitutionalism.[143] Defending deference as a means of avoiding the 'judicialisation of politics', juristocracy or lawfare begs the question: Who is at war with whom and why?

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[136] Brand 'Courts, Socio-Economic Rights and Transformative Politics' at 7.
[137] Brand 'Courts, Socio-Economic Rights and Transformative Politics' at 8.
[138] Brand 'Courts, Socio-Economic Rights and Transformative Politics' at 11.
[139] Brand 'Deference' *Stell LR* 2011 3 621.
[140] Brand 'Deference' *Stell LR* 2011 3 614.
[141] Brand 'Deference' *Stell LR* 2011 3 625.
[142] Brand 'Deference' *Stell LR* 2011 3 630-631.
[143] Brand 'Deference' *Stell LR* 2011 3 626.

Brand urges the courts to adopt 'a useful and sustainable approach' that does not avoid, but acknowledges genuine institutional problems.[144] Similarly, in *The Selfless Constitution: Experimentalism and Flourishing as Foundations of South Africa's Basic Law*,[145] Woolman argues that when courts fail to enunciate norms, then both best practice by other branches of the state and participation in a court-created forum to promote meaningful engagement, are also sacrificed. Premised on shared constitutional interpretation and participation, experimental constitutionalism[146] spurns avoidance.[147]

Courts should be 'sensitive to the impact that their work might have on the achievement of this substantive constitutional conception of democracy', a form of democracy that does more than boast of its structures, symbols, forms and procedures. It promotes democracy as participatory and practiced, with all state agencies and, emphatically, a critical mass of the population who are committed towards achieving its transformative goals.[148]

The vision of democracy as dialogical, agonistic and jurisgenerative debunks suggestions that separation is synonymous with unmitigated departmentalism in which the three arms of government have independent and decisive authority to interpret the Constitution where its own power is concerned. Nor does judicial independence mean unbridled judicial supremacy.[149] Naturally, if democracy is functioning optimally, recourse to judicial review will be minimal. After all, courts do not seek out cases but remain passive until activated to resolve disputes. Conversely, judicial review is strong when political questions can no

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[144] Brand 'Deference' *Stell LR* 2011 3 617.
[145] Stu Woolman *The Selfless Constitution: Experimentalism and Flourishing as Foundations of South Africa's Basic Law* Juta 2013 ISBN 978 1 4851 0007 2.
[146] Discussed below.
[147] Woolman at 22, 28.
[148] Brand 'Deference' *Stell LR* 2011 3 623-624
[149] *Motata v Minister of Justice and Correctional Services and Another* (52010/2016) [2016] ZAGPPHC 1063; [2017] 1 All SA 924 (GP) (30 December 2016) para 27-28; R C Post& R B Siegel "Popular Constitutionalism, Departmentalism, and Judicial Supremacy" (2004). Faculty Scholarship Series. Paper 178 1031. http://digitalcommons.law.yale.edu/fss_papers/178; D W Tyler 'Clarifying Departmentalism: How the Framers' Vision of Judicial and Presidential Review Makes the Case for Deductive Judicial Supremacy' (2009) 50 *William & Mary Law Review* 2215; D E Johnsen "Functional Departmentalism and Nonjudicial Interpretation: Who Determines Constitutional Meaning?" (year) http://www.law.duke.edu/journals/lcp. (accessed15/12/2016).

longer be resolved through political discourse, strategies and tactics. Then separation of powers works like a porous, malleable membrane functioning osmotically between judicial review at one end and popular political democracy on the other end. When popular democracy or the other arms of government weaken, judicial review tends to strengthen. Cases typifying this include *UDM*,[150] *SASSA*[151] and *Tlokwe*.[152]

*Mwelase*[153] is a game-changer. Dysfunctionality in the Department of Rural Development and Land Reform drove the CC to clarify the application of the separation of powers principle under such conditions:

'[46] All this shows is that the mythical spell must be broken. And the impasse must be resolved. And it can be done, with cooperation, goodwill, humility and respect – and without necessarily adversarial combat. The courts and government are not at odds about fulfilling the aspirations of the Constitution. Nor does the separation of powers imply a rigid or static conception of strictly demarcated functional roles. The different branches of constitutional power share a commitment to the Constitution's vision of justice, dignity and equality. That is our common goal. The three branches of government are engaged in a shared enterprise of fulfilling practical constitutional promises to the country's most vulnerable.'[154]

In *Mwelase*, the CC elevates dialogue to enjoy the imprimatur of constitutional law recognition. The courts do not have to become the battleground for hegemony as political warfare turns into lawfare.[155] The dialogue is not only amongst the three arms of the government but also between the courts and the academy and civil society, to which the CC remains responsive thus:

'[50] Through all times and issues, this Court has emphasised the importance of respect for the separated distribution of powers between Legislature, Executive and

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[150] *United Democratic Movement v Speaker of the National Assembly and Others* [2017] ZACC 21
[151] *SASSA*.
[152] *Electoral Commission of South Africa v Speaker of the National Assembly and Others* [2018] ZACC 46.
[153] *Mwelase* para 46.
[154] *Mwelase* para 46.
[155] Dennis M Davis 'Separation of powers: Juristocracy or democracy' (2016) *SALJ* 258 at 16; Dennis M Davis 'Twenty Years of Constitutional Democracy: A Preliminary Reflection' (2015-2016) 60 *N.Y.L. Sch. L. Rev.* 39 at 54.

Judiciary. And it has not only enjoined restraint in the exercise of judicial power, it has displayed it – so much so that its critics have on occasion reproved it for over-cautious timidity.[156] (footnotes omitted) (my underlining)

Woolman draws on the work of experimental theorists Dorf, Simon, Sable and Sturm.[157] The attraction of experimental constitutionalism is that it seeks to ground the answers to constitutional and political questions in 'empirical findings, in best practices arrived at through trial and error, a shared commitment to forward and lateral looking analysis of solutions that serve our ends best, and reflexivity with respect to those ends themselves.'[158] It avoids declaring 'grand theories that predetermine outcomes'.[159] Aggregating our collective knowledge and wisdom coupled with a commitment to reflexivity promises better outcomes.[160] Feedback mechanisms and simulation of possibilities[161] enables reflection upon experience and to plan new courses of action.[162] Experimentalism tests theories in specific areas of law, to inform the interpretation of constitutional provisions that are set at a high level of abstraction for implementation at coordinate branches of central government and other implementing agencies.[163] Woolman substitutes 'deliberation' with 'experimentation' because some problems are 'so complex' that only 'permanent experimentation', 'feedback and information-sharing, will allow communities, states and international institutions … stay on top of seemingly intractable problems.[164] Experimentation is revolutionary because those who experiment anticipate jettisoning their preconceived ideas for new ones.

In presenting his design for experimentalism, Woolman seeks to balance the doctrine of constitutional supremacy with the doctrine of separation of powers to suggest how the authority for constitutional interpretation should be distributed amongst the three arms of government and civil society and how to

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[156] *Mwelase* para 46; See also *Holomisa*.
[157] Woolman *The Selfless Constitution* at 204.
[158] Woolman *The Selfless Constitution* at 7.
[159] Woolman *The Selfless Constitution* at 7.
[160] Woolman *The Selfless Constitution* at 58.
[161] Or as facilitators describe, 'reality testing' or 'scenario sketching'.
[162] Woolman *The Selfless Constitution* at 29.
[163] Woolman *The Selfless Constitution* at 62.
[164] Woolman *The Selfless Constitution* at 62.

avoid some outcomes.[165] He foresees an enhanced role for Chapter Nine institutions with regard to investigations, information sharing and norm setting.[166] He finds hope for advancing experimentalism in judgments of the CC in housing and education that already evidence principles of experimental constitutionalism. Experimentalism is premised on the belief that information to solve polycentric problems is best obtained from multi-stakeholder participation instead of command and control systems.[167]

The doctrine of separation of power '"cannot be used to avoid the obligation of a court to prevent the violation of the Constitution."'[168] (footnotes omitted) However, the courts 'step intervene to correct erroneous interpretations of the law, or to protect rights, only when persuaded by argument and evidence. The 'bogeyman of separation of powers concerns should not cause courts to shirk from this constitutional responsibility.'[169] And litigants and their representatives should ensure that they generate legal materials that enable the courts to meet this obligation.

Klare reasons that a consequence of the doctrine of Constitutional supremacy is that 'the Constitution knows no functional borders or exclusive institutional domains';[170] 'trespass' is not a reason for exercising judicial caution or reluctance.[171] Reasons 'drawn from a substantive vision of democracy, including socio-economic democracy, derived from the Constitution' must justify restraint and interference.[172] Whether restraint prevails because breaching the separation of powers is 'harmful' or interference occurs because it is justified, depends on a balancing of competing values. Separation of powers must 'contribute to achieving more fundamental values given by the Constitution, namely, democracy, human dignity, equality, freedom, and accountable, responsive and open government.' Spurning 'vintage

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[165] Woolman *The Selfless Constitution* at 60.
[166] Woolman *The Selfless Constitution* at 204-207.
[167] Woolman *The Selfless Constitution* at 199.
[168] *Mwelase* para 52.
[169] *Mwelase* para 51.
[170] Karl Klare 'Self-Realisation, Human Rights, And Separation of Powers: A Democracy-seeking Approach' *Stell LR* 2015 3 at 447.
[171] Klare 'Self-Realisation' at 447.
[172] Klare 'Self-Realisation' at 448.

conceptions of checks-and-balances, institutional competence, and simplistic binaries', Klare contends for 'a democracy-seeking project' inspired by the context to innovate and transform.[173] Democracy takes on new meaning under a constitution that fosters 'new governance relationships, new sources of legitimate political authority, and a modernized conception of government by majority rule.'[174] However, separation of powers is complicated even more by 'a duty to nurture in all human beings their inherent but often blocked or underdeveloped capacities for self-governance and self-realisation in political and personal life.'[175]

The separation of powers remains a constant tension between deference and under-realisation, and overreach and excess.[176] The courts 'acutely aware of the perils of trying to do too much' will intervene, 'with necessary trepidation' 'only when the evidence and arguments compel them to conclude that the Executive or the Legislature has done wrong, or has not done enough.' While *Mwelase* is a breakthrough, sight should not be lost that, in the particular circumstances of the case, the Department had conceded that a court-appointed special master might be warranted. However, it persisted that the level of violation and dysfunction were not extreme enough.[177] So the debate about the special master was not about overreach, but about 'a careful consideration of where judicial power stops, and, with it, the practical question as to when a court intervention on this scale is justified.'[178] The scale in *Mwelase* was compelling:

'[40] This is because here, over nearly two decades, and indisputably since 2006, the Department has manifested and sustained what has seemed to be obstinate misapprehension of its statutory duties. It has shown unresponsiveness plus a refusal to account to those dependent on its cooperation for the realisation of their land claims and associated constitutional rights. And, despite repeated promises, plans and undertakings, it has displayed a patent incapacity or inability to get the job done.

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[173] Klare 'Self-Realisation' at 446.
[174] Klare 'Self-Realisation' at 446.
[175] Klare 'Self-Realisation' at 446.
[176] *Mwelase* para 52.
[177] *Mwelase* para 54.
[178] *Mwelase* para 55.

[41] In this, the Department has jeopardised not only the rights of land claimants, but the constitutional security and future of all. South Africans have been waiting for more than 25 years for equitable land reform. More accurately, they have been waiting for centuries before. The Department's failure to practically manage and expedite land reform measures in accordance with constitutional and statutory promises has profoundly exacerbated the intensity and bitterness of our national debate about land reform. It is not the Constitution, nor the courts, nor the laws of the country that are at fault in this. It is the institutional incapacity of the Department to do what the statute and the Constitution require of it that lies at the heart of this colossal crisis.

[42] The performance of the Department in response to the increasingly focused pressures the applicants applied, has been an object, and abject, case in point. Each time, the Department has temporised. It has done this, each time, with promises of better performance. This time it would get things right. But it never did. It has been a classic case of more-same, more-same. The very course of this litigation, right up to the proceedings in this Court, has shown the Department's inability, in colloquial but apposite terms, to get its act together. While the good faith and good intentions of its promises and undertakings may be accepted, they have repeatedly failed to translate into effective, rights-affirming practical action. (footnotes omitted) (my underlining)

Substitute the demand for land with the national outcry against gendered violence, and the Department of Rural Development and Land Reform with the SAPS, and the judgment in *Mwelase* will hold good. Despite maximum penalties of life imprisonment for child and 'gang' rapists, there are no signs of the SAPS doing enough to abate the scourge.[179]

Social science theories from which dialogue theories evolve, ameliorate the counter-majoritarian resistance to judicial review on the basis that the court does not always have the final say.[180] Instead of judicial deference, they create

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[179] Thabo Mokone 'Cyril Ramaphosa calls an emergency sitting of parliament to deal with gender-based violence' *https://www.businesslive.co.za/bd/national/2019-09-14-cyril-ramaphosa-has-called-an-emergency-sitting-of-parliament-and-ncop-to-deal-with-gender-based-violence/;* Shukumisa Coalition Open Letter 'Mr President, we are deeply disappointed' 9 September 2019 https://www.dailymaverick.co.za/article/2019-09-09-mr-president-we-are-deeply-disappointed/

[180] Bateup 'The Dialogic Promise: Assessing the Normative Potential of Theories of Constitutional Dialogue' 71 Brook. L. Rev. (2006) at 1118. Hickman traces the concept of constitutional dialogue to Alexander Bickel, who paradoxically, also coined the idea of 'the

'room for strong judicial voices that can proclaim what is right and just' after considering the state's case for limiting the right and allowing the legislature to correct mistakes.[181] Nor is the court the only one who has a say when non-judicial participants (e.g. civil society, experts) with perhaps even 'greater democratic credentials' influence constitutional interpretation.[182] Furthermore, court orders require political support for compliance.[183] Political branches can enact new legislation to challenge, test or restrict court decisions.[184] Punishing or threatening the court is also an option, albeit one of last resort, when disagreement is intense.[185] 'Packing the court' with judges perceived or known to be sympathetic to the administration or the President has precedents in South Africa and abroad.[186] These 'institutional constraints' on judicial decisions refute unmitigated reliance on 'objective interpretative theories in constitutional scholarship'[187] that ignore subjective local current context. Furthermore, some constitutions, like ss 1 and 33 of the Canadian Charter, expressly allow political branches to override or generally limit judicial decisions, unless deference to the judiciary or 'unprecedented judicialization' gets in the way.[188] The 'most promising theories of constitutional dialogue' are those that do not privilege the judges' contributions.[189]

The conundrum can no longer be about the legitimacy of judicial review or about where to draw the red line in the shifting sands of the separation of powers.[190] If litigation is incapable of significant social reform, then its alternative of popular mobilisation is also not without limitations. Dialogue theories do not merely save judicial review from extinction as anti-democratic on account of being

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counter-majoritarian difficulty' to mean that ordinary politics could not reverse decisions of the US Supreme Court.[180]

[181] Kent Roach 'Constitutional and Common Law Dialogues Between the Supreme Court and Canadian Legislatures' (2001) *Can B Rev* at 489.

[182] Bateup 'The Dialogic Promise' at 1118, 1122.

[183] Bateup 'The Dialogic Promise' at 1119.

[184] Bateup 'The Dialogic Promise' at 1119.

[185] Bateup 'The Dialogic Promise' at 1119.

[186] Stephen Breyer *Making Our Democracy Work – A Judge's View* at 10; Le Roux and Davis *Lawfare* at 34. See discussion under 'Context' below.

[187] Bateup 'The Dialogic Promise' at 1119.

[188] Bateup 'The Dialogic Promise' at 1119-1120. Ran Hirschl 'Towards juristocracy: the origins and consequences of the new constitutionalism' 2004 Chapter 1 p18.

[189] Bateup 'The Dialogic Promise' at 1122.

[190] Klare 'Self-Realisation, Human Rights, And Separation of Powers: A Democracy-seeking Approach' *Stell LR*. 2015 3 at 466.

counter-majoritarian[191] and a violation of the separation of powers principle; nor do they propel the evolution of litigation simply to overcome its limits. In my literature review it emerged that in the current neo-constitutional era, dialogue theories have burgeoned beyond being reflexive post-hoc explanations and justifications of judicial review, to become strategies for innovating legal process reform, for reengineering and reinvigorating democracy. So, the debate should also not be about whether the institutional concerns about whether the courts' capacity, legitimacy, integrity and security should influence their decisions because they do.[192]

However, mainstreaming judicial review because it was once resisted as counter majoritarian should be celebrated cautiously. Neo-constitutions emerged as a reflexive response to avert simmering crises and an uncertain post-cold war world. Striking equilibrium in the form of some kind of liberal democracy, in which human agency has economic and political rights enforceable by the rule of law, supported by a free press and independent judiciary,[193] stalls chaos, tethers the beast of poverty, averts anarchy and delays constitutional crises. Absent vigilance, judicial review risks morphing constitutional democracies into juristocracies.[194] Judicial review offers flexibility to test the neo-constitutional waters as the new world unfolds. Recalibrating separation of powers is not cause for alarm but an exciting opportunity for 'constitutional dialogue'[195] within which to work out a new '"model of flexible cooperative relationship" between the branches of government'.[196]

**3.6 Context.**

[191] P Bergallo SELA (Seminario en Latinoamérica de Teoría Constitucional y Política) Papers. Paper 44 (2005) 6.
[192] Danie Brand 'Judicial Deference and Democracy in Socio-economic Rights Cases in South Africa' in 'Law and Poverty' edited by S Liebenberg and Geo Quinot (2013) 172 at 174-175.
[193] Martin Wolf 'Liberalism will endure but must be renewed – It is a work in progress, not a utopian project' https://www.ft.com/content/52dc93d2-9c1f (accessed 10 July 2019).
[194] See '11. What if we do not care about litigation?'
[195] Klare 'Self-Realisation' at 452-3.
[196] Klare 'Self-Realisation' at 452-3.

Peoples' struggles create context. In my literature review I identify three dramatic, destabilising historical occurrences that triggered litigation's reform in the past half century or more: The first was World War II that indirectly influenced the remedies prescribed in *Brown*,[197] which in turn led to the desegregation of schools in the USA. Ironically, South Africa regressed as it entrenched apartheid further with the Group Areas Act and a wave of pernicious legislation.[198] Having won 79 of the 150 seats in the House of Assembly but a minority of 41.2 percent of the votes, in contrast to the 50.9 per cent won by the opposition, the National Party and its allies were determined to realise its racist strategy.[199] How determined the government was to transform South Africa into an apartheid state emerged from the earliest constitutional cases in *Harris,* a dramatic tug-of-war between Parliament's quest for supremacy over the judiciary in the former's attempts to pass the Separate Representation of Voters Act.[200] It also packed the Appellate Division with judges sympathetic to the Nationalist Party after it failed to secure judicial endorsement for its attempts to disenfranchise coloured people.[201]

This was not the first time that South Africa regressed while the USA adopted an enlightened position. In 1916, Roscoe Pound voiced his concerns about the

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[197] *Brown v Board of Education* 347 U.S. 483 (1954).

[198] Group Areas Act 41 of 1950; The Black Education Act 47 of 1953; the Black Labour Relations Regulation Act 48 of 1953 and the Reservation of Separate Amenities Act 49 of 1953 to name a few.

[199] Le Roux and Davis *Lawfare* at 46.

[200]Separate Representation of Voters Act 46 of 1951; *Harris* & *others v Minister of the Interior & another* 1952 (2) SA 428 (A) *(Harris 1)*; *Minister of the Interior & another v Harris* & *others* 1952 (4) SA 769 (A) at 779 (*Harris 2*). Parliament created a historic constitutional crisis that surfaced in *Harris* & *Others v Minister* of the *Interior* & *another* 1952 (2) SA 428 (A) (*Harris 1*). The House of Assembly and the Senate sitting bicamerally, passed by a bare majority the Separate Representation of Voters Act 46 of 1951 which separated representation of European and non-European voters in the Cape. Section 152 of the South Africa Act (then also referred to as the 'Constitution'), required both Houses to sit together. Finding it 'impossible to separate the good from the bad' (*Harris* 1 at 472) the erstwhile Appellate Division unanimously set aside the whole Act on 20 March 1952. In retaliation, on 4 June 1952 Parliament passed the High Court of Parliament Act 35 of 1952 to superimpose over the Appellate Division a high court consisting of senators and members of the House of Assembly to review decisions of the Appellate Division. The Appellate Division reconstituted exactly as in *Harris 1*, again unanimously but also with each of the 5 judges writing separately and supportively, declared the High Court of Parliament Act invalid on procedural and substantive grounds. Most obviously, the High Court of Parliament was 'not a court of law but Parliament functioning under another name.' (*Harris 2* at 784). Subsequently, the government changed tack by appointing judges sympathetic to it.

[201] Harris, Le Roux and Davis *Lawfare* 32-34, 43-62.

strain that morality put on law.[202] He questioned when and why obedience to law is exhorted and what makes law enforcement succeed and what makes its founder.[203] In 1912, the African National Congress (ANC), the oldest political organisation on the continent was formed in South Africa. However, its first general secretary, Sol Plaatje angrily penned 'Native Life in South Africa' denouncing the 1913 Land Act in his opening line with:

'Awaking on Friday morning, June 20, 1913, the South African Native found himself, not actually a slave, but a pariah in the land of his birth.'[204]

The second destabilisation came with the ending of the Cold War that induced neo-constitutionalism. Both destabilisers implicated not only the substantive law but also the form of litigation. *Brown* debunked the conception that 'judicial review debilitates the political branches of government' as decision-making by the unelected few and is therefore undemocratic.[205] A sense of urgency accompanied the revolutions of the nineties, the third destabiliser. The show of public, political participation and common purpose was as graphic and immediate as the crowds breaking the Berlin Wall, and the spontaneous outpouring of fraternity internationally when Nelson Mandela was released from prison. With the rise of neo-constitutionalism, resistance to judicial review recedes. Or so we hope.

Why did the US Supreme Court legitimise segregation in 1886 in *Plessy*[206]and fifty-eight years later reverse it in *Brown*?[207] Both cases involved exactly the same constitutional clause. The responses to *Brown* are mixed and controversial.[208] Klarman proffers that the court in *Brown* 'deployed an

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[202] Roscoe Pound 'The Limits of Effective Legal Action' (1917) 3 *A.B.A. J.* 55 at 55.
[203] Pound (1917) *A. B. A. J.* at 58.
[204] *Sol Plaatje* http://zar.co.za/plaatje.htm (accessed 08/01/2016).
[205] Bateup 'The Dialogic Promise' at 1113.
[206] *Plessy v. Ferguson*, 163 U.S. 537 (1896).
[207] *Brown v. Board of Education* 347 U.S. 483 (1954).
[208] Some hail it as ideologically reassuring (Rosenberg 'The Hollow Hope' at 424-5), as symbolic, educational and as having a 'significant influence' in a 'positive direction. In Klarman 'Fidelity, Indeterminacy, and the Problem of Constitutional Evil' (1997) 65 *Fordham L. Rev.* 1739 at 1750-51 referring to Balkin, Klarman denies that *Brown* had such a 'dramatic' effect. Rosenberg acknowledges that Brown is 'universally credited with producing extra-judicial effects' but his research produces 'counter-intuitive findings' (Rosenberg 'The Hollow Hope' at 8, 421 and 424). His findings show that expectations of courts being effective in inducing change, especially in the face of resistance have not been met. (Rosenberg 420-1) Courts are

emerging or existing national consensus to suppress outlier state practices.'[209] Social and political context set 'the boundaries on plausible constitutional interpretation' rather 'than by constitutional traditions.'[210] Using the concept of freedom, Klarman notes that following World War II, the Civil Rights Movement was born.[211] If African Americans could die for their country, then they had to be protected from lynchings and other racial violations.[212] It was the Civil Rights Movement that provided the substantive cause of the free speech controversies[213] and a 'War on Poverty', which allowed the Warren Court to recognize the link between race, poverty and criminal procedure.[214] These substantive historical occurrences lead Klarman to conclude that 'in the grand scheme of things, courts have played a relatively marginal role in the history of American freedom. That is not to say no role at all, but rather a fairly small one.'[215]

Similarly, Rosenberg asks: Under what conditions can courts make a significant social difference?[216] When does it make sense to litigate to bring about significant social reform? He answers:

'Perhaps only when political, social and economic forces have already pushed society far along the road to reform will courts have an independent effect. Even then their decisions may be more a reflection of significant social reform already occurring than an independent, important contribution to it.'[217]

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powerless to implement their remedies and depend on the legislature to support their decisions. Furthermore, litigation diverts funding and activists from their political efforts to an institution too constrained to induce significant social reform. (Rosenberg 423).

[209] Klarman *Rethinking the History of American Freedom* at 278-279.

[210] MJ Klarman 'Fidelity, Indeterminacy, and the Problem of Constitutional Evil' (1997) 65 *Fordham L. Rev*. 1739 at 1743.

[211] Klarman *Rethinking the History of American Freedom* at 273.

[212] Klarman *Rethinking the History of American Freedom* at 276.

[213] Klarman *Rethinking the History of American Freedom* at 272 and the cases cited there namely *New York Times v. Sullivan*, 376 U.S. 254 (1964); *NAACP v. Button*, 371 U.S. 415 (1963); *NAACP v. Alabama*, 357 U.S. 449 (1958).

[214] Klarman *Rethinking the History of American Freedom* at 272 and the cases cited there namely *Gideon v. Wainwright,* 372 U.S. 335 (1963); *Miranda v. Arizona* 384 U.S. 436 (1966); U.S. 415 (1963) and *NAACP v. Alabama*, 357 U.S. 449 (1958).

[215] Klarman *Rethinking the History of American Freedom* at 278 *NAACP v. Button*, 371 U.S. 415 (1963); *NAACP v. Alabama*, 357 U.S. 449 (1958).

[216] Gerald N. Rosenberg *Hollow Hope* Second Edition, (2008) 4. By 'significant social reform' Rosenberg means on the scale of *Brown v. Board of Education* and *Roe v. Wade*, 410 U.S. 113 (1973). It means changing more than the way a single bureaucracy functions would not fit this definition, but 'attempting to change the functioning of a whole set of bureaucracies or institutions nationwide would.'

[217] Rosenberg *Hollow Hope* at 5; see also Rodríguez-Garavito 'Beyond the Courtroom: The

Rosenberg holds that *Brown* was a symbolic victory mistaken for a substantive one, the misfit of a legal solution for political and cultural problems.[218] Others, like Sonia Sotomayor are convinced that *Brown* initiated processes that ended apartheid in America; because of *Brown* most Americans today would agree that segregation was wrong.[219] *Brown* 'can be confidently adjudged as "correct" only by virtue of widespread acquiescence in its result (the test of time).'[220] Today it is unimaginable that any court would sanction the separate but equal argument – at least, not on the grounds of race – once popular in the USA before the school desegregation cases.[221]

Conversely, in apartheid South Africa, racial discrimination was entrenched in political machinations such as the Tri-cameral System.[222] Popular political resistance galvanised in the formation of the United Democratic Front (UDF) on 3 August 1983. Organised rolling mass action defied the notion that the right to equality imports a co-relative right to segregation. Shifts in popular politics from apartheid toward liberal democratic values occurred more subtly in the judiciary. Increasingly, liberal judges strived to decide in favour of anti-apartheid forces.[223]

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Impact of Judicial Activism on Socioeconomic Rights in Latin America' (2011) *Texas Law Review* 1670 at 1677 http://www.corteidh.or.cr/tablas/r27171.pdf (accessed on 27/03/2016) who notes: 'Contrary to the conventional view on *Brown*, which saw the decision as revolutionizing race relations in the U.S. and contributing to the birth of the civil rights movement in the 1960s, Rosenberg's empirical study concluded that the judgment had little effect and that the faith placed in courts as mechanisms for social change was a "hollow hope". In his view, it was the political mobilization of the 1960s and the resulting antidiscrimination legislation (and not the structural judicial decision) that achieved racial desegregation.'

[218] Rosenberg *The Hollow Hope* at 424-5.

[219] Sonia Sotomayor in conversation with Albie Sachs and Dennis Davis 28 July 2017 (UCT Law School).

[220] Posner at 38:

[221] M J Klarman *Rethinking the History of American Freedom'*(2000) 42 *Wm. & Mary L. Rev.* 265 278-279 http://nrs.harvard.edu/urn-3:HUL.InstRepos:12965060 (accessed on 02/01/2017) 271.

[222] http://www.sahistory.org.za/article/tricameral-parliament (accessed 10 April 2017).

[223] E.g. *S v Ebrahim* 1991 (2) SA 553 (A) (declaring unlawful the abduction, arrest and detention of an ex-Robben Island political prisoner), *Minister of Justice v Hofmeyr* 1993 (3) SA 131 (A) (declaring unlawful the conditions of detention that deprived a political detainee of literature), *S v Ramgobin and others* 1986 (4) SA 117 (N) (declaring inadmissible taped and video recorded evidence of political activists) and the spate of administrative law decisions based on the right to a hearing. *Administrator, Transvaal and others v Traub and others?* 1989 (4) SA 731 (A); *Administrator, Transvaal and others v Zenzile and others?* 1991 (1) SA 21 (A); *Administrator, Natal and another v Sibiya and another?* 1992 (4) SA 532 (A); *Buthelezi and others v Attorney-General, Natal* 1986 (4) SA 377 (A).

Common to both historical moments in the fifties in the USA and the eighties in South Africa was the pressure for fundamental societal transformation.[224] Both moments were characterised by law reform responding to social and moral pressure. However, courts seldom initiate radical social transformation or changes in public perception. A positive theory of constitutional interpretation and dialogue is that, over time, judicial decisions level with or reach equilibrium with sustained public opinion, not that courts actively seek out public opinion.[225] Why this happens, Friedman suggests, must have its source in the constrained political milieu in which courts function. [226] Courts respond to popular preferences not in an immediate, knee-jerk way but cautiously and only after intense debate, education and coalescence or political engagement.[227] Debate reinvigorates the push-pull tension of controversial issues until it subsides into consensus. [228] Moves to reform South Africa's electoral system from proportional representation to constituency based elections for national and provincial legislatures captures a growing sense of disaffection with the current state of political organisation.[229]

What is to be done to create a societal context receptive to transformative constitutionalism? Firoz Cachalia argues convincingly that for transformative constitutionalism to achieve 'large-scale social change and the redistribution of resources', conflicts must be 'repoliticised' and trust in democratic processes restored. Turning transformation 'into a court-centred, platonic project dependent for its rationale on 'distrust of democratic processes' would strip politics of its 'visibility in handling of problems and resources,' resulting ultimately in distortions in the balance of power between the three arms of

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[224] Steven Breyer *Making our Democracy Work – A Judge's View* at 49-67.
[225] Barry Friedman 'The Importance of Being Positive: The Nature and Function of Judicial Review' 72 U. Cin. L. Rev. 1257 2003-2004 1299; Sandra Day O'Connor *The Majesty of the Law: Reflections of a Supreme Court Justice* (2003) 166 Fn 175 ('Real change, when it comes, stems principally from attitudinal shifts in the population at large. Rare indeed is the legal victory - in court or legislature - that is not a careful by-product of an emerging social consensus. Courts, in particular, are mainly reactive institutions.'); Sandra Day O'Connor, 'Public Trust as a Dimension of Equal Justice: Some Suggestions to Increase Public Trust' 36 CT. REV. 10.
[226] Friedman 'The Importance of Being Positive' 72 U. Cin. L. Rev. 1257 2003-2004 1299.
[227] Friedman 'The Importance of Being Positive' 72 U. Cin. L. Rev. 1257 2003-2004 1297.
[228] Friedman 'The Importance of Being Positive' 72 U. Cin. L. Rev. 1257 2003-2004 1303.
[229] *New Nation Movement NPC and Others v President of the Republic of South Africa and Others* [2019] ZACC 27.

government.[230] Assuming more power than they can manage is a risk that courts tend to resist with deference.[231] Instead, redirecting litigants towards a 'conversation between the branches of government is not objectionable on the basis that the court is thereby surrendering part of its interpretive responsibility; consequently, judicial primacy is not called into question.' Cachalia supports the concept of dialogue in so far as it may 'have more promise for accommodating considerations of democratic accountability.' Furthermore, in socio-economic rights cases at least, which are potentially more policy-laden and polycentric, considerations of democratic accountability may be relevant in giving content to rights.'[232]

Supporters of the neo-constitutional project contend that new constitutions of the nineties create, at least in text and theory, new common purpose fortified by international solidarity around universal constitutional rights and values that move decisively beyond first generation civil and individual rights to second generation collective socio-economic rights, and even third generation rights to a healthy, sustainable environment.[233] Constitutions are the new law, the powerhouse or the engine room[234] for substantive social reform through the supreme law of the land,[235] with the judicial authority vested in the courts as the apex and final arbiters of constitutional interpretation.[236]

But criticism of neo-constitutionalism is gaining ground worldwide. Courts tend to 'reinforce existing power structures in society, often acting as a vehicle of class, race, gender, and other forms of subordination.'[237] Roberto Gargarella's survey of the evolution of constitutional reform and the judiciary leads him to a

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[230] Firoz Cachalia 'Separation of Powers, Active Liberty and the Allocation of Public Resources: The E-Tolling Case (2015) 132 SALJ, citing French Philosopher Jacques Rancière at 310.
[231] Cachalia 'Separation of Powers' (2015) 132 SALJ at 308.
[232] Cachalia 'Separation of Powers' (2015) 132 SALJ at 309.
[233] Penny Andrews and Stephen Ellmann eds. 'Post-Apartheid Constitutions' 2001; S Liebenberg and Geo Quinot (editors) 'Law and Poverty – Perspectives from South Africa and Beyond'; Christopher Mbazira 'Litigating Socio-economic Rights in South Africa – A choice between corrective and distributive justice' PULP (2009). Le Roux and Davis *Lawfare* at 2-3.
[234] R Gargarella 'Latin American Constitutionalism: Social Rights and the "Engine Room" of the Constitution' (2014) 4 *Notre Dame Journal of International & Comparative Law* http://scholarship.law.nd.edu/ndjicl/vol4/iss1/3 (accessed on 09/02/2017).
[235] Sections 1(c) and 2 of the Constitution.
[236] Sections 165 and 167(3)-(7) of the Constitution.
[237] Michael Dorf 'Legal Indeterminacy and Institutional Design' 78 N.Y.U. L. Rev 875 (2003) 901.

similar conclusion. Since the 19th Century, notwithstanding the emphasis on social, economic and political rights in the Mexican and Latin American constitutions, and dramatic innovation with dialogic constitutionalism, transformation is lacking in the basic structure of political power, and the organisation and composition of the judiciary that maintains its 'elitist bias'. Judges continue to side with the middle and upper classes, leaving citizens little option to hold public officers accountable.[238] Gargarella concludes that veto rights, impeachment and judicial review are defensive tools suitable for avoiding civil war but hardly conducive for 'promoting public, collective dialogue'.[239]

At the turn of the 20th century, Mexican and Latin American judiciaries regarded constitutional rights as goals to be pursued by the political branches.[240] The social rights clauses became dormant over a protracted period for many complex reasons, but three are relevant for present purposes:

- A counter-majoritarian structure that isolated the judiciary from the people left little room for popular participation.
- The organization of power not only remained unreformed, but became more 'centralized, vertical and isolated from popular pressures'.[241]
- The new constitutions failed to bolster the political influence of marginalized groups and their capacity to decide and control those in power.

In other words, the '"working class" then came into the Constitution through the section of rights, while 'the doors of the "engine room" of the Constitution remained closed to them.'[242] Neoliberal reforms of the 21st Century also failed

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[238] Roberto Gargarella 'Constitutional Changes and Judicial Power in Latin America' https://www.sas.upenn.edu/dcc/sites/www.sas.upenn.edu.dcc/files/uploads/Gargarella%20-%20Constitutional%20Change.pdf 14-15. (accessed 26 February 2017); Gargarella (2014) 'Latin American Constitutionalism: Social Rights and the "Engine Room" of the Constitution' Notre Dame Journal of International & Comparative Law: Vol. 4: Iss. 1, Article 3. http://scholarship.law.nd.edu/ndjicl/vol4/iss1/3 (accessed 9 February 2017).
[239] Gargarella 'Constitutional Changes and Judicial Power in Latin America' at 15.
[240] Gargarella 'Constitutional Changes and Judicial Power in Latin America' at 6-7.
[241] Gargarella 'Constitutional Changes and Judicial Power in Latin America' at 8.
[242] Gargarella 'Constitutional Changes and Judicial Power in Latin America' at 8; Gargarella

to open the doors of the engine room.[243] Rights and power remained divorced from each other.[244] The forces of 'hyper-presidentialism' blocked social reform.[245] Reforms emerged after better access to justice was granted.[246]

The establishment in Costa Rica of the Constitutional Chamber with its expansive right to standing, its break from procedural formalism, with lawyers available free of fees, with claimants of any age being able to file in any language, swiftly and dramatically changed access to justice.[247] Colombia and later Argentina and Brazil experienced similar changes.[248] These changes also heralded doctrinal innovation.[249] Dialogic constitutionalism inspired judges to innovate, for instance, by broadening the base and scope of participation, by organizing public gatherings, prescribing plans and reporting requirements, and monitoring compliance.[250]

Scholars ventilate similar shortcomings about South Africa as in parts of Latin America and Costa Rica. Despite having a Constitution world-renowned for its generous and expansive recognition of even socio-economic rights, contemporary academics reinforce the lament[251] that the lack of a legal consciousness and culture necessary for transformative constitutionalism and the failure of politics stand out as two conditions that impede our jurisprudence.[252] Instinctively 'traditional',[253] jurists are reluctant 'to interrogate and renovate the common and customary law so as to promote the values expressed in the Bill of Rights,' notwithstanding the unequivocal entrenchment

(2014) 'Latin American Constitutionalism: Social Rights and the "Engine Room" of the Constitution' at 16-18.
[243] Gargarella 'Constitutional Changes and Judicial Power in Latin America' at 11.
[244] Gargarella 'Constitutional Changes and Judicial Power in Latin America' at 11; Gargarella (2014) 'Latin American Constitutionalism: Social Rights and the "Engine Room" of the Constitution' at 16-18.
[245] Gargarella 'Constitutional Changes and Judicial Power in Latin America' at 11.
[246] Gargarella 'Constitutional Changes and Judicial Power in Latin America' at 11-12.
[247] Gargarella 'Constitutional Changes and Judicial Power in Latin America' at 12.
[248] Gargarella 'Constitutional Changes and Judicial Power in Latin America' at 13.
[249] Gargarella 'Constitutional Changes and Judicial Power in Latin America' at 14.
[250] Gargarella 'Constitutional Changes and Judicial Power in Latin America' at 15.
[251] Described in Chapter 2 Part A under 'Subjective Conditions'.
[252] Davis and Klare 'Transformative Constitutionalism and the Common and Customary Law' (2010) 26 *SAJHR* 403 at 403.
[253] Davis and Klare (2010) 'Transformative Constitutionalism and the Common and Customary Law' (2010) 26 *SAJHR* 403 at 467.

of the courts' power in s 8(3)(a) of the Constitution to make law when the legislature does not. Transformative jurisprudence is slow with better showings in contexts like legacy of apartheid challenges than economic redistribution.[254] Traditionalism survives unrelated to the legal actors' race, gender or political ideology.[255] Instead of remedying the conditions that impede development, the constitutional project is targeted.[256]

Critics of the constitutional project in South Africa argue, for instance, that during negotiations for a democratic constitution, advocates for the majority black and poor people did not secure economic transformation favouring them. To entrench property rights constitutionally and to insist on no expropriation without compensation, they protest, ignores the injustice, violence and pain of the colonialists' deprivation of the land of indigenous people.[257] Reversing instead of progressively building on the gains of *Grootboom* has escalated conflict in communities. Non-governmental organisations like the Abahlali Base Mjondolo Movement of South Africa engage in violent confrontations with security forces.[258] Opposition political parties like the Economic Freedom Fighters (EFF) escalate their demand for land redistribution without compensation in violation of the s 25 of Constitution. Pressured in the run-up to the National and Provincial Elections of 2019, the ANC-led government established an advisory panel to report on land reform and agriculture.[259]

On the land question in South Africa, despite the passage of more than two decades, the democratically elected government never tested the scope of

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[254] Davis and Klare 'Transformative Constitutionalism and the Common and Customary Law' 26 *SAJHR* 403 2010 at 414.
[255] Davis and Klare 'Transformative Constitutionalism and the Common and Customary Law' 26 SAJHR. 403 2010 at 407.
[256] Le Roux and Davis *Lawfare* at 14-19.
[257] Le Roux and Davis *Lawfare* at 14-19.
[258] *Mngomezulu v Ethekwini Metropolitan Municipality* (079/2018) [2019] ZASCA 91 (3 June 2019); *Mngomezulu v eThekwini Metropolitan Municipality and Another* (12503/2014) [2017] ZAKZDHC 31 (30 August 2017). 'Homes in a War Zone' in 'The Independent On Saturday 19 August 2017 at 1.
[259] Ramaphosa Receives Report of Advisory Panel on Land Reform, Agriculture https://ewn.co.za/2019/06/11/ramaphosa-receives-report-of-advisory-panel-on-land-reform-agriculture (accessed 10 August 2019).; A Basson'ANC decision on land is about the election, not the economy' https://www.news24.com/Columnists/AdriaanBasson/anc-decision-on-land-is-about-the-election-not-the-economy-20180801 (accessed 10 August 2019).

section 25 of the Constitution. Deputy Chief Justice Dikgang Moseneke publicly pronounced that the Constitution permits expropriation and does make land reform possible.[260] Justice Albie Sachs writes:

'Far from being a barrier to radical land redistribution, the Constitution in fact requires and facilitates extensive and progressive programmes of land reform. It provides for constitutional and judicial control to ensure equitable access and prevent abuse. It contains no willing seller, willing buyer principle, the application of which could make expropriation unaffordable.'[261]

Notwithstanding, the Constitution is attacked as the obstacle to transformation, to deflect attention from political ineptitude.[262] Overall, for socioeconomic rights claims the gains for the poor are 'very modest'.[263] Judicial activism in the first decade of democracy should not be mistaken for unbridled enthusiasm for transformative constitutionalism. Expanding judicial power and building public confidence in an independent judiciary to deliver on rights is on the transformation agenda. However, that agenda remains ambiguous. Do the political actors transfer policy-making powers to the judiciary, because they are confident that deference rather than antagonism for and by the judiciary would better assure the hegemony of the elites? [264] Despite having the most progressive constitutions, liberal approaches to standing, and the escalation in the number of constitutional cases, socio-economic inequality in South Africa and New Zealand rank amongst the highest in the world.[265] Canada ranked among the top three countries in the United Nations Human Development Report but seventy-third for human development of its aboriginal population.[266] New-constitutions promise more than they deliver. Therefore, the pressure to

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[260] R Pithouse 'Dikgang Moseneke: Constitution allows for land expropriation' https://www.customcontested.co.za/dikgang-moseneke-constitution-allows-for-land-expropriation/ (accessed 10 August 2019).
[261] A Sachs 'Does the Constitution stand in the Way of Radical Land Reform?' 92 in 'Oliver Tambo's Dream' (2017).
[262] Le Roux and Davis *Lawfare* 'Conclusion: Precedent and possibility' at 301.
[263] DM Davis 'Socioeconomic rights: Do they deliver the goods?' Int J Constl Law (2008) 6 (3-4) 687.
[264] Hirschl 'Towards juristocracy: the origins and consequences of the new constitutionalism' 2004 Chapter 1 p20, p22, p213 recounts similar trends in Canada following the Constitution Act of 1982, in Israel with the enactments of two fundamental rights laws in 1992.
[265] Hirschl 'Towards juristocracy' 2004 at 219.
[266] Hirschl 'Towards juristocracy' 2004 at 219.

call government to account for its policy choices cannot let up, however modest the gains are.[267]

However, not only government is accountable for the degeneration of institutions and the consequent impediments to access to livelihood rights. Nor are poor policy choices the problem. People who populate dysfunctional institutions responsible for distribution of goods and services are equally accountable. World renowned for its policies and systems, the South African Revenue Services was systematically emaciated almost instantaneously with a change-over in governance and administration in 2009 under the Zuma presidency. Similarly, the bias of the Public Protector, Busisiwe Mkwebane contrasts starkly with the respect the courts accorded her predecessor, Thuli Madonsela.[268] So policies are only as good as the people charged to execute them.[269]

Dysfunctional institutions harm the population they are meant to serve. Paradoxically, such institutions are hunting grounds for both the elite and poor people. The elite profit from a corrupted system of procurements. The poor bear the brunt of appalling delivery of goods and services, often occasioned by corrupt procurement practices. However, litigating against dysfunctional institutions is profitable. Claims against the state and its agencies escalate in the form of medical malpractice suits against health facilities, and the SAPS, the National Prosecuting Authority and other institutions for wrongful arrests, detentions and prosecutions against.[270] Claims against the Road Accident Fund used to fill the court rolls. As no-fault liability came into effect, litigating against the state gradually displaces compensation claims for personal injuries

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[267]Davis 'Socioeconomic rights: Do they deliver the goods?' Int J Constl Law (2008) 6 (3-4) 687.
[268] See for example N Marrian 'Office of the public protector must not be captured' https://mg.co.za/article/2019-06-14-00-office-of-the-public-protector-must-not-be-captured; T Jika 'Mkhwebane has done it again'https://mg.co.za/article/2019-06-14-00-mkhwebane-has-done-it-again (accessed 23 June 2019).
[269] Le Roux and Davis *Lawfare* Foreword by Pravin Gordhan at xi fn 3 citing Daron Acemoglu and James A Robinson *Why Nations Fail: The Origins of Power, Prosperity and Poverty* 2012.
[270] *AD and Another v MEC for Health and Social Development, Western Cape Provincial Governmen*t (27428/10) [2016] ZAWCHC 182 (1 December 2016).

arising from motor collisions.[271] Legal actors and experts previously engaged in road accident cases search for new revenue streams by litigating against dysfunctional institutions.[272] Ironically, as state funding for health care shrinks, the risk of accidents and shoddy services escalate. Consequently, malpractices increase.[273] Claims escalate both in number and size. Claimants for damages for cerebral palsied children average over R10m per child.[274] As claims are paid, the already shrunken budgets diminish further. The vicious cycle of diminishing resources and escalating malpractices continues.

Dorf and Sabel[275] introduce the idea of democratic experimentalism as a form of government. Power and with it, participation are devolved to enable citizens to tailor solutions using local knowledge. Sabel and Simon suggest that public institutions that 'chronically' fail to fulfil their obligations and insulate themselves from political accountability are susceptible to claimants exercising 'destabilization rights' to 'unsettle and open' them up to judicial scrutiny. This enables courts at the outset to intervene to unsettle litigants' expectations and to facilitate 'experimentalist collaboration'.[276] Experimentalist remedies are less threatening and invoke greater civic participation,[277] accountability[278] and goal-setting. Effectively, 'the remedy institutionalizes a process of ongoing learning and reconstruction'.[279] The role of the court diminishes once the norm setting that defines compliance shifts from the judiciary to 'the actors who live

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[271] *The Premier of the Western Cape Provincial Government N.O. v Rochelle Madalyn Kiewitz obo Jaydin Kiewitz* (158/2016) [2017] ZASCA 41 (30 March 2017) para 12.
[272] *Madida obo M v Mec for Health for the Province of Kwa-Zulu Natal* (14275/2014) [2016] ZAKZPHC 27 (14 March 2016) para 75-84.
[273] T Kahn 'Court halts lawyer's allegedly fraudulent claims' https://www.businesslive.co.za/bd/national/health/2019-06-27-court-halts-lawyers-allegedly-fraudulent-claims/ B Fuzile 'Court stops R39m payments to controversial lawyer Zuko Nonxuba amid fraud investigation' https://www.timeslive.co.za/news/south-africa/2019-03-06-court-stops-r39m-payments-to-controversial-lawyer-zuko-nonxuba-amid-fraud-investigation/ (accessed 29 June 2019).
[274] Analysis of pending cases in the Kwa Zulu Natal High Court (Pietermaritzburg) appendix to *Madida obo M v Mec for Health for the Province of Kwa-Zulu Natal* (14275/2014) [2016] ZAKZPHC 27 (14 March 2016) para 75. *NK obo ZK v MEC for Health, Gauteng* (216/17) [2018] ZASCA 13 (15 March 2018).
[275] M C Dorf and C F Sabel 'A Constitution of Democratic Experimentalism' 1998 *Vol 98 No 2 Col.L.R*.
[276] Charles F. Sabel & William H. Simon 'Destabilization Rights: How Public Law Litigation Succeeds' 117 Harv. L. Rev. 1016 (2004) at 1021.
[277] Sabel and Simon 'Destabilization Rights' *Harv. L. Rev.* (2004) at 1015.
[278] Sabel and Simon 'Destabilization Rights' *Harv. L. Rev.* (2004) at 1027.
[279] Sabel and Simon 'Destabilization Rights' *Harv. L. Rev.* (2004) at 1019.

by them'. [280] Continuous collaborative processes reduce dependence on judicial management, 'the risk to its political legitimacy'[281] and 'hence mitigate separation-of-powers concerns about structural remedies'.[282]

Three preconditions prop Woolman's theory of experimentalism: Flourishing, social capital and choice architecture. By flourishing, Woolman means the endowment of dignity that comes with the bestowal of that basket of primary goods that include civil and political rights to every member of the community. For this, he draws on Amartya Sen's development theory and Martha Nussbaum's capabilities theory[283] for group and individual flourishing.

By social capital Woolman means 'our collective effort to build and to fortify those things that matter.[284] It is contingent upon our ability to associate meaningfully. For a developmental state like South Africa to succeed, both bonding and bridging networks are essential for social and political revolution or flourishing.[285] Social capital equates to our capacity to create and maintain forms of association that enable meaningful action. Social formations provide the milieu in which we come to understand what it means to be human, to be different yet recognised. As ephemera, social capital is elusive and fragile because it is built upon relationships, commitments, trusts, respect and loyalty.[286] Social capital is constitutive of social cohesion and indispensable for flourishing and experimentalism.[287] Coercion is the antithesis of respect, trust and loyalty; persuasion, builds community.[288]

Fortified by experiments conducted by 'choice architects', Thaler and Sunstein in *Nudge*, Woolman accepts the value of organising the context in which people

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[280] Sabel and Simon 'Destabilization Rights' *Harv. L. Rev.* (2004) at 1020.
[281] Sabel and Simon 'Destabilization Rights' *Harv. L. Rev.* (2004) at 1020.
[282] Sabel and Simon 'Destabilization Rights' *Harv. L. Rev.* (2004) at 1091.
[283] Discussed in Chapter 3 under 'Interests or disputes Rights'.
[284] Woolman *The Selfless Constitution* at 56.
[285] Woolman *The Selfless Constitution* at 27, 54-55, 58.
[286] Woolman *The Selfless Constitution* at 56.
[287] Woolman *The Selfless Constitution* at 56.
[288] Woolman *The Selfless Constitution* at 57; see also A M Alterio and R Niembro 'Constitutional Culture and Democracy in Mexico' 139 at 146 in *Constitutional Democracy in Crisis?* Mark A Graber; Sanford Levinson and Mark Tushnet eds. (2018).

make decisions without imposing their visions of 'the good'.[289] He endorses Sunstein's description of 'deliberation and grand theorising' as 'thought processes … that lead to sub-optimal solutions.'[290] Flourishing, together with leveraging 'social capital' through social experimentalism raises possibilities of creating the context for choice architecture to germinate thus improving the lives of all.[291] Is there hope for experimentalist interventions of the kind proffered by Dorf, Simon, Sabel and Woolman above?

Prospects for dialogue among the elite, the claimants, their lawyers, the institutions and the courts are weak, even when the court encourages it. Corruption and inefficiencies trounce dialogue when, as anecdotal accounts suggest, health workers and police officers double as touts for lawyers or misplace medical and police records so that the institutions cannot defend themselves adequately. Co-conspirators share the spoils of their malfeasance. Under these conditions, for courts to separate those who have genuine claims from others who conspire to defraud the state is difficult.

Only 18 of the 257 municipalities received a clean audit in 2019.[292] The remedies proposed to fix them include a 'stable leadership that is committed to a strong control environment and effective governance,' and 'continuous monitoring of their audit action plans in order to timeously address any audit findings and a pro-active approach to dealing with emerging risks'. Is dialogue to implement such remedies possible with the incumbents? Litigation in the form of criminal prosecutions could kickstart dialogue about plea bargains.

When self-interest predominates over public interest, common aims and reciprocity have little showing. In this context, prospects recede for mustering support to fix dysfunctional institutions. Enduring solutions must aim to prevent malpractices altogether at source. Litigation or lawfare can support efforts in

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[289] Woolman *The Selfless Constitution* at 54-55.
[290] Woolman *The Selfless Constitution* at 29.
[291] Woolman *The Selfless Constitution* at 29.
[292]Staff Writer 'Auditor-general reveals shocking state of South Africa's municipalities' https://businesstech.co.za/news/government/325671/auditor-general-reveals-shocking-state-of-south-africas-municipalities/ (accessed 7 July 2019).

that direction; but litigation alone cannot accomplish the fundamental institutional overhaul. Municipalities are at the coalface of service delivery. 'Active citizenship' must underpin 'effective politics'. [293] Communities dependent on public services need to lead the struggle to eliminate malfeasance in dysfunctional institutions. What must communities do to become the formidable force for transformation that they once were under apartheid?

Litigation, itself an institution distinguishable from other social institutions in form, function and procedures, [294] deserves similar scrutiny as all other institutions that fail to function optimally. Thus, to realize to the fullest the capacity of judges to exercise impartial judgment depends, for instance, on how good or bad the institution of advocacy is. Advocacy is intrinsic to the design of the social framework of litigation.[295] Legal education, culture and practice informs the quality and quantity of advocacy, which in turn determines the competence and capabilities of judges and other legal actors. Enforcement of court decisions would also depend on how responsive institutions are in executing them. Therefore, in searching for solutions to optimize the effectiveness of litigation, the emphasis should shift from theorizing about judicial review and what judges ought to do, to unravelling what legal actors actually do. Practical ways should be found for bolstering advocacy and improving administrative efficiencies of court services to reduce waiting time and the high costs of litigation, and to be responsive to the public need for services. Furthermore, failing institutions must be fixed so that litigation is freed to do the work it is meant to.

### 3.7 Bulwark

Litigation is designed and intended to maintain social order. It stands as the bulwark against chaos. However, for litigants and legal actors resorting to litigation is a choice that either promotes or impedes transformation. Choice

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[293] Le Roux and Davis *Lawfare* at 305.
[294] Fuller 'Forms and limits' (1978) *Harv. L.R. at* 357.
[295] Fuller 'Forms and limits' (1978) *Harv. L.R. at* 384.

creates opportunities for unarticulated extraneous factors to intercede. As lawfare, it is a double-edged sword, a duality that 'can be a good and a bad thing.' It is good for litigation to be political, to advance constitutionalism; it is bad when it becomes the site of political contestation with politicians trying to usurp the judiciary to do their bidding.[296] Its prevalence measures institutional dysfunctionality, social discord, ailing politics and the capacity of litigation to remedy disorder. Defensively, it is a tool to enforce the rule of law as a bulwark against chaos and anarchy, to stave off constitutional crises. Offensively, it is a weapon of choice for those seeking to use rule *by* law to subdue resistance against those seeking to implement the rule *of* law.

*Constitutional Democracy in Crisis?* suggests that a quarter century into neo-constitutionalism, the magnanimity and altruism promised in constitutional texts have yet to materialise. Populism, strong-man politics, 'authoritarian constitutionalism' gut constitutional states like Zimbabwe, Turkey and Hungary.[297] The rhetoric of democracy is used to justify abuse of executive power on the basis that the people elected the President, who is not accountable to unelected judges.[298] Take elections, the foundation on which all other pillars of democracy stand. When fake news influences popular support; when Internet hackers alter election results; when powerful acolytes trade votes for patrimony and patronage for personal advantage against the public good; when holding public office is transactional, based not on what office bearers can do for the country but the opposite;[299] when elected representatives prefer their political party instead of the people; when a majority party abuses its political might to trump not only effective opposition but also the constitutional values of accountability and transparency to frustrate

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[296] Le Roux and Davis *Lawfare* at 5, 20, 300.

[297] 'The Conversation' https://theconversation.com/why-the-world-should-be-worried-about-the-rise-of-strongman-politics-100165 (accessed 10 August 2019); L Nelson 'Obama issues a new warning against 'strongman politics' https://www.politico.eu/article/barack-obama-donald-trump-vladimir-putin-us-russia-issues-a-new-warning-against-strongman-politics/ (accessed 10 August 2019); Graber et al 'Introduction' at 1, Alterio and Niembro 'Constitutional Culture and Democracy in Mexico' at 145, James Thuo Gathi 'Term Limits and Three Types of Constitutional Crisis in Sub-Saharan Africa' at 335, Mark A Graber 'What's in Crisis?' at 668, 679 in *Constitutional Democracy in Crisis?* (2018) Graber et al eds.

[298] Le Roux and Davis *Lawfare* Preface xiv.

[299] Henk Botha 'Representing the Poor: Law, Poverty, and Democracy' in 'Law and Poverty' S Liebenberg and Geo Quinot eds. (2013) 172 at 96.

attempts to expose and eliminate corruption – then the umbilical link between the electorate, their representatives and the constitutional system of multiparty representative democracy has snapped.[300] Governance by the majority for the majority is a sham.[301] Politics has failed. Society turns to the judiciary or lawfare to rebalance to democracy.

As majority politics fail, the judiciary takes up the slack. Acknowledging the separation of powers, the CC left the choice between an open or a secret ballot on the opposition's motion of no confidence against President Zuma to the Speaker of Parliament, but considered it necessary to remind the politicians and the people that:

'A factor that is relevant to the Speaker's decision-making in relation to a democratically-permissible voting procedure is that "an individual member remains free to follow the dictates of personal conscience".

[79] Central to the freedom "to follow the dictates of personal conscience" is the oath of office. … Nowhere does the supreme law provide for them to swear allegiance to their political parties, ... Meaning, in the event of conflict between upholding constitutional values and party loyalty, their irrevocable undertaking to in effect serve the people and do only what is in their best interests must prevail. This is so not only because they were elected through their parties to represent the people, but also to enable the people to govern through them, in terms of the Constitution.'[302]

After inviting the Speaker to reflect upon the risk of dismissal by voting in defiance of the party's instructions, the CC pointed out that 'some consequences are adverse or injurious not so much to individuals, as they are to our constitutional democracy.' Here it warned the Speaker that if 'oiled hands' determine the outcome of the voting 'then no conscience or oath finds expression.'[303] It directed that the voting process should not be 'a fear or money-inspired sham but a genuine motion for the effective enforcement of accountability', [304] and that members should 'honour their constitutional

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[300] Botha 'Representing the Poor: Law, Poverty, and Democracy 'at 96-97.
[301] Botha 'Representing the Poor: Law, Poverty, and Democracy' at 96.
[302] *United Democratic Movement v Speaker of the National Assembly and Others* [2017] ZACC 21 para 78-79.
[303] *United Democratic Movement v Speaker of the National Assembly and Others* para 80-81.
[304] United Democratic Movement v Speaker of the National Assembly and Others para 82.

obligations'.[305] The prospect of the prevailing atmosphere being 'toxified' was not lost on the Court.[306]

'Follow your conscience!' was sloganized in the days preceding the ballot. This dialogue between the CC and the Speaker advocated for a secret ballot subtly, stopping short of trenching on the separation of powers principle. However, speculation followed that the Speaker declared a secret ballot possibly because she had support from President Zuma, who was sure that the no-confidence motion would fail, which it did.[307] A classic example plays out of 'constitutional hardball', 'stealth authoritarianism' or 'abusive constitutionalism'.[308]

When the history of the assertions of interest shows that the other arms of government or agencies have failed to resolve conflict, litigation ensues. It is not a forgone conclusion that the other institutions are better capacitated than the courts to resolve assertions of interests implicating social policy.[309] For instance, a local authority that prefers to allocate housing to the party faithful, to the exclusion of others, becomes the very cause of conflict. It disqualifies itself as a bona fide service provider and peacemaker. When the majority acts unconstitutionally, judicial oversight to find the most efficient means of ordering society peacefully trumps counter-majoritarian resistance against litigation.

Without accountability and transparency, speculation quickly morphs into suspicion. Emotions escalate. Dialogue transitions to use of force. Rationality recedes. Resistance intensifies. Subversion follows. When deference leaves unfulfilled claims for the most basic goods and services, like life-sustaining

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[305] United Democratic Movement v Speaker of the National Assembly and Others para 86.
[306] *United Democratic Movement v Speaker of the National Assembly and Others* para 88.
[307] For theories on why the Speaker ruled in favour of a secret ballot see http://www.news24.com/Columnists/MelanieVerwoerd/was-zuma-behind-the-secret-ballot-20170809. For accounts of intimidation see e.g. threats against Mahkhosi Khoza for supporting no confidence motion and secret ballot. http://www.sabc.co.za/news/a/07ef528041d74638882eaeefd9221e08/Khoza-continues-to-support-secret-ballot-despite-threats; http://www.huffingtonpost.co.za/2017/07/04/makhosi-khoza-on-the-anc-while-i-fear-for-my-safety-i-cannot-j_a_23015537/.
[308] Graber 'What's in Crisis?' 665 at 668, 679; Balkin 'Constitutional Crisis and Constitutional Rot' 13 at 15 in *Constitutional Democracy in Crisis?* Graber et al eds. (2018).
[309] Danie Brand 'Judicial Deference and Democracy in Socio-economic Rights Cases in South Africa' in *Law and Poverty* S Liebenberg and Geo Quinot eds. (2013) 172 at 178.

water, when arrogance replaces accountability and consistency, when the door to dialogue is shut, what opportunities remain for people to vindicate rights? The scale of the deprivation, matched only by the intensity of resistance, is a wakeup call to ensure the credibility and integrity of the peaceful resolution of institutional problems. Over-emphasizing the technical and underestimating the political complexities about institutional concerns cause litigants to believe that resolving disputes falls beyond not only the competence of the courts but also their own competence. Perceiving themselves as 'passive recipients of services' who had better relinquish their agency to the elite political experts in government who are exclusively charged with such responsibilities,[310] as if this were a 'centralist', 'benevolent' state instead of a participatory democracy,[311] risks subverting the power of people to change their own lives and the authority and integrity of the courts to help them.

Litigation is the pre-eminent statutory process for resolving all disputes peacefully and publicly when conflict reaches such a degree that it threatens to breach social order.[312] This is the basic, 'most obvious aspect' of litigation.[313] It is not a game of chess in which contestants plot to outwit each other in order to win. At a deeper, universal level, imbalances would exist in any political system in which social ordering is not by common aims and reciprocity. Litigation must be about inculcating common aims and reciprocity to strengthen social ordering and institutions. For without these two forms of ordering 'nothing resembling a society can exist.'[314] They are the 'coming together [to] secure an advantage for all participants.'[315] As a form of social ordering,[316] litigation occurs when the search for common aims and reciprocity reaches its limits.[317] Limits are reached the moment when litigants are no longer able to agree on and work towards mutually beneficial common goals; in so far as they want

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[310] Danie Brand 'Judicial Deference and Democracy in Socio-economic Rights Cases in South Africa' at 187.
[311] Danie Brand 'Judicial Deference and Democracy in Socio-economic Rights Cases in South Africa' at 191.
[312] Fuller 'Forms and limits' (1978) 92(2) *Harv. L. Rev* 353 at 357.
[313] Fuller 'Forms and limits' (1978) *Harv. L. Rev* at 357.
[314] Fuller 'Forms and limits' (1978) 92(2) *Harv. L. Rev* 353 at 357.
[315] Fuller 'Forms and limits' (1978) *Harv.L.Rev* at 357.
[316] Fuller 'Forms and limits' (1978) *Harv. L. Rev* at 357.
[317] Fuller 'Forms and limits' (1978) *Harv. L. Rev* at 357.

different things, they are unable to reciprocate, share, trade or otherwise accommodate the other's needs or goals.[318]

When common aims and reciprocity are weak or non-existent, courts continue to function as the bulwark, the bastion against self-help, force, vigilantism and violence. Whereas voting as an aspect of democratic decision-making is permissibly emotional and inarticulate, adjudication must always meet higher standards of rationality to be effective as a form of social ordering.[319] Without standards, litigation will continue to shift, adjust and readjust in its endless search to deliver the most responsive remedies to society. For people to relinquish their participation in favour of the courts setting standards for them is unhealthy for democracy. Judicial review should not be allowed to debilitate democracy. Instead, litigation should evolve to cultivating common aims and reciprocity to strengthen social ordering and institutions.

Has any revolution been won through litigation? Klarman and Rosenberg above answer 'no'. Arguing persuasively in favour of making the constitutional project work, Le Roux and Davis caution that 'the courts alone would not be able to power this journey away from apartheid and towards constitutional nirvana. … The concern was that political struggle by active citizens, civil society groups, political parties and organised labour should not be converted into litigation alone.[320] Brand concludes his investigation into the impact of adjudication on transformative politics with the finding that even though courts can ameliorate the limiting effects of adjudication in at least four ways, 'courts can never wholly avoid the limiting impact of adjudication on transformative politics, but should rather aim to remain continually aware of it.'[321]

### 3.8 Form and substance

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[318] Fuller 'Forms and limits' (1978) *Harv. L. Rev* at 357-358.
[319] Fuller 'Forms and limits' (1978) *Harv.L.Rev* at 367.
[320] Le Roux and Davis *Lawfare* at 3.
[321] Danie Brand 'Courts, socio-economic rights and transformative politics' Dissertation presented in partial fulfilment of the degree Doctor of Laws at Stellenbosch University April 2009 p iii.

Fuller posited that the structure of the law interacts or combines 'felicitously' with process in a mutually influential or dialectical way.[322] Hart and Sacks, who produced *The Legal Process,* a practice manual for law students in the USA, also acknowledged 'that judgments about procedural fairness rested upon and implicated substantive value judgments.'[323] For Kennedy too, the form and substance of litigation work in tandem with each other. Thus 'we will have a better understanding of issues of form if we can relate them meaningfully to substantive questions about what we should want and about the nature of humanity and society.'[324] It is not enough, if it is possible at all, for procedural rules to improve efficiency of process and form only, without regard for the result. Procedural rules, substantive rights, effective remedies and efficient enforcement form a mutually reinforcing, dialectal continuum.

As a social institution, courts, like legislatures, markets, private entities and other decision-making institutions, have to answer to the question:[325] 'How is a good social order achieved and maintained?' [326] Having well designed functioning institutions, of which litigation is one, forms a substantial part of the answer.[327] Given the implications of process and rules on social life with all its complexity and dynamism, how does a procedural system 'allocate substantive decisions' so that the courts and other decision-making institutions do the work they are designed to do?[328] The solution for designing functioning institutions, including litigation, lies somewhere at the intersection of sociology, ethics, political theory, morality and social life, all of which are inseparable from law.[329] However, without a critical mass of common aims and reciprocity, no solution is durable. Ironically, conflicts emerge in the form of litigation precisely when the search for commons aims and reciprocity are exhausted.

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[322] Fuller 'Mediation Its Forms and Functions' (1971) *S. Cal. L. Rev.* at 306.
[323] Dorf 'Legal Indeterminacy and Institutional Design' (2003*) N.Y.U. L. Rev* at 932.
[324] Duncan Kennedy 'Form and Substance in Private Law Adjudication', *Harv. L. R.* (1976) 89:1685-1778 at 15.
[325] Bone 'False Dichotomy' (1995) *Boston U. L.J.* at 1275-1277.
[326] Bone 'False Dichotomy' (1995) *Boston U. L.J.* at 1282.
[327] Bone 'False Dichotomy' (1995) *Boston U. L.J.*at 1283.
[328] Bone 'False Dichotomy' (1995) *Boston U. L.J.* at 1275-1276.
[329] Bone 'False Dichotomy' (1995) *Boston U. L.J.* at 1276.

Although Fuller cites the testamentary will of Timken to exemplify polycentric decisions, the example serves just as well to illustrate the gains for adjudication if litigants are willing to search for common aims and reciprocity. In *Timken*, the rule arising from the deceased's will was that the paintings bequeathed to two museums should be shared equally. Although the right to a half share in the paintings was established, how sharing would take place had no rule. Asserting claims arising from contract is a search for reciprocity at the instance of an interested party.[330] Knowing that agreement must be concluded for the best outcome requires the common aim to find a mutually satisfactory solution. Like in socio-economic rights claims, *Timken* established rights with no rules on how to access them. However, in spaces where policy is non-existent or weak, as organising principles, common aims and reciprocity hold palpable pointers for adjudicating disputes not only of interests, but also any dispute in which a collective search for the best rule is necessary to yield the most constitutionally transformative outcome for a litigated conflict.

So enormous is the burden on litigation that its definition falls far short of what it actually does. Although the litigant must 'assert some principle or principles by which his arguments are sound and his proofs relevant',[331] choosing the 'correct' principle, deciding questions of morality, and finding multi-disciplinary solutions, are some of the complexities that arise during litigation that can lead to new norms being set under the common law. Judges with their training and experience are entrusted with the responsibility of discerning what the community's common values are or ought to be in an ever-evolving world.[332] However, the opportunity for testing what the 'best' principle is, and what the most moral and multidisciplinary solutions are, are not readily available in the form of litigation, be it adversarial or inquisitorial, unless they are consciously adduced as evidence or argument.

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[330] Fuller 'Forms and limits' (1978) *Harv. L. Rev* at 386.
[331] Fuller 'Forms and limits' (1978) *Harv. L. Rev* at 368-369.
[332] James Grant 'The Rise of Juristocracy' WQ VOL34 SP 2010 Article 01 p20 citing Aharon Barak, President of the Israeli Supreme Court 1995-2006.

Then there is the matter of rationality. The propensity for human beings to act 'in blind conformity to custom, in passive acquiescence to authority,' and in response to 'inarticulate impulses'– what Fuller disparages as 'the tosh' – should not be ignored in judging any social institution. But it should also not be elevated to 'the basic source of social order', for that would mean abandoning 'any hope of fruitful analysis.'[333] Litigation is principled decision-making grounded in law. If this were not so then asking a priest for a solution or tossing a coin would do just as well.[334] What must be done for litigation to function optimally and reflexively across disciplines?

No one can deny that courts lack the technical knowledge, personnel and resources to find and implement solutions to problems as complicated as forceful displacement of people or the lack of access to essential medicines. The constitutional rights of access to housing and to healthcare are merely aspirational and practically inaccessible if all that litigation achieves is a restatement of rights by way of declarators. However, by coalescing relevant knowledge of not only government officials, but also, for example, the affected people, academics, experts, and non-governmental and human rights agencies, courts can promote dialogue towards a collaborative search for solutions. Solutions, be they about establishing, enforcing or monitoring rules, rights or remedies, can have direct and indirect effects. Potentially, the dialogue could lead to unlocking policy processes, reconnecting disconnected state agencies to improve coordination, creating public policies formulated in the language of rights,[335] and generally overcoming 'institutional shortcomings in dealing with complex socioeconomic issues.'[336]

The best outcomes for litigated disputes and other problem-solving processes are those that manage conflict effectively. Managing conflict is far more challenging today than it was before the fourth industrial revolution. Whereas in the past, poor unskilled people had their labour power to wield as a weapon

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[333] Fuller 'Forms and limits' (1978) *Harv. L. Rev* at 360.
[334] David Pannick *Judges* at 1.
[335] Rodríguez-Garavito (2011) *Texas Law Review* at 1695-1696.
[336] Rodríguez-Garavito (2011) *Texas Law Review* at 1695-1696.

against injustices, today technology has blunted that weapon in sectors where technology has replaced people. Simultaneously, social media proffers new modes of mobilisation, available to anyone who has the means to use those platforms. What poor black people did not have under apartheid, but have under democracy, is the franchise, their electoral power. The intersection between then and now is that the majority of poor people remain poor. The national democratic struggle has largely undone formal racism by eliminating racism from legislation[337] and promulgating new legislation to prohibit and protect against various forms of discrimination.[338] What it has not addressed sufficiently is socio-economic and class inequality. Then and now, people have nothing to lose but the shackles they identify as the causes of injustice. History tells us that under appropriate conditions they would act to remove them. The alternative – inertia – is not an option. Not for as long as hunger and want drive change, and threats to the environment pose risks for all of humanity and the living world.

Like South America, the South African experience has not been all negative.[339] A theory of integrating law and politics without compromising the form of litigation and its substantive remedies seems possible if one takes from Liebenberg and Young the value of bolstering the quality and quantity of participation.[340] Turning up the volume on the voice of the impoverished, as Wilson and Dugard advocate, would strengthen the participation of claimants for socio-economic rights.[341] Capacitating litigants would enable them to inject into their proofs and arguments policy proposals and politics relevant to the

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[337] Apartheid Legislation 1850s-1970 https://www.sahistory.org.za/article/apartheid-legislation-1850s-1970s (accessed 28 July 2019).

[338] Promotion of Equality and Prevention of Unfair Discrimination Act, 4 of 2000 (PEPUDA) and the Employment Equity Act, 55 of 1998 (EEA). https://www.sahrc.org.za/home/21/files/RESEARCH%20BRIEF%20ON%20RACE%20AND%20EQUALITY%20IN%20SOUTH%20AFRICA%202013%20TO%202017.pdf; National Action Plan (NAP) to Combat Racism, Racial Discrimination, Xenophobia and Related Intolerance http://www.justice.gov.za/docs/other-docs/NAP/NAP-20190313.pdf (accessed 28 July 2019).

[339] Sandra Liebenberg and Katharine G. Young 'Adjudicating Social and Economic Rights: Can Democratic Experimentalism Help?' in *Social and Economic Rights in Theory and Practice: Critical Inquiries* Helena Alviar Garcia et al. eds. (2015) at 238.

[340] Liebenberg and Young 'Adjudicating Social and Economic Rights: Can Democratic Experimentalism Help?' at 243.

[341] Wilson and Dugard 'Taking Poverty Seriously: The South African Constitutional Court and Socio-Economic Rights' at 222.

decisions they seek. To uphold the integrity of litigation, judges would be obliged to engage with the materials before them and to generate reasoned decisions based on the materials. Legal actors and litigants should be aware of the limits of litigation in order to mitigate adverse consequences flowing from the misfit of litigation to the nature of conflicts under consideration. Achieving this quality and quantity in litigation calls for a return to basics in the practice of law: Why, when, from whom and how should legal representatives take instructions to litigate? What is to be done to preserve the integrity of litigation? Is innovation and renovation possible without political agency?

The common concerns of Fuller, Fiss, Chayes, Ray and Sturm for the legitimacy of litigation are participation, judicial independence and impartiality and reasoned decision-making.[342] Sturm's remodelling to legitimise litigation is to expand participation at the remedial stage, a departure from the conventional adversarial model litigation,[343] by allowing individual groups to generate their own remedies. Sturm's 'deliberative model of remedial decision making'[344] anticipates mediation to develop remedies after the court has determined liability. The judge identifies the participants and appoints the mediator.[345] She sets the deadlines/timelines and the standard for effective consultation against which the outcome would be assessed.[346] The judge publicly evaluates the mediated or negotiated agreement to determine the adequacy of the process, the responsiveness of the remedy and its capacity to address substantive norms.[347] In this way the impartiality of the judge is preserved while protecting

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[342] Owen M. Fiss 'Against settlement' 93 Yale L.J. 1073 at 1983-1984.
at 1390; Brian Ray '*Occupiers of 51 Olivia Road v City of Johannesburg:* Enforcing the Right to Adequate Housing through 'Engagement' 8 Hum. Rts. L. Rev. 703 2008 2008 (5) BCL 475 (CC) at 810.
[343] Ray '*Occupiers*' 8 Hum. Rts. L. Rev. 703 2008 2008 (5) BCL 475 (CC) at 810.
[344] Sturm 'Resolving The Remedial Dilemma: Strategies of Judicial Intervention In Prisons' 138 U. Pa. L. Rev. 805 1989-1990; 'A Normative Theory of Public Law Remedies' 79 Geo. L.J. 1355; Scott and Sturm 'Courts as Catalysts: Rethinking the Judicial Role in New Governance' ColumJ EurL Vol 13 (2006) 565; Ray '*Occupiers*' 8 Hum. Rts. L. Rev. 703 2008 2008 (5) BCL 475 (CC) at 811.
[345] Ray '*Occupiers*' 8 Hum. Rts. L. Rev. 703 2008 2008 (5) BCL 475 (CC) at 811.
[346] Sturm 'A Normative Theory of Public Law Remedies' 79 Geo. L.J. 1355 at 1429-1430; Ray '*Occupiers*' 8 Hum. Rts. L. Rev. 703 2008 2008 (5) BCL 475 (CC) at 811.
[347] Sturm 1431; Ray '*Occupiers*' 8 Hum. Rts. L. Rev. 703 2008 2008 (5) BCL 475 (CC) at 811.

adjudication at the remedial stage. Fiss and Sturm worry about ADR undermining litigation's norm creating aims.[348]

Recognising the limits of the forms of litigation, advocates of alternative dispute resolution (AlDR)[349] like Ray, argue that AlDR has norm-creating potential for adjudicating socio-economic rights.[350] By analysing *Occupiers of* 51 *Olivia Road* v *City* of *Johannesburg* Ray shows how in the final remedy-seeking stage of litigation, the CC induced negotiation and mediation to resolve many issues in dispute. In so doing the CC set policy and precedent for the application of such processes in similar eviction cases.[351] AlDR can mediate concerns about legitimacy and separation of powers when enforcement of socio-economic rights arises.[352] Integrating AlDR with adjudication in a way that enhances the legitimacy of the resolution, enables extra-judicial interpretation and enforcement of socio-economic rights and democracy.[353] AlDR is less formal, more flexible, more responsive to practical issues arising in socio-economic rights cases.[354] Engagement, negotiation and mediation oscillate between a party-controlled process and court direction.

Fiss is against settlement and other AlDR processes because they lack independence and reasoned decision-making.[355] Mainly his criticism is that private AlDR is not necessarily connected to public values.[356] Consensus based processes do not set precedents.[357] Their impact is confined to the disputants. They do not set policy.[358]

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[348] Fiss 'Against settlement' 93 Yale L.J. 1073 at 1983-1984; Sturm S Sturm 'A Normative Theory of Public Law Remedies' 79 Geo. L.J. 1355 at 1429-1430.
[349] I distinguish AlDR from appropriate dispute resolution (ApDR) below.
[350] Ray '*Occupiers*' 8 Hum. Rts. L. Rev. 703 2008 2008 (5) BCL 475 (CC) at 799.
[351] Ray '*Occupiers*' 8 Hum. Rts. L. Rev. 703 2008 2008 (5) BCL 475 (CC) at 800.
[352] Ray '*Occupiers*' 8 Hum. Rts. L. Rev. 703 2008 2008 (5) BCL 475 (CC) at 799.
[353] Ray '*Occupiers*' 8 Hum. Rts. L. Rev. 703 2008 2008 (5) BCL 475 (CC) at 800.
[354] Ray '*Occupiers*' 8 Hum. Rts. L. Rev. 703 2008 2008 (5) BCL 475 (CC at 800-801.
[355] Fiss 'Against settlement' at 1085; Ray '*Occupiers*' 8 Hum. Rts. L. Rev. 703 2008 2008 (5) BCL 475 (CC) at 809.
[356] Ray '*Occupiers*' 8 Hum. Rts. L. Rev. 703 2008 2008 (5) BCL 475 (CC) at 810.
[357] Ray '*Occupiers*' 8 Hum. Rts. L. Rev. 703 2008 2008 (5) BCL 475 (CC) at 798.
[358] See Ray '*Occupiers*' 8 Hum. Rts. L. Rev. 703 2008 2008 (5) BCL 475 (CC) for discussion on 'The Debate Over Adjudication and Alternative Dispute Resolution' at 801 -810.

In my view, the debate about AlDR has moved on to what processes would be appropriate to resolve particular disputes or conflicts, ApDR.[359] If a process resolves a conflict in accordance with constitutional principles, why should it matter that the settlement does not set precedents or policies? The very fact of the settlement is the precedent, its terms may or may not be, depending on the context. Thus, if litigants settle on the basis that a local authority will construct houses with specifications X for its residents, it will have a have a hard row to hoe if it deviates from X for another community, unless it can distinguish the circumstances. That is precedents at work in practice. The complexities of conflicts cannot fit into the one-size-fits-all mould of litigation. Furthermore, settlements can be made orders of court, a practice to be encouraged not only for setting precedents and policy but also for supervision by the courts to ensure compliance in all respects. Last, the idea of suitable processes being 'alternate' is a misrepresentation. A progressive approach would be to creatively examine every conflict, diagnose its sources and causes, and then match them to appropriate processes that would be most capable of yielding constitutional transformative ends. More about this in Chapter 4: Recommendations.

### 3.9 Dialogue

My literature review shows the evolution of both judicial review and dialogue in litigation during the past century. Litigation's evolution in the USA, starting with the use of special masters during the school desegregation cases, morphed into the use of 'tripartite arbitration' or wing arbitrators in labour disputes.[360] Then structural reform and other modifications emerged. The hybridization of litigation with other processes such as negotiation and mediation or 'meaningful engagement' responds to the substantive complexity of conflicts. Social theories in litigation innovate more boldly than before in search of deeper, broader and more meaningful dialogue. However, experimentalism, agonism and jurisgenerative dialogue, which evolve to fix dysfunctional institutions, have yet to gain traction. Inspired by the authorities I cite below I ask: What is the

[359] More about this in Chapter 4: 'Recommendations'.
[360] Fuller 'Forms and Limits' Harv. L.R. at 353, 354.

next phase of the evolution of dialogue in litigation?

Dialogue theory is that theory of democracy, law and practice that is an amalgam of 'the virtues of the other theories whilst attempting to avoid the absolute claims to virtue that some other theories make.'[361] It is a 'theory of judicial authority and constitutional decision-making' distinct from theories of interpretation,[362] it is a theory about process that centralises the substance of conflict. As a metaphor for a colloquy or conversation with the court,[363] participants would include experts, the academy,[364] and anyone having a direct and substantial interest in the resolution of the dispute submitted for adjudication. But it is no ordinary conversation.

Dialogue in litigation has evolved organically to mediate contestation and competition so that conflict is contained within tolerable limits for democracy to survive, if not thrive. In order to preserve the integrity of litigation, dialogue is a response aimed at cutting across the complexities of conflicts canvassed under 'Complexity' above. It is also a proactive tool to mediate power amongst the three arms of government to guard against 'the abuse by or over-concentration of power in particular organs of state by diffusing governmental authority,' when an inflexible application of the separation of powers would result in hardship.[365] To serve this dual purpose, dialogue is both a sword and a shield. However, to pursue both purposes effectively, dialogue must be agonistic or jurisgenerative, as the circumstances require.[366] Deliberative dialogue does not account fully for the function of conflict, contradictions and difference.[367] Superficial palliatives flowing from deliberative dialogue are sure to unravel

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[361] Froneman *Stell LR* (2005) at 19. He describes the 'other theories' as 'Democracy as Majority Power', 'Democracy as Procedural Fairness', and 'Democracy as Rights', JC Froneman 'Legal Reasoning and Legal Culture: Our "Vision"' of Law' (2005) 1 *Stell LR* at 19.
[362] Bateup 'The Dialogic Promise: Assessing the Normative Potential of Theories of Constitutional Dialogue' at 1118.
[363] Roach 'Constitutional and common-law dialogues between the Supreme Court and Canadian legislatures' (2001) 80 *Can B Rev*. 481 at 485.
[364] E.g. *Laubscher* para 73.
[365] Klare 'Self-Realisation, Human Rights, and Separation of Powers: A Democracy-seeking Approach' *Stell LR* 2015 3 at 449.
[366] See Chapter 2 Part A.
[367] Chantal Mouffe 'Deliberative Democracy or Agonistic Pluralism' (2000); Paul Schiff Berman 'Jurisgenerative Constitutionalism: Procedural Principles for Managing Global Legal Pluralism' (2013) 20 Ind. J. Global Legal Stud. 1 (2013).

sooner rather than later.

However, theories of dialogue to merely justify judicial review have limited utility; 'at best they strike a compromise between the tyranny of the majority and the counter-majoritarian difficulty.'[368] Bogged down as they are in 'theorizing about the nature of law and constitutions,'[369] they fail to reimagine the fundamental design[370] of 'legal and constitutional institutions.'[371] The dilemma of legal indeterminacy[372] and judicial unpredictability[373] persist, rendered all the more difficult by the 'maddening complexity of the world' and the diversity of morality that eschew agreement on specifics.[374] The 'principle of institutional settlement' in terms of which rules allocate authority among institutions,[375] works for as long as there is general consensus about social goals, but not for a morally diverse and complex world in which institutions malfunction and common aims and reciprocity are elusive.[376] Furthermore, institutions are not finite; all those needed may not already exist;[377] and those that exist may have exhausted their usefulness.[378]

Instead, Dorf offers coherentism[379] to enable 'the judge to identify the best answer to any legal question [by] asking what outcome will best reflect the set of institutional arrangements taken as a whole'.[380] However, coherentism is only possible if legal actors are skilled, experienced and share a genuine commitment to transform constitutionally.[381] Dorf ratchets his interest in institutional design to his experimentalist theory as a collaboration between courts and other agencies for solving problems through deliberation.[382]

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[368] Dorf (2003) *N.Y.U. L. Rev* at 875.
[369] Dorf (2003) *N.Y.U. L. Rev* at 877.
[370] Dorf (2003) *N.Y.U. L. Rev* at 909.
[371] Dorf (2003) *N.Y.U. L. Rev* at 877.
[372] Dorf (2003) *N.Y.U. L. Rev* at 875.
[373] Dorf (2003) *N.Y.U. L. Rev* at 883.
[374] Dorf (2003) *N.Y.U. L. Rev* at 877.
[375] Dorf (2003) *N.Y.U. L. Rev* at 922-923.
[376] Dorf (2003) *N.Y.U. L. Rev* at 924.
[377] Dorf (2003) *N.Y.U. L. Rev* at 932.
[378] Dorf (2003) *N.Y.U. L. Rev* at 930-931.
[379] Dorf (2003) *N.Y.U. L. Rev* at 935.
[380] Dorf (2003) *N.Y.U. L. Rev* at 935.
[381] Dorf (2003) *N.Y.U. L. Rev* at 935.
[382] Dorf (2003) *N.Y.U. L. Rev* at 877.

Collaboration becomes a matter of mutual interest. As a social institution responsible for ordering society to work optimally, litigation depends on other institutions doing the work they are meant to do.[383] Conversely, dysfunctional institutions turn to the courts to kickstart them towards functionality.

Liebenberg and Young acknowledge dialogic, deliberative features of adjudication exhibited in South Africa's developing socio-economic rights jurisprudence and 'the directly democratic, small-scale' use of democratic experimentalism in the prescript to engage meaningfully. However, they call for remedies beyond dispute resolution, for deliberations about structural reform, and for participation beyond the litigants and (local) government, to include civil society organisations.[384] Like Woolman, they advocate a broader role for the court to include supervising negotiation amongst stakeholders (litigants, experts, Human Rights Commission, the Commission for Gender Equality, etc) to induce 'additional insights' in cases like *Mazibuko*.[385] They also acknowledge that lack of 'parity of deliberative strength among the parties' could limit the usefulness of democratic experimentalism.[386] By definition, claimants of socio-economic rights lack the resources for effective participation.[387] This disparity is the milieu in which juristocracy could flourish.

Brand proposes 'judicial prudence', which, although similar to deference, differs in that the court, applying an inquisitorial approach, does not vacate its hold on a matter but stays involved for as long as it has the capacity to resolve disputes and create processes or set parameters for dispute resolution.[388] To this end Brand advocates a generous approach to standing and a shift from an

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[383] *Black Sash Trust v Minister of Social Development and Others (Freedom Under Law NPC Intervening*) (CCT48/17) [2017] ZACC 8; 2017 (5) BCLR 543 (CC) (17 March 2017); *United Democratic Movement v Speaker of the National Assembly and Others* [2017] ZACC 21.
[384] Liebenberg and Young 'Adjudicating Social and Economic Rights: Can Democratic Experimentalism Help?' in *Social and Economic Rights in Theory and Practice: Critical Inquiries* Helena Alviar Garcia et al eds. (2015) 243.
[385] 2010 (4) SA 1 (CC); Liebenberg and Young 'Adjudicating Social and Economic Rights' at 245-6.
[386]Liebenberg and Young 'Adjudicating Social and Economic Rights' at 247, 251.
[387]Liebenberg and Young 'Adjudicating Social and Economic Rights' at 247, 251.
[388] Brand 'Judicial Deference and Democracy in Socio-economic Rights Cases in South Africa' in *Law and Poverty* S Liebenberg and Geo Quinot eds. (2013) 172 at 190.

adversarial to an inquisitorial role for courts in constitutional litigation.[389] By using one or a combination of these mechanisms judicial prudence would morph from 'binary' to 'triangular' formations by drawing on the participation of, not only the litigants and other agencies, but also the people.[390] Brand's triangular forms usefully maximises participation quantitatively and qualitatively. Options from which solutions evolve, either by consensus or the court's determination, would be varied, grounded in democratic practice, conceived in 'dialogic, participatory and pluralistic terms',[391] altogether a 'collaborative enterprise'[392] more reliable and enduring than a binary approach. Participants would take an interest and understand better one another's lives; better information would improve policy-making, social justice and fairer politics; participating to access benefits and services would promote the core constitutional values of dignity and freedom.[393] Such participation would enhance democracy if participants approach the debates open to persuasion and capable of persuading others.[394] Brand's model holds out possibilities for shifting conflict resolution from dispute resolution to problem solving.

However, although an inquisitorial approach entrusts the court with more control over the proceedings, it is no assurance that it would yield constitutionally transformative outcomes if, for instance, the legal actors are elitist, unimaginative, incompetent or lazy. More challenging is participation in litigation that anticipates multiple and competing process and substantive possibilities. How should a court respond if the participants in litigation eschew any common aims or reciprocity? How and what policy options should the court prefer or reject in order to create justiciable rights? For this, a normative theory

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[389] Brand 'Judicial Deference and Democracy in Socio-economic Rights Cases in South Africa' at 190-193.
[390] Brand 'Judicial Deference and Democracy in Socio-economic Rights Cases in South Africa' at 195.
[391] Botha 'Representing the Poor: Law, Poverty, and Democracy' in *Law and Poverty* S Liebenberg and Geo Quinot eds. (2013) 172 at 97.
[392] Solange Rosa 'Transformative Constitutionalism in a Democratic Developmental State' in *Law and Poverty* Liebenberg et al eds. at 100.
[393] Rosa 'Transformative Constitutionalism in a Democratic Developmental State' at 106-107, 110.
[394] Rosa 'Transformative Constitutionalism in a Democratic Developmental State' at 109.

of litigating disputes of interest helps. To this end Wilson, Dugard and Williams contribute to the discourse.[395]

Whereas Brand focuses on the procedural interventions needed to yield substantive transformative remedies, Wilson and Dugard commend a formulaic methodology for adducing and analysing evidence to vindicate interests through socio-economic rights litigation. They ask first, what is the interest a litigant seeks to assert, in what context and on what evidence? Second, is the interest one that justifies realisation and protection? Third, having regard to timing and needs of the litigant on the one hand, and competing considerations on the other hand, is the state's response in terms of its policy and implementation appropriate, and therefore reasonable. [396]

This formulaic enquiry is a useful checklist to ensure that the court has a full and balanced contextual account in which the right being asserted is resisted. To skip over the first two enquiries to answer the third enquiry results in the scales being skewed favourably towards the state, with the needs and interests of the claimants slipping silently off the scales. It also misconceives the purpose of the litigation, which is not to test the state's policy and its implementation generally and in the abstract. The purpose is for a claimant to assert an interest to enforce a right in a very specific context.[397] Davis urges that a clear understanding of the content of the right and the extent of the denial of the right must precede the test for reasonableness of the governmental measures.[398] The reasonableness test must fail if it does not respond to those most desperate to access the right.

Context is informed by the interest advanced by the claimants of those rights.[399] Wilson and Dugard urge the courts to develop a theory of socio-economic 'needs and interests', by listening more closely to what poor litigants say in their

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[395] Wilson and Dugard 'Taking Poverty Seriously: The South African Constitutional Court and Socio-Economic Rights' in *Law and Poverty* at 230-231.
[396] Wilson and Dugard 'Taking Poverty Seriously' at 230-231.
[397] Wilson and Dugard 'Taking Poverty Seriously' at 231.
[398] Davis 'Socioeconomic rights: Do they deliver the goods?' Int J Constl Law (2008) 6 (3-4) 687.
[399] Wilson and Dugard 'Taking Poverty Seriously' at 231.

papers about how poverty affects their access to socio-economic goods.[400] Legal actors, too, must be prepared to put time and effort into understanding these needs and experiences, to give voice to them in pleadings, affidavits, argument, and judgments[401] making the case for determining fundamental socio-economic rights in ways that recognise and respond to the interests of the poor. To adopt a genuinely 'transformative adjudicative paradigm' and realise its 'full transformative potential' by 'illuminating structural inequalities and disadvantage'[402] courts must take greater account of the 'lived experience of poverty'[403] of claimants of socio-economic rights in order to develop a theory of the needs, purposes and values underpinning such rights. Deference to the executive or legislature, as preferred agencies for practising participatory democracy, misconstrues the interest of claimants who are before court, precisely because their engagements with the other two arms of government have already failed.[404]

*Mazibuko* did not solve the claimants' real-life problem of inadequate water.[405] Instead, the litigation exacerbated the conflict. Seven years later, residents pitched battle with police firing rubber bullets at them as they blockaded the streets of Soweto with burning tyres, threatening to boycott payments for water.[406] Increased service delivery protests, resorts to self-help and threats to the rule of law suggest that the beast of poverty, inequality and deprivation is breaking free from its tethering. This calls for higher standards of weighing the appropriateness of state policy and implementation, against claimants' assertions of needs and interests. An unqualified reasonableness standard is too flexible at this stage in the evolution of our constitutional democracy. Unqualified, reasonableness can set the bar too low for communities that do

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[400] Wilson and Dugard 'Taking Poverty Seriously' at 230-231.
[401] Wilson and Dugard 'Taking Poverty Seriously: The South African Constitutional Court and Socio-Economic Rights' *Stell LR* 2011 3 at 665-6.
[402] Wilson and Dugard 'Taking Poverty Seriously: The South African Constitutional Court and Socio-Economic Rights' *Stell LR* 2011 3 at 664-665.
[403] Wilson and Dugard 'Taking Poverty Seriously: The South African Constitutional Court and Socio-Economic Rights' *Stell LR* 2011 3 at 666.
[404] Wilson and Dugard 'Taking Poverty Seriously: The South African Constitutional Court and Socio-Economic Rights' *Stell LR* 2011 3 at 670.
[405] *Mazibuko v City of Johannesburg* 2010 4 SA 1 (CC).
[406] https://www.timeslive.co.za/news/south-africa/2017-07-04-soweto-residents-protest-over-free-water/ (accessed 17 August 2017).

not have even the baseline of livelihood rights.

Unlike disputes of interest generally in which rights have yet to be established before they can be enforced, disputes about socio-economic interests are about enforcing constitutionally established rights. Everyone has the right to have access to sufficient food and water.[407] Therefore, the litigation must be about determining ways of accessing socio-economic rights efficiently, timeously and adequately. Reasonableness must be judged against the standard of our transformative Constitution[408] in which socio-economic rights must be realized progressively.[409] So the question is not whether but when claimants can have their socio-economic rights. Brand's prudential, inquisitorial approach would enable the courts to retain their hold on cases to supervise the progressive realization of the right if mere monitoring is not enough. In Chapter 2 Part A I refer to Williams's advocacy for interrogating the methodology used to calculate whether a claim for basic income was reasonable; her approach enabled a platform for dialogue between the legislature, the courts and the participants in the litigation.[410] By setting dignity as the standard, the German court was better able to meet the substantive test for reasonableness in socio-economic rights claims than the CC, which settled for deference.

How do claimants advance their lived experiences to support their claims of interests so effectively that courts have little wriggle room to default to deference? Would it have made a difference in *Mazibuko* if, in considering competing claims in the third leg of the Wilson-Dugard enquiry, the CC had called for an assessment of the City's capacity to deliver free basic water equitably amongst poor and wealthy residents, the efficacy of its 'user pay' policy, its capacity to enforce non-payment of water accounts, whether traditional mechanisms of enforcing debt repayment would succeed or exacerbate conflict, and whether nudging residents into compliance, to use

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[407] Section 27(1)(b) of the Constitution.
[408] Klare 'Legal culture and transformative constitutionalism' (1998) 14 *SAJHR* 146; Solange Rosa 'Transformative Constitutionalism in a Democratic Developmental State' in *Law and Poverty* S Liebenberg and Geo Quinot eds. (2013) at 100.
[409] *Government of the Republic of South Africa v Grootboom* 2000 1 SA 46 (CC).
[410] BVerfGE, judgment of 9 February 2009, 1 Bvl 1/09, 1 Bvl 3/09, 1 Bvl 4/09. (unofficial)

water responsibly, to pay their bills, to discourage self-help, and to respect the rule of law were options? Dialogue in cases like *Mazibuko* would alleviate strain on the boundaries of the separation of powers doctrine. Resistance to enforcement of rules relating to water distribution and usage would weaken or abate.

Contributions from the academy on dialogue theories generally and its application to socio-economic claims in particular prove helpful not only in tracking the evolution of the theories but also in anticipating what the next shifts might be. However, these contributions are preoccupied with reforms once the decision to litigate is taken. What processes precede and inform the decision to litigation? What strategies inform choices about claims, forms of prosecuting them and remedies? Is any purpose served by communities delving into what induces the difference in approaches between the CC's flexible approach to the right to human dignity in *Mazibuko*, and the FCC treating it as an inviolable right in *Hartz IV*?[411] Or whether the distribution of livelihood rights accords with their constitutional aspirations and dignity? Or the reasons for the apparent reluctance of the CC to recognise marital status as a ground of discrimination? Or the tardiness of the Executive and the Legislature in amending the Sexual Offences Act to decriminalise sex workers? Whether such reluctance and tardiness are cultural and systemic? What link, if any, exists between such culture and gendered violence?

Following the discussion in Chapter 2, renovating litigation calls for deeper excavations into exposing sources and causes of conflict in order to design bespoke processes and remedies to resolve disputes effectively. Technically, the CC resolved the dispute in *Mazibuko*: it issued a final remedy. In reality it escalated the conflict. Proceduralists who appreciate the dialectic between rules, rights, remedies, enforcement and monitoring suggest 'empirical testing' as a prerequisite in the formulation and adoption of rules.[412] Designing

[411] BVerfGE, judgment of 9 February 2009, 1 Bvl 1/09, 1 Bvl 3/09, 1 Bvl 4/09. (unofficial)
[412] Dorf cites Laurence Tribe who 'noted that procedural protections invariably serve underlying substantive values' in LH Tribe 'The Puzzling Persistence of Process-Based Constitutional Theories' (1980) 89 *Yale L.J.* 1063 at 1067-1072; Bone 'False Dichotomy' (1995) *Boston U. L.J.*at 1321.

appropriate procedural rules, testing, correcting and redesigning them as required to realize most effectively the substantive rights protected through the remedies they induce for enforcement, would avoid proceduralising rights, particularly socio-economic rights.[413]

### 3.10 Participation

Who should participate in dialogue? Who understands transformation better than those who seek it?[414] '[N]o one liberates himself by his own efforts alone, neither is he liberated by others.'[415] Authentic transformation involves dialogue with, not for, the people.[416] Participants in dialogue for transformation must be those seeking transformation. They 'must be their own example in the struggle for their redemption.'[417] Freire elaborates:

'Dialogue with the people is neither a concession nor a gift, much less a tactic to be used for domination. Dialogue, as the encounter among men to "name" the world, is a fundamental precondition for their true humanization'[418]

'It is by political participation that citizens limit the power of the state, and, therefore, become interested and learn about constitutionalism.'[419] The people must play a fundamental role in transforming their circumstances, otherwise they could be manipulated.[420] Freire reminds that the oppressed should be aware of their ambiguous role both as participants and the subjects of the transformation.[421]

Freire emphasises that given the proper tools for dialogue, every human being, 'is capable of looking critically at the world', of gradually perceiving 'personal and social reality as well as the contradictions in it', of becoming conscious of

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[413] D Brand 'The Proceduralisation of South African socio-economic rights jurisprudence, or 'What are socio economic rights for?' in *Rights and Democracy in a Transformative Constitution* H Botha, A van der Walt & J van der Walt eds. (2003) at 35-37 and 55-56.
[414] Paul Freire *Pedagogy of the oppressed* 45.
[415] Freire *Pedagogy* 72.
[416] Freire *Pedagogy* 127, 131.
[417] Freire *Pedagogy* 53-4.
[418] Freire *Pedagogy* 137.
[419] Alterio and Niembro 'Constitutional Culture and Democracy in Mexico' in *Constitutional Democracy in Crisis?* 139 at 146.
[420] Freire *Pedagogy* 125-6.
[421] Freire *Pedagogy* 127.

his or her own perception of reality and dealing critically with it.[422] Participating in dialogue that acknowledges and enables these capabilities restores human dignity and renews hope for a better life.[423] Nancy Fraser's offerings on the principle of parity of participation[424] could extend beyond government socio-economic programmes, to include measures to level the bargaining power in contractual relations and improve the quality and quantity of litigation implicating socio-economic rights.[425] Capabilities theorists like Sen and Nussbaum and experimentalists like Simon, Sabel, Dorf, Sturm and Woolman fortify this conclusion. So does our own experience through OCMS discussed in Chapter 4.

Communities engage 'critically and creatively with reality and discover how to participate in the transformation of their world.'[426] Critically recognizing the causes of discontent and perceiving oppression as a limiting but not an immutable reality, are the first steps towards transformation.[427] It is by organising the oppressed and engaging in 'action in depth that the culture of domination is culturally confronted.'[428] Critical thinking 'perceives reality as process, as transformation, rather than as a static entity.' Critical thinkers focus on transforming their reality; naive thinkers seek to accommodate the past into the present as 'normal'.[429]

Academic and journalist, Steinberg, asks provocatively: 'Who has interpreted political events in SA more intelligently of late: the commentariat, whose vocation is to understand politics, or ordinary people in the street?' And he answers: '[S]ome of the commentariat's analysis of the revelations around the

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[422] Freire *Pedagogy* 32.
[423] Freire *Pedagogy* 33.
[424] Nancy Fraser 'Rethinking the public sphere: A contribution to the critique of actually existing democracy' in C Calhoud (ed) Habermas and the Public Sphere (1992) 109–42; Nancy Fraser 'Rethinking recognition' (2000) 3 New Left Review 107–20; Nancy Fraser 'Social justice in the age of identity politics: Redistribution, recognition, and participation' in N Fraser &A Honneth eds. Redistribution or Recognition: A Political-Philosophical Exchange (2003) 7.
[425] Liebenberg S 'Towards an equality – promoting interpretation of socio – economic rights in South Africa: Insights from the egalitarian liberal tradition' 2015 (132) *SALJ* 411 at 437.
[426] Freire *Pedagogy* 3.
[427] Freire *Pedagogy* 47.
[428] Freire *Pedagogy* 54-55.
[429] Freire *Pedagogy* 91-2.

funding of Cyril Ramaphosa's ANC presidential campaign has been worse than dire. It has been so incompetent and naive as to constitute a dereliction of professional duty.'[430]

What is the role of intellectuals? It would be a mistake to assume that intellectuals know more than members of indigent communities. Each group has a different knowledge base. Both enrich strategies for transformation. Leaders, cadres, organisers and lawyers should not go to communities with 'an educational or political action program which fails to respect the particular view of the world held by the people.' Such a program would constitute 'cultural invasion, good intentions notwithstanding.'[431] Interventions in communities must be ethical[432] and transformative.'[433] Leadership emerges from 'the social strata of the dominators', who renounce their class to side in solidarity with the oppressed. Freire urges:

'Joining the oppressed requires going to them and communicating with them. The people must find themselves in the emerging leaders, and the latter must find themselves in the people.'[434]

Radical transformation 'cannot designate leaders as thinkers and the oppressed as mere doers.' Both should act together in 'unshakable solidarity'.[435] Dialogue is 'an act of creation; it must not serve as a crafty instrument for the domination of one person by another.'[436]

Is such dialogue with communities welfarism? Welfare programs manipulate the oppressed, anaesthetizing them against the sources and causes of their problems, distracting them from finding concrete solutions.[437] Dialogue to organise the oppressed is the 'the antagonistic opposite', the antidote to manipulation. Treating the poor as 'ignorant' 'unfortunates' in need of

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[430] Jonny Steinberg 'The people are far more knowing than those paid to know' https://www.businesslive.co.za/bd/opinion/columnists/2019-09-06-jonny-steinberg-the-people-are-far-more-knowing-than-those-paid-to-know/ (accessed 8 September 2019).
[431] Freire *Pedagogy* 95-6.
[432] Freire *Pedagogy* 19.
[433] Freire *Pedagogy* 25.
[434] Freire *Pedagogy* 159.
[435] Freire *Pedagogy* 129.
[436] Freire *Pedagogy* 88-9.
[437] Freire *Pedagogy* 152.

humanitarian aid is 'egoism cloaked in the false generosity of paternalism,' an instrument of dehumanization.[438] Instead, authentic 'humanism' should animate pedagogic dialogue.[439] The participation of people distinguishes social and political transformation not only from welfarism but also from military coups.[440] Organisation is neither 'regimentation' nor 'authoritarianism'.[441]

### 3.11 What if we do not care about litigation?

Democracy could 'retreat', 'backslide', 'fail'[442] or morph into juristocracy. Balkin distinguishes between constitutional crisis and constitutional rot. He identifies three types of constitutional crises: One, politicians refuse to obey the constitution and court orders. Two, constitutions prevent politicians from averting looming disaster, a rare occurrence as constitutions are usually enabling. Three, people refuse to obey the constitution and resort to protests.[443]

Constitutional rot is a degradation of constitutional norms. Whereas crises occur over brief periods, rot operates over long periods. Constitutional democracy depends on more than obedience to law. It needs 'well-functioning institutions that balance and check power and ambition', 'the public's trust that government officials will exercise power in the public interest and not for their own personal benefit or for the benefit of private interests and cronies', and 'forbearance on the part of public officials in their assertions of power and obedience to norms of fair political competition'. These norms encourage 'cooperation between political opponents and factions even when they disagree strongly' and from 'privileging short-term political gains over long term injuries to the health of the constitutional system.'[444] Without these baseline norms, constitutional rot occurs. The state becomes unresponsive to the people as politicians become preoccupied with remaining in power. Even if elections are

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[438] Freire *Pedagogy* 53-4.
[439] Freire *Pedagogy* 53-4.
[440] Freire *Pedagogy* 128.
[441] Freire *Pedagogy* 178.
[442] Graber et al *Constitutional Democracy in Crisis?* at 1.
[443] Graber et al *Constitutional Democracy in Crisis?* at 14.
[444] Graber et al *Constitutional Democracy in Crisis?* at 17.

still held, 'the result is oligarchy.'[445] Leaders become beholden to a 'small group of backers who keep them in power.'[446] The public 'lose faith in the political system.'[447] Enter demagogues 'who stoke division, anger, and resentment.'[448] Race, ethnicity, religion dominate the agenda of right-wing populists.[449] Healthy democracies withstand demagogues. If demagogues 'take power and lead the nation, however, constitutional rot has become serious indeed.'[450] Trust deficits, polarisation, inequality and policy disasters fuel the rot.[451] Left unchecked, constitutional rot can result in constitutional crisis.[452]

Applying these norms to South Africa, the signs are that constitutional rot has set in. The majority party, the ANC, is preoccupied with fighting internal factional battles. Opposition parties cannot muster sufficient common aims and reciprocity to form lasting coalitions to lead the country out of political stalemates and economic quagmires. The elections in May 2019 was dominated by race politics with parties like the FF Plus making significant strides in corralling white voters and the EFF, the black voters. Distrust and disillusionment with politics showed up in the lowest turnout of voters, 66.05 percent as opposed to 87.92 percent in 1999. With each passing day, investigative journalists, courts and commissions of enquiries spew out evidence of corruption in the private and public sector. The debt to GDP ratio expands from a record low of 27.80 percent in 2008 to an all-time high of 55.80 percent in 2018.[453] Unemployment increased to 29 percent in 2019, up from 27.6 percent in the previous period. The jobless rate hits record highs since 2003 with unemployment rising by 455 000 and employment rising by piffling 21 000.[454] South Africa's Gini coefficient at 0.63 in 2015 is the highest in the

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[445] Graber et al *Constitutional Democracy in Crisis?* at 17.
[446] Graber et al *Constitutional Democracy in Crisis?* at 17.
[447] Graber et al *Constitutional Democracy in Crisis?* at 17.
[448] Graber et al *Constitutional Democracy in Crisis?* at 18; Francis Fukuyama 'Contemporary populism' https://www.cde.org.za/contemporary-populism/ (accessed 16 August 2019).
[449] Graber et al *Constitutional Democracy in Crisis?* at 3.
[450] Graber et al *Constitutional Democracy in Crisis?* at 18.
[451] Graber et al *Constitutional Democracy in Crisis?* at 18.
[452] Graber et al *Constitutional Democracy in Crisis?* at 21.
[453] https://tradingeconomics.com/south-africa/government-debt-to-gdp (accessed 10 August 2019).
[454] https://tradingeconomics.com/south-africa/unemployment-rate (accessed 10 August 2019).

world.[455] Does this amount to a constitutional crisis?

Not so despite these 'palpable contradictions', says Sibanda, at least, for as long as the constitutional centre holds.[456] However, South Africa is diagnosed as 'experiencing severe constitutional problems'.[457] Klug finds:

'Given the degree with which corrupt networks have managed to penetrate the state and the resultant undermining of significant state institutions such as the national intelligence, prosecution, and tax agencies, we might be justified in arguing that South Africa's constitutional democracy is in crisis.'

However, he concludes that there is 'ample evidence' that constitutional institutions 'ranging from the Public Protector to the courts' have intervened to expose malfeasance and propel Parliament and the executive to fulfil their constitutional obligations. This 'resilience of constitutional institutions and constitutional order' stalls a constitutional crisis.[458] Research shows that the most trust institutions are the CC and the IEC. Klug correctly anticipated shifts once the erstwhile Public Protector 'was finally brought to heel' with 'the appointment of a new Public Protector from within Zuma's faction'.[459]

Courts are one of the pillars propping up our constitutional democracy. Revitalising litigation takes on greater significance when other institutions are failing. However, over-emphasising the role of the judiciary comes with the risk of juristocracy.

Juristocracy is the unprecedented transfer of power from representative institutions to judiciaries, or the 'judicialization of politics'.[460] How does juristocracy arise? Judiciaries engender hope that bills of rights would be

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[455] https://www.google.com/search?client=safari&rls=en&q=gini+coefficient+south+africa&ie=UTF-8&oe=UTF-8 (accessed 10 August 2019).

[456] Sanele Sibanda 'Not Purpose-made! Transformative Constitutionalism, Post-Independence Constitutionalism, And the Struggle to eradicate Poverty' in *Law and Poverty* eds. Sandra Liebenberg and Geo Quinot at 55.

[457] Graber et al *Constitutional Democracy in Crisis?* at 2.

[458] Heinz Klug 'State Capture or Institutional Resilience: Is there a Crisis of Constitutional Democracy in South Africa' *Constitutional Democracy in Crisis?* Graber et al eds. at 310-311 at 310.

[459] Klug 'State Capture or Institutional Resilience' in *Constitutional Democracy in Crisis?* at 310-311.

[460] Ran Hirschl *Towards juristocracy: the origins and consequences of the new constitutionalism* at 6.

enforceable free of partisan pressures. Trusted as independent and impartial arbiters, judiciaries take the bogeyman out of constitutionalism for the elite. Rights adjudication completes the case for neo-constitutionalism being democracy with necessary limits. However, when notions of democracy being a rights-based protection for minorities against the 'tyranny of the majority' gains traction globally, juristocracy finds a foothold. Judiciaries assume disproportionately more power than their counterparts in government.

Constitutional reforms triggered by 'stalemate and stagnation' are not isolated from their political origins.[461] Vested political, economic and judicial actors favour institutions that promote their class interests.[462] While professing commitment to constitutionalism, political and economic elites preserve their hegemony with policies to hedge against 'the vicissitudes of democratic politics.'[463] Property and mobility rights put the brakes on undoing free-market, capital-friendly commercial environments.[464] Together, politicians and the profession entrusted with selecting and appointing judges would have a relatively free hand to pack courts with their preferences.[465] Under these conditions, legislatures and executives would willingly submit to juristocracy, confident that, on balance, increased judicial intervention would favour them.[466] Protecting individual and minority rights would lend credibility and justification for neo-constitutions. Threatened political and economic elites would retain the rhetoric of rights and judicial review while they shift policy making to the judiciary and semiautonomous bodies.[467] Constitutions and judicial review would have no independent life other than what these actors choose to breath into them.[468] Concomitantly, criticism of the role of judiciaries in determining controversial social and political issues, and their escalating empowerment would remain subdued.[469] When the clamour for fundamental constitutional

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[461] Ran *Juristocracy* at 11.
[462] Ran *Juristocracy* at 11.
[463] Ran *Juristocracy* at 12.
[464] Ran *Juristocracy* at 12.
[465] *Helen Suzman Foundation v Judicial Service Commission* [20 18] ZACC 8 para 35-37, 42, 57-59, 67-68.
[466] Ran *Juristocracy* at 11.
[467] Ran *Juristocracy* at 12.
[468] Ran *Juristocracy* at 11.
[469] Ran *Juristocracy* at 4.

transformation fall on the deaf ears of the elite in government and in the judiciary, when powerplay substitutes rationality, when irrationality displaces dialogue, conditions are rife for juristocracy. A constitutional crisis is sure to follow.

Already, litigation-financing firms listing on stock exchanges complete the commoditisation of litigation.[470] For these enterprises, success would depend on litigation being successful. What does 'success' mean in the context? Would denial of a personal injuries claim against a tobacco company count as 'successful' litigation by the financing firm and its shareholders? How authentic then is the constitutionalisation of rights? Are constitutions merely a totem for mega-conglomerates and transnational entities governing monetary policy, with democracy being relegated to an 'electoral routine?'[471]

The judicialization of politics should not reflexively result in tossing out judicial review with the bathwater of juristocracy. Controversial since at least 1803,[472] judicial review has evolved to command respect as a leveller of power. Which of the three arms of government should be entrusted with interpreting and applying the law? Not the executive, which 'not only dispenses the honors, but holds the sword of the community'; not the legislature, which 'would too rarely enforce the Constitution if this invalidated a law it had recently passed.'[473] As the guardian against overreach by the executive and the legislature, the judiciary holds the other arms accountable.[474] Judges have 'comparative expertise; they reconcile conflicting statutes, study precedents, and are '"skilled in the laws".'[475] Unlike other functionaries who are more vulnerable to the vicissitudes of public opinion, judges enjoy security of tenure, being 'appointed

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[470] https://www.burfordcapital.com; (accessed 6 July 2019) Emma Powel 'Litigation Finance: can growth continue' https://www.investorschronicle.co.uk/shares/2019/01/17/litigation-finance-can-growth-continue/ (accessed 26 June 2019); Neil Rose ' Listed law firm launches litigation funding subsidiary' https://www.legalfutures.co.uk/latest-news/listed-law-firm-launches-litigation-funding-subsidiary 8 September 2018 (accessed 26 June 2019)
[471] Ran *Juristocracy* at 220-221.
[472] Stephen Breyer *Making Democracy Work – a Judge's View* (2010) at 12-21 citing *Marbury v Madison*, 5 U.S. (1 Cranch) 137 (1803).
[473] Breyer *A Judge's View* at 8.
[474] James Grant 'The Rise of Juristocracy' WQ VOL34 SP 2010 Article 01 at 22.
[475] Breyer *A Judge's View* at 8.

for lengthy terms and [receiving] constitutional guarantees as to their compensation.'[476] Then there are 'the people'. It would be a mistake to assume without more that their interests coincide with their elected representatives. They cannot be expected to live by the rule of law, and to follow it even when they disagree with it. When public feelings run high, judges may have difficulty as technicians without a purse or the sword to assuage them.[477] The executive too may have trouble curbing subversion, as insidious as illegally hooking up electricity or producing hopelessly inadequate court transcripts that result in violent criminals being set free on appeal.[478]

Judicial review is 'a kind of institutional ballast, helping to stabilise the kind of democracy that respects rights and helps to prevent the "people drunk" from undoing the will of the people sober".[479]' It limits the exercise of public power. But it also limits the protection of socio-economic rights, which, unsurprisingly, given the high levels of inequality, afflicts the majority. As 'a far stronger power than the power to interpret a statute'[480] judicial review remains hamstrung by separation and deference. Ever so subtly, the counter-majoritarian resistance to judicial review resurfaces under neo-constitutionalism to stall distribution and escalate globalisation.

Is this the milieu for democracy to flourish, die or adapt like Darwin's natural selection theory for living species? Buffered by pro-and anti-democratic forces, would judicial review morph incrementally into new forms in its struggle to maintain equilibrium? The dominant trajectory of the constitutional journey depends on 'the outcome of political and legal contest shaped by the prevailing political discourse, the legal traditions in the country and the available legal materials, the facts of the particular dispute, the quality of the lawyering and the ideology of the judiciary.'[481] And the people?

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[476] Breyer *A Judge's View* at 8.
[477] Breyer *A Judge's View* at 11.
[478] Jonny Steinberg 'Roots of rebellion lie in degrading low-wage work' https://www.businesslive.co.za/bd/opinion/columnists/2019-06-28-jonny-steinberg-roots-of-rebellion-lie-in-degrading-low-wage-work/ (accessed 29 June 2019).
[479] Breyer *A Judge's View* at 6.
[480] Breyer *A Judge's View* at 5.
[481] Le Roux and Davis *Lawfare* at 302.

'We, the people' need to participate in political dialogue.[482] Without active participation in political life, democratic institutions will founder. So too will the rule of law if the public ignores the courts' interpretations of the Constitution that it dislikes.[483] People tend to support institutions they understand and trust.[484] 'Illuminating the minds of the people at large' (*sic*) safeguards against tyranny.[485] Educating people about the role of the judiciary, the Electoral Commission and other functioning Chapter 9 institutions in giving effect to the Constitution and advancing democracy is a way forward.[486] How does one use education to capture the attention and imagination of busy people going about their lives, to become active citizens? Without dialogue and resistance against juristocracy, distributive social justice would stagnate, camouflaged by judicial insistence on procedural fairness to restrain the elites.[487] Restoring and safeguarding neo-constitutionalism as a 'living laboratory of constitutional innovation' remains the challenge.[488]

What is the next phase in the evolution of litigation? Constructive dialogue or juristocracy? What lies ahead for conflict management? More litigation or self-help, powerplay and chaos?

### 3.11 Conclusion

Chapter 3 is dedicated to expatiating on these reasons for the need to care about litigation. To revitalise litigation to deliver transformative constitutionalism, fixing the DSD is a possibility. However, more challenging is participation as co-operative, collaborative yet agonistic or jurisgenerative dialogue. Dialogue theories are a metaphor for a colloquy or conversation between the court and others.[489] It is that theory of democracy, law and

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[482] Breyer *A Judge's View* at 215.
[483] Breyer *A Judge's View* at 215.
[484] Breyer *A Judge's View* at 216-7.
[485] Breyer *A Judge's View* at 216-7.
[486] Breyer *A Judge's View* at 218-219.
[487] Ran *Juristocracy* at 14.
[488] Ran *Juristocracy* at 223.
[489] Kent Roach 'Constitutional and common-law dialogues between the Supreme Court and Canadian legislatures' (2001) 80 *Can B Rev*. 481 at 485.

practice that attenuates concerns about judicial accountability when judicial decisions implicate political branches, as they do when institutional processes and 'shared elaboration of constitutional meaning between the judiciary and other actors', including non-judicial actors, arise for constitutional interpretation. Dialogue would combine rights enforcement with the recognition of capabilities in the search for common aims and reciprocity, the sine qua non for litigation to function optimally.[490]

[490] Roach 'Dialogues between the Supreme Court and Canadian legislatures' (2001) 80 *Can B Rev*. 481 at 485.

# Chapter 4. Recommendations

> 'However, the moment the new regime hardens into a dominating "bureaucracy" the humanist dimension of the struggle is lost and it is no longer possible to speak of liberation. Hence our insistence that the authentic solution of the oppressor-oppressed contradiction does not lie in a mere reversal of position, in moving from one pole to the other. Nor does it lie in the replacement of the former oppressors with new ones who continue to subjugate the oppressed all in the name of their liberation.' [1]

## 4.1 Introduction

Chapter 3 shores up dialogue as a process for further innovation to yield substantive transformative constitutionalism. Thus far, many contributors I cite, focus on dialogue as a court-centred enterprise. Experimentalists reach beyond to involve communities more actively. Development theorists like Sen, Nussbaum and Freire fortify my view that fundamental transformation remains vested in the people, not as the elite or as 'passive clients, users and customers' but as active citizens concerned about their welfare and that of the generations to come.[2]

Hence, my search for the next phase in the evolution of litigation leads me to suggest a triple strategy to cultivate an ecosystem, a milieu in which litigation can perform optimally. Then litigation can live up to its definition. This involves first, OCMS, a deep form of dialogue within communities to bolster court-centred dialogue as one of its objectives. The other objectives of community-centred dialogue are to manage and resolve conflict for which litigation is but one option. Second, it involves redesigning the DSD; and third, facilitation as a subset of the second. I also illustrated in Chapter 2 Part B and Chapter 3 that sources and causes of conflict have to be matched to appropriate processes to yield the most effective outcomes. Coupled with community centred dialogue,

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[1] Paulo Freire 'Pedagogy of the oppressed' (2000) https://oxfordre.com/education/view/10.1093/acrefore/9780190264093.001.0001/acrefore-9780190264093-e-10 (accessed 10 July 2019).

[2] Solange Rosa 'Transformative Constitutionalism in a Democratic Developmental State at 108-112, 122.

a strategic approach to conflict management would lay the foundations for a developmental approach to problem solving and building democratic institutions. Filtering out conflict in this way would distil disputes better suited for litigation from others that should be resolved differently.

Hence, my threefold recommendations which build on best practice in community centred dialogue (e.g. OCMS) and ApDR, must cumulatively accomplish the following:

- active participation by leaders, litigants and legal representatives, in community-centred dialogue.
- build organisation and ignite constitutional and political consciousness and culture.
- cultivate common aims and reciprocity.
- cultivate constructive public emotions committed to preserving shared national goals.
- develop political leaders who understand 'the need to touch citizens' hearts and to inspire, deliberately, strong emotions' supportive of national stability in the way that Mandela, King and Gandhi did.[3]
- help to diagnose sources and causes of conflict.
- enable communities to draw links between their realities, politics, economics and the imperative to transform constitutionally.
- acknowledge that litigation is one of several frontiers in the struggle for livelihood and political rights and capabilities, which are constitutive of freedom as development,[4] and to strategise for transformation accordingly.
- provide content about rights and capabilities that Wilson and Dugard recommend as their first and second enquiries in testing for reasonableness.[5]

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[3] Martha C. Nussbaum *Political Emotions – Why Love Matters for Justice* (2013).
[4] Amartya Sen *Freedom as Development*.
[5] Stuart Wilson and Jackie Dugard 'Taking Poverty Seriously: The South African Constitutional Court and Socio-Economic Rights' in 'Law and Poverty' edited by S Liebenberg and Geo Quinot (2013) 222 at 230-231.

- cultivate capacity within communities to seize and retain control of their litigation.
- maximise capabilities as Nussbaum recommends, so that communities can be active participants in decision-making to fix dysfunctional institutions as experimentalists urge.
- acknowledge and manage extraneous influences bearing on legal actors.
- enable communities to participate in court-centred dialogues by consciously choosing the proofs and arguments that would yield transformative constitutionalism.
- enable communities to test for reality and develop remedies to match.
- enable communities to creatively generate substantive remedies in claims for distribution to develop precedents, mindfully managing their polycentric impact.
- redefine how legal actors 'take instructions' and relate to litigants.

### 4.2 Community-centred dialogue

Dialogue with communities is the heartland of choice. It is where choice as democracy is exercised. Participation in elections is a choice – to register to vote, to vote, for whom to vote and to stand for elections. Similarly, conflict management is also an exercise of choice – to resist, to negotiate or mediate to reach consensus, to agree to disagree, to litigate, to protest peacefully, or to avoid any engagement altogether.

Paulo Freire's influence on South African and other oppressed peoples is legendary.[6] I show how his *praxis* in *Pedagogy of the Oppressed* (*Pedagogy*) informed the practice of organising, conscientizing and mobilising in the liberation struggle (OCMS) against apartheid. While *Pedagogy* and OCMS are receptive to agonistic and jurisgenerative engagements, they are distinguishable from other forms of participation, including experimentalism. I

[6] Freire at 12; others included Frantz Fanon's *Wretched of the Earth* in 1961, Herbert Marcuse's *One-Dimensional Man* in 1964 and Antonio Gramsci *Prison Notebooks the Intellectuals*

argue that *Pedagogy* and OCMS constitute the quality, depth and breadth of community centred dialogue that would create foundations for institutions of democracy to flourish.

*Pedagogy* as dialogue was Freire's key to entering political consciousness, reflection and action. In South Africa, community struggles for livelihood rights were grounded in the practice of OCMS against apartheid. Freire's approach to dialogue in *Pedagogy* informed the tactics adopted in the struggle against apartheid from the seventies into the eighties. Lessons from Frantz Fanon's *The Wretched of the Earth*, Antonio Gramsci's *Prison Notebooks – The Intellectuals*, and Herbert Marcuse's *One-Dimensional Man*, ignited consciousness so that theories about social change infused the practice of OCMS.

Notwithstanding political liberation, the struggles for livelihood and economic rights persist. [7] Rights talk inclines increasingly towards rhetoric, notwithstanding our revolutionary Constitution. [8] Spawned in times of repression *Pedagogy* and OCMS remain strategies for revolutions to liberate oppressed people. My aim in reflecting on them is for the infinitely modest purpose of exploring their usefulness in transforming litigation as a process in the practice of conflict management, problem- solving and building institutions of democracy. With some differences, my contribution is also fortified by convincing cases made for participation [9] and appeals to consciousness, reflection and action by experimentalists.[10]

Whereas *Pedagogy* is accessible online, little is written about OCMS.[11] Even the acronym varies. Some refer to it as OCM, others as MOE (mobilise,

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[7] E.g. Danie Brand 'The South African Constitutional Court and livelihood rights' in *Transformative constitutionalism: Comparing the apex courts of Brazil, India and South Africa* (2013) Oscar Vilhena, Upendra Baxi and Frans Viljoen eds.; D M Davis 'Socioeconomic rights: Do they deliver the goods?' I.Con Vol. 6: 687https://doi.org/10.1093/icon/mon014.
[8] Kennedy 'Form and Substance' (1976) 89 *HLR* at 1685.
[9] Henk Botha 'Representing The Poor: Law, Poverty And Democracy' at 527.
[10] Stu Woolman *The Selfless Constitution: Experimentalism and Flourishing as Foundations of South Africa's Basic Law*.
[11] Sunday Independent / 16 October 2016, 11:01am / Opinion Pravin is our Che Guevara https://www.iol.co.za/sundayindependent/pravin-is-our-che-guevara-2080278 (accessed 14 July 2019).

organise, educate).[12] What it meant at a particular point in time on any issue – rent increases, water fines or participation in the Tricameral Parliament – usually evolved thorough discussions, which were captured on flipcharts at Activists' Forums. Assembled precisely to give content into OCMS,[13] Activists' Forums were platforms for political education and strategizing in response to social and political problems of the time.

To reconstruct our collective memory of the practice of OCMS, I invited a random sample of activists to respond to the question: 'What is your understanding of OCM[S][14] and what, if any, is its relevance for politics and constitutional transformation today'? By no means do the activists' feedback amount to a scientific survey. As a random response, it authenticates my experience of OCMS. Roughly, it supports a finding of the close correlation between Freire's conception and practice of *Pedagogy* as dialogue and the implementation OCMS.[15] The purpose of drawing parallels between *Pedagogy* and OCMS is to extract the essence of dialogue in the context of communities to assess whether it is useful for litigation.

### 4.2.1 What is OCMS?

Evidence of OCMS rarely shores up on public platforms. This opinion piece below is a rare find:

> 'One story worth telling in the context of theory is Gordhan's role as an instructor in the underground. Generations of activists were schooled in OCMS - Organise, Conscientise, Mobilise and Support. Working above ground in community organisations like the Natal Indian Congress, the Durban Housing Action Committee and the Phoenix Working Committee, Gordhan drew on

[12] Activist Abba Omar 'is not sure what the roots of the terminology was but I suspect YM, Vish or PG had introduced that into our lexicon.'
[13] As an activist I participated in OCMS.
[14] Two activists pointed out that I had omitted the 'S' from OCMS.
[15] E.g. Activist Goolam Aboobaker responded: 'Books like Pedagogy of the Oppressed emphasized people's consciousness is raised through their active involvement in issues that affect them in their daily lives. This suggested that if we wanted to Organise people where they lived, this would have to be via the issues that concerned them there. This included issues like affordable rents, basic facilities and amenities (e.g. Childcare and early learning, distance to schools, recreational facilities, etc.).

> struggles around the world to recruit activists for the underground ANC from the early 1970s. His contribution in building cadreship was critical during a period of sustained apartheid repression.'[16]

Historically, OCMS evolved organically in response to repression and the human spirit for survival. Liberation struggles abroad, namely, the Cuban struggles following the revolution in 1953 and the overthrow of the Sandanista in Nicaraguan in 1979 formed the backdrop.[17] Lessons were also drawn from the Defiance Campaign in South Africa in the fifties.[18] However, it was political and socio-economic developments in the seventies that rekindled the flames of revolutionary fervour. In 1972 the erstwhile University of Durban-Westville, established for 'Indians' and 'Coloureds', triggered student boycotts. The Coronation Brick and Tile factory strike from 1973,[19] the flooding of Tin Town residents in 1975 and their relocation to the newly established township of Phoenix, north of Durban,[20] the school boycotts in Soweto in 1976, the workers' strikes against industries like Fatti's and Moni's, red meat producers, Wilson-Rowntree, Colgate and Simba Chips that escalated to community-supported consumer boycotts from 1979,[21] are a few of the high-profile events providing the context for resistance on the national front.[22]

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[16] Sunday Independent / 16 October 2016, 11:01am / Opinion Pravin is our Che Guevara https://www.iol.co.za/sundayindependent/pravin-is-our-che-guevara-2080278 (accessed 14 July 2019). Phoenix Working Committee, one of the earliest housing action committees, was formed in the practice of OCMS. For a detailed account of its formation in 1978, the issues used to galvanise community support, how meetings were convened and conducted, how leadership was elected see 'Phoenix Community Centre' http://phoenixcommunitycentre.com/?page_id=17. Politically, their connection was with the Natal Indian Congress. Brij Maharaj 'Segregation, Desegregation and De-Racialisation – Racial Politics and the City of Durban' http://abahlali.org/files/Freund_Padayachee_2002.6.pdf.

[17] Activist Lechesa Tsenoli: 'Conscientization, occurred amongst the most serious cadres who studied how other struggles like *Nicaragua* and Cuba unfolded. They brought lessons to bear on our own struggle. They learnt of dialectical materialism…. We were also conscientized by the bravado of people who brought materials into the country under the very noses of the authorities and by the challenges in the courts.'

[18] 'In South Africa, Freire's ideas and methods were central to the 1970s Black Consciousness Movement, often associated with Steve Biko,[29][30] as well as the trade union movement in the 1970s and 1980s, and the United Democratic Front in the 1980s. There is a Paulo Freire Project at the University of KwaZulu-Natal in Pietermaritzburg.' (footnotes omitted) https://en.wikipedia.org/wiki/Paulo_Freire (accessed 10 July 2019).

[19] https://www.sahistory.org.za/article/1973-durban-strikes (accessed 11 August 2019).

[20] Phoenix Working Committee http://phoenixcommunitycentre.com/?page_id=17 (accessed 15 July 2019).

[21] Sonja Bendix *Industrial Relations in South Africa* at 607; https://www.sahistory.org.za/archive/fattis-and-monis-strike (accessed 8 September 2019)

[22] Activist Altaaf Karim 'The Durban Moment' (unpublished).

In the meantime, senior leaders of the African National Congress (ANC) in exile convened 'to undertake a strategic review'.[23] The ANC had not taken advantage of 'the conflagration' sparked by the school boycotts of Soweto 1976.[24] Nor had the 'upsurge of political and labour opposition at home … been directly initiated by the ANC underground.' How to direct these 'rapidly developing disparate activities … towards a coherent programme of national liberation'[25] was answered with a 'sojourn' to Vietnam in October 1978.[26] Lessons from Vietnam were about mobilising and organising across social, cultural and sports bodies, and equipping people with Marxist-Leninist ideology. Separating the legal from the semi-legal, the political from the military, the Vietnamese were able to form mass-based support, under the leadership of the National United Front (NUF).[27] The NUF had taken care 'not to be domineering but to be guided by the organisations on the ground',[28] and to enter into 'popular consciousness'. Prime Minister Ho Chi Minh had commented: '"Only through [the Party's] daily actions and struggles … will its leadership be recognised by the masses."'[29]

These lessons ultimately found expression in the ANC's strategic review in *The Green Book*,[30] a handbook for ANC members. Then began the ANC's shift in emphasis from the military to the political. Political contact strengthened between the ANC inside South Africa and in exile.[31] Trade unions under COSATU's predecessor FOSATU, housing action committees that had burgeoned country-wide, cultural, religious and sports organisations collectively mobilised and organised against the Tricameral System of apartheid. They united under the banner of the United Democratic Front (UDF)

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[23] Luli Callinicos *Oliver Tambo – Beyond the Engeli Mountains* (2004) at 522.
[24] Callinicos *Oliver Tambo* at 522.
[25] Callinicos *Oliver Tambo* at 523.
[26] Callinicos *Oliver Tambo* at 522.
[27] Callinicos *Oliver Tambo* at 524-525.
[28] Callinicos *Oliver Tambo* at 525.
[29] Callinicos *Oliver Tambo* at 525.
[30] Callinicos *Oliver Tambo* at 525; 'The Green Book' https://www.marxists.org/subject/africa/anc/2001/eye-needle.htm
[31] Callinicos *Oliver Tambo* at 533; 556.

in 1983.[32]

Gordhan's response to my survey question was to depict OMCS graphically as a cycle of OMC spinning on the axis of Struggle.[33] OMCS is 'cyclical', 'integrated,'[34] 'an ongoing spiral'[35] because its start and end points depend on the circumstances to which it applies. Another architect of OCMS expands on its dialectical spiral nature:

'The basic premise of this strategy is that in order to engage people (mobilise) in any activity against authority, they will have to re-group under the rubric of common interests or grievances (organise) to assert their collective power. The acts of mobilising and organising to challenge the status quo require engagement in campaigns, agitation, propaganda and other (even militant) activity (struggle) to not only achieve immediate, local victories, but to understand the value of such struggle in enhancing their own perceptions of their power in opposition to authority (consciousness). The preferable, more complete, concept was therefore OCMS….'[36]

A former NUSAS and trade union activist adds:

'We believed at the time that for change to be revolutionary/sustainable, change and action needed to be undertaken by people who are ORGANISED (not Arab Spring/anarchic approach), they need to be MOBILISED IN A DISCIPLINED way (especially because of the conditions of repression and the costs of ill-discipline to the individual and organisation were high) and people need to know why they were being mobilised (CONSCIENTISATION).'[37]

Building organisation through mass participation to achieve shared goals was the plan:

'A key principle we accepted was that change comes about when [a] large number of people decide to act together in pursuit of shared goals. However, this does not happen spontaneously but through the building of Organisations that lead by

[32] Callinicos *Oliver Tambo* at 533.
[33] Notes of interview with Pravin Gordhan on 13 February 2016 and my recollection of many workshops led by Gordhan, Yunus Mahomed, Vishwapreya Sewparsad and Yousuf Vawda.
[34] Activist Altaaf Karim.
[35] Notes of interview with Pravin Gordhan on 13 February 2016; Activist Yousuf Vawda.
[36] Activist Yousuf Vawda.
[37] Activist Lisa Seftel.

themselves. The role of intellectuals is to act as catalysts and initiators of that organisation.

In building the Organisations we realised that they had to be built via mass participation. Here we took inspiration from the M-plan that was used by the Congress Alliance during the defiance campaign. Accordingly, we embarked on a programme of Organising house meetings street by street (simultaneously) in Phoenix and Chatsworth.'[38]

### 4.2.2 What is community-centred dialogue?

Freire conceived pedagogy as dialogue that is, communication without which 'there can be no true education.'[39] It is 'epistemological, a process of learning and knowing encompassing both an individual and a social character that leads to theorising about experiences shared in the process.[40] Without an 'epistemological curiosity', dialogue misses out on 'the unity between theory and practice'.[41] To be able to make these links, neither language nor literacy but ideology counts to steer dialogue towards social transformation.[42] Critical consciousness awakens 'the expression of social discontents' precisely because they are real experiences of the oppressed. Therefore, dialogue has two dimensions, reflection and action, in such radical interaction that if one is sacrificed – even in part – the other immediately suffers.[43] Action for action sake jettisons dialogue.[44]

A veteran in the struggle for democracy confirms:

'We ensured that every campaign, be it a localised issue like a bus boycott or a national campaign like the vote boycott of the Tri-Cameral Parliament, was linked to the vision of a non-racial, democratic and free South Africa. We mobilised from the ground up by going door to door, being involved in sporting, social or religious organisations and

[38] Activist Goolam Aboobaker.
[39] Freire at 92-3.
[40] Freire at 17.
[41] Freire at19.
[42] Freire at 23.
[43] Freire at 88.
[44] Freire at 88.

we ensured a constant presence of political organisations affiliated to the UDF. We ensured that people fully understood what they were protesting and fighting for.'[45]

### 4.2.3 Do communities need to be educated or knowledgeable about law, social justice and political rights?

In Chapter 3 under the sub-title 'Who participates in dialogue' I discussed the interaction between leaders, intellectuals and communities. OCMS was grounded mainly in the civics. Communities elected leaders from their environment who could articulate and act to remedy their hardships. This is what it meant to create mass democratic organisations, not just movements. Communities are home to 'organic intellectuals'. Given 'proper tools' for diagnosis they would participate in problem-solving dialogue on their own behalf. An educationist recalls:

'[I]t was necessary to conscientize them … on things like why they were experiencing such injustice, who, what was responsible for this state of injustice. It was also about helping communities to understand their rights and to know that these human rights should not be denied. … [A] mobilizing aspect where people sought to get widespread support for the struggle and developed strategies to demand and to act against the injustice.'[46]

Consciousness through OCMS facilitates analysis of subjective and objective conditions:

'Hand in hand with OMC/MOE was the question of strategy and tactics. The process of choosing the right campaigns needed a careful assessment of what we called the objective and subjective conditions. At that point, we defined 'objective' as those issues which were outside of our control – such as the economy. 'Subjective' related to consciousness, state of organization etc.'[47]

*Pedagogy* also advocates working with communities 'in order to come to know through dialogue with them [about] both their *objective situation* and their *awareness* of that situation.'[48] No plan of action can be elevated to a strategy

[45] Activist Prema Naidoo.
[46] Activist Venitha Pillay.
[47] Activist Abba Omar.
[48] Freire at 25.

without a reality test of the subjective and objective conditions. Hence in Chapter 2 Part A, I prefaced my diagnosis of what goes on in litigation with an objective and subjective analysis.

### 4.2.4 Plugging into politics

Before intervening in communities, dialoguers 'must have political clarity.' [49] Political clarity comes with understanding historical circumstances, being able to diagnose subjective and objective conditions, and to take a view of the What, Why, When and How of transformation. These questions would open dialogue about politics, ideology and a host of subjective factors that influence analysis of the status quo. Formulating a demand that water should be free to low income households is ideologically biased in favour of a socialist or social democratic system of distribution. Dismissing climate change as a figment of left-wing imagination or radicalism inclines towards elitist, conservative dispositions. However, demands for land without compensation is intensely nuanced and controversial. The left, right and centre in a single community may make this demand but mean different things, articulate different reasons and pursue different strategies. In such a debate, no one is ideologically neutral. Nor are economics, politics, psychology, party political positions, amongst other law and non-law factors avoidable.

How did OCMS import politics into the political?

'At the level of activists, this is about making sure that activists can ACT based on political understanding and that learning/political education is something that is valued. At the level of the people/masses, this is about ensuring that people act based on their lived experience and understanding the relationship between their lived experience and the long-term goal of political freedom, economic emancipation etc.'[50]

'The political' refers to the construction of opposing and necessarily conflicting relationships (friend/enemy; residents/city council), and 'politics' means the

[49] Freire at 19.
[50] Activist Lisa Seftel.

ordering and organisation of society characterised by 'the political.'[51] That we choose to be a multiparty democracy is politics; that we have majority and opposition parties and coalitions is political. Antagonism manifests in both 'the political' and in 'politics'. Ineluctably, antagonism is indispensable to public life, public action and the search for common aims.[52] As discussed above under 'culture' in Chapter 2 Part A, Mouffe advocates agonism as an alternative to conceiving democracy as 'deliberative'.[53] She envisages that through '"agonistic pluralism" the aim of democratic politics would be to transform antagonism into agonism.' By enabling channels for the collective expression of passions to be mobilized towards democratic designs, constructing rational consensus is possible.[54]

Antagonism is destructive of democracy in so far as the politics of them/us and friend/enemy obstruct consensus and collaboration. Deliberative democracy that seeks to suppress dissent would induce apathy, disaffection and agnosticism with participation politics, which would pose greater risks for democracy itself.[55] In contrast, far from jeopardizing democracy, agonism is the sine qua non for its existence.[56] Acknowledging resistance and dissent would be a first step towards harnessing and channelling conflict towards dialogue and an ensuing search for egalitarian common aims and reciprocity, a critical mass of which is needed to counter-balance conflict. Otherwise, nothing resembling a society can exist.

However, political choices between alternatives that are indeterminable on strictly rational grounds are usually, though not always, as Mouffe suggests, irreconcilable. For instance, applying strict law to conflicts that arise during elections may be an exercise in rationality but utterly futile if it exacerbates antagonism. Exercising political choice may yield results more closely

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[51] Chantal Mouffe: 'Agonistic Democracy and Radical Politics' http://pavilionmagazine.org/chantal-mouffe-agonistic-democracy-and-radical-politics/ (accessed 15 April 2018).
[52] Mouffe: 'Agonistic Democracy'.
[53] Mouffe 'Agonistic Democracy'.
[54] Chantal Mouffe 'Deliberative Democracy or Agonistic Pluralism' Institutional Repository at IHS Vienna 16.
[55] Mouffe 'Agonistic Pluralism'.
[56] Mouffe 'Agonistic Pluralism'.

resembling substantively free and fair elections. Perfectly free and fair elections are rare, if at all possible. Intra-party disputes amongst members of the Pan African Congress contesting the leadership of the party was hard to resolve through adjudication. Ultimately, the court nudged the parties into a settlement in which key positions were distributed temporarily between both factions just so that the PAC could contest the elections.[57] A strict application of law might have disqualified the PAC from participating in the elections.

### 4.2.5 Intra-organisational dialogue

Dialoguers must mediate their differences (intra-organisational bargaining) to formulate and adopt some ideological position for the collective on controversial issues such as land and water rights. Chinks in the armour of the collective can be exploited by bearers of obligations of such rights. Legal actors with a formalist bent seize upon such fractures to avoid dispensing substantive remedies. Admittedly, consensus is not always forthcoming even amongst communities with a high level of shared values. Then, the points of departure within the collective have to be carefully framed to hedge against unpredictable outcomes from the courts, the executive, the administration or any other decision-maker.

Furthermore, without confronting ideological dispositions and other influences frankly, important content for dialogue would be omitted in a strategic plan to transform institutions via litigation or other means. Importantly, the omission would not yield a genuine assessment of sources and causes of conflict. The ensuing solutions could also miss their target. Conversely, by working through their differences through intra-organisational dialogue, communities understand the contradictions, the strengths and weaknesses of the various dispositions and gain the confidence to articulate their position(s). This would be a sound foundation for constructive dialogue that could feed into reform of dysfunctional institutions and even law. Inculcating a culture of rational dialogue, grounded in the political about the politics for transformation would,

[57] *Moloto v Apooe* HCGP (case no. 11224/2019) unreported.

over time, shut out the deafening noise of rhetoric and social media sound bites.

### 4.2.6 OCMS vs Experimentalism

Woolman finds that the breadth of the range of participants in school governing bodies (SGBs) 'is consistent with the bottom-up, reflexive, polycentric and flexible commitments' associated with experimental institutions.[58] Although the South African Schools Act (SASA)[59] vests enormous law-making power in the state,[60] the form and functions of SGBs enable participation amongst stakeholders at the coalface of education. Woolman enthuses that 'SGBs are one of the few institutions that have the makings of a great, new and rather unique South African political tradition',[61] with the power to create 'new stores of social capital.'[62] In his view, SGBs 'enjoy popular acceptance and participation across race, class and language divides.'[63] Through trial and error, SGBs are now accepted as a 'legitimate emergent, experimental institution that enhance a bottoms-ups, reflexive (sometimes reactive), broad-based participatory form of public decision-making.'[64] Woolman dismisses criticism that 'SASA and other pieces of legislation were part and parcel of a global neo-liberal agenda', that by granting 'certain democratic political rights to communities, parents and learners' the state palmed off its obligations to provide quality education to the elite.[65]

Like Woolman, Botha also anticipates that the state would enable participation by taking 'positive steps to secure conditions under which citizens – including the poor and marginalised – can exercise rights of democratic participation'.[66] However, Woolman acknowledges the limits of 'evolutionary epistemology' and that 'political agnosticism' is characteristic of SGBs. Nevertheless, he argues

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[58] Woolman *The Selfless Constitution: Experimentalism and Flourishing as Foundations of South Africa's Basic Law* at 49, 80, 339.
[59] South African Schools Act, 84 of 1996.
[60] Woolman *The Selfless Constitution* at 347.
[61] Woolman *The Selfless Constitution* at 341.
[62] Woolman *The Selfless Constitution* at 347.
[63] Woolman *The Selfless Constitution* at 341.
[64] Woolman *The Selfless Constitution* at 347.
[65]Woolman *The Selfless Constitution* at 340.
[66] Botha 'Representing The Poor: Law, Poverty And Democracy' at 527.

that their effect is revolutionary.[67] These limitations, in my view, distinguish his account of experimentalism from the epistemology of *Pedagogy* and OCMS which are in form and substance, process and effect, political and revolutionary. The kind of participation involved in *Pedagogy* and OCMS is agonistic and jurisgenerative. In this way, they square more precisely with the aims of our revolutionary Constitution.

The economic interests of the state and the political interests of its officer bearers do not always equate to common interest or reciprocity with those of the communities they are meant to serve. Common interest exists in SGBs for as long as they do not stray beyond the remit of their powers. When they do, the state invokes either the legislature or the judiciary to tether the SGBs.[68] Theoretically, communities can also hold the state's 'feet to the fire' when it fails to perform. However, impoverished SGBs do not have a powder keg of resources to litigate on the scale that the state and SGBs in wealthy communities can.[69] Left toothless, SGBs can perpetuate existing patterns of class interests. Furthermore, legislation circumscribes the parameters of powers of the participants. Consequently, the agenda for dialogue is confined to basic education. Nevertheless, SGBs have the potential to be springboards for dialogue on other frontiers.

*Pedagogy* and OCMS are distinguishable from other forms of participation in the quality and quantity of participation by the state. They take dialogue to deeper levels at which communities experiment with their consciousness, capabilities, rights, obligations and possibilities to gain the confidence to articulate and actively pursue transformative constitutionalism. Working within the law, they interpret and seek to apply it to egalitarian effect. Dialogue at this level and of this intensity grounds the strategy for engaging the state on any platform. Litigation would be but one of several platforms.

### 4.2.7 Subversive?

[67]Woolman *The Selfless Constitution* at 164-167.
[68] Woolman *The Selfless Constitution* at 346.
[69] Woolman *The Selfless Constitution* at 346-347.

Subversive is how OCMS was perceived by apartheid's apparatchiks. So was *Pedagogy*:

'Subversive as such education might be, as epistemological dialogue it is the 'midwife'[70] of the revolutionary transformation needed for the poor to be 'fully human'.[71]

Subversion should no longer be a concern in a constitutional democracy founded on basic freedoms. Furthermore, the ANC applied OCMS to accomplish our constitutional democracy through agonistic dialogue. Its *Green Book* remains its reference. Moreover, taking the Constitution back to the people in 1996 was a form of OCMS, an unprecedented public participation in constitution-making. However, while freedoms exist in constitutional texts, culture, loyalty and fear may nevertheless impede participation. Political party loyalty, fear of losing state grants, loss of briefs from fee-paying clients or hopes of elevation on the bench may affect whether and how litigants and legal actors participate in dialogue in litigation. If those seeking to participate in dialogue lack, in law or fact, 'this primordial right' to speak freely, then they must first reclaim it.[72]

### 4.2.8 Future of OCMS

Three activists criticised social media for being inadequate as a mobilising tool for building organisation and raising consciousness. It lacks the benefit of face to face dialogue, of exchanging information, debate and persuasion.[73] This is not to say that technology has no place in the struggle for transformative constitutionalism. It has mobilising uses but limited organisational capacity. A veteran of the anti-apartheid struggle distinguishes organisation from social movements:

'The strategies and tactics used to mobilise civil society before 1994 is naturally very different from what is being done by organs and organisations today. The context is

[70] Freire at 48.
[71] Freire at 29.
[72] Freire at 88-9.
[73]Activists Prema Naidoo, Lechisa Tsenoli and Lisa Seftel.

of course very different. This does not imply that what was done pre-1994 has no relevance or lessons that the new generation can benefit from.

Today we have a broad front of organisations which is coalescing into what is popularly termed the Social Movement. Most of these organisations are, I believe, issue orientated – TAC on HIV, Right to Know on secrecy, COSATU on labour broking, etc. What they lack is a broad vision of what they want the future to look like. Without creating a vision, they are mobilising by using populist tactics on very real issues. Without defining what they are collectively working towards. [This] is the first major criticism I have.

Naturally, organisations are entitled to challenge the state through the judiciary. Often the hearing of these cases is accompanied by some kind of demonstration which may at best attract no more than a hundred sympathisers and activists. In a politically charged country, these are small returns on pertinent issues. I believe that many of today's activists have traded grassroots mobilisation for social media activism. The result of this strategy is that many people, some who even support the cause, have very little understanding of what civil society organisations are fighting for.

Lastly, I do believe that activism has become specialised and issue based. Today you get gender activists, environmental activists, equality activists, etc. We were just activists who defined and fought for a progressive agenda. The fact that we operated within the community we lived in meant that we had to be familiar and knowledgeable about a variety of issues. We were multifaceted.

All of the above, I believe, is linked to the fact that those in the social movement have not defined a common vision for a future South Africa.'[74]

This description of social movements as 'issue orientated' coincides with a growing tendency amongst non-governmental organisations to be territorial about their practices. I acknowledge that specialisation is indispensable for responding adequately to the complexity of issues for litigation. Furthermore, no one can deny the gains of the TAC's litigation for the health care of those living with HIV/AIDs. However, the state's denial of medicines to them was hardly a decision isolated from its other strategic considerations. Compartmentalising sites of struggle into issues is vulnerable to notorious divide and rule tactics. They obstruct the formation of mass democratic movements grounded in organisation. Therefore, pooling together multiple

[74] Activists Prema Naidoo.

fields of specialisation, exposing how their interconnectedness collaborates to compound oppression, would expose patterns of politics and the political designed to resist transformative constitutionalism.

Equally disconcerting is the mobilising power of social media to create false narratives. Falsely accusing political opponents of being apartheid-era spies exemplifies this tactic.[75] Bell Pottinger's commercialisation of false narratives in pursuit of undemocratic aims is nothing short of treasonous.[76] Inspiring action without reflection compromises one of the two dimensions of dialogue. Action for the sake of action or to perpetuate falsehoods puts us on a trajectory towards crises. Discerning where truth lies in cases like *SASSA* becomes the battlefield. In this way, diverting attention from organisational activities delays if not sabotages programmes for interpreting and applying the Constitution for development.

### 4.2.9 OCMS to rebuild institutions

My diagnosis in Chapter 3 that South Africa is in a state of constitutional rot implicates OCMS. Corrupt, dysfunctional local governments are at the coalface of community struggles for livelihood rights and freedoms. Dialogue with the crooked and dishonest has little prospects of creating organisation unless the dialogue is also about cleaning the rot. Until the rot is cleaned, constitutional crisis will eventuate.

As indicated above, dialogue as communication with communities has aims wider than a court-centred notion of a conversation amongst participants in litigation and sometimes between the three arms of the state. The very range of participants, the issues for dialogue combine with the constituent elements of *Pedagogy* and OCMS to push the process beyond the litigation of disputes

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[75] *Hanekom v Zuma* (D6316/2019) [2019] ZAKZDHC 16 (6 September 2019).
[76] The Reputation-Laundering Firm That Ruined Its Own Reputation https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=13&ved=2ahUKEwinvL_EmfHkAhXHEVAKHWkpCdcQFjAMegQIARAB&url=https%3A%2F%2Fwww.newyorker.com%2Fmagazine%2F2018%2F06%2F25%2Fthe-reputation-laundering-firm-that-ruined-its-own-reputation&usg=AOvVaw1am-Ghc_IaOsw7kTi-WUAJ (accessed 27 September 2019).

into conflict management for development. The elements are so intricately interwoven that isolating their constituent parts would compromise their dialectical character. Learning, knowing, theorising, reflecting, acting, uniting, building and sharing as individuals engaging critically, consciously and collectively about social problems, are foundational to both practices. These are elementary building blocks for cultivating confidence amongst individuals to make their own choices based on their knowledge, experience, needs and wishes. Thus fortified, they can cultivate consciousness and ideas for development, intervene to influence the chain of choices made on their behalf, and shape the outcomes of litigation to best suit their purpose. Such consciousness serves not only the aims of constitutional transformation through litigation but also through other individual and collective actions against bearers of obligations.

Through OCMS, communities would strategise about the most effective processes for conflict resolution, based on their realities, their capabilities and what they assess are possibilities, threats and opportunities. When communities choose to litigate, they give instructions, informed of the law, the risks and the rewards. Combined with experimentalist forms of engagement to destabilise and fix dysfunctional institutions, communities would know what works and what does not. Legal actors are their agents, but communities retain control of their own agency. As they would do when they participate in elections to choose their political representatives or to stand for elections themselves.

Transformative litigation has to be strategic. No strategy would be reliable without a thorough appreciation of subjective and objective conditions to determine the risks and rewards of particular choices. No such assessment is possible without the active participation of communities. Participation will be incomplete without political clarity. And without political and ideological clarity, no diagnosis would be possible of what facts and principles of law would appeal to the ideological dispositions of the legal actors.[77] Non-strategic, reactive, reflexive lawfare for scoring political points are skirmishes that must be distinguished from strategic litigation for constitutional transformation.

[77] Chapter 3 Part A.

### 4.3 Reengineering the DSD

Jerold S Auerbach states in *Justice Without Law - Resolving Disputes Without Lawyers*:

> 'In every society there is a wide range of alternatives for coping with the conflict stirred by personal disputes. Litigation is only one choice among many possibilities, ranging from avoidance to violence. The varieties of disputes settlement, and the socially sanctioned choices in any culture, communicate the ideals people cherish, their perceptions of themselves, and the quality of their relationships with others. They indicate whether people wished to avoid or encourage conflict, supress it, or resolve it amicably. Ultimately the most basic values of society are revealed in its dispute settlement procedures'[78]

In a similar vein, Sally Engle Merry in her book review 'Disputing Without Culture'[79] acknowledges that there is 'a fit between disputes and the processes that resolve them most effectively'.[80] As an anthropologist she views disputing as 'cultural behaviour, informed by participants' moral views about how to fight, the meaning participants attach to going to court, social practices that indicate when and how to escalate disputes to a public forum.'[81] Furthermore, dispute resolution 'is shaped by the culture of those who practice it.[82] The choice of process reflects ideology which originates from a social and cultural context. Cumulatively, process influences the behaviour of those who participate in it.'[83]

Merry points out that disputes are not always settled at the initial process but rather transform and continue over protracted periods. Hence social scientists speak of 'dispute processing' instead of dispute resolution.[84] Acknowledging the chameleon-like character of dispute resolution that changes hue according to the perceptions of its participants, she points out that the choice of process

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[78] Auerbach J S *Justice Without Law? Resolving Disputes Without Lawyers* (1984) at 4.
[79] Merry (1986-1987) *Harv. L. Rev.* at 2059.
[80] Merry (1986-1987) *Harv. L. Rev.* at 2059.
[81] Merry (1986-1987) *Harv. L. Rev.* at 2063.
[82] Merry (1986-1987) *Harv. L. Rev.* at 2064.
[83] Merry (1986-1987) *Harv. L. Rev.* at 2064.
[84] Sally Engle Merry 'Disputing Without Culture' (1987) 100 *Harv. L. Rev.* at 2065.

depends on where the dispute is in a particular sequence. If the unfolding sequence is such that a coercive process follows upon a consensual one, the risks inherent in the former influence the latter.[85] This dynamic is lost unless the processes are designed to fit a systemic whole. Defining the issues in dispute, choosing between consensual and coercive processes, identifying the person who helps to match process to issues are political choices.[86] Carrie Menkel-Meadow's tackles the overarching dilemma when designing dispute systems: What kind of dispute belongs to which forum? In other words, how should disputes be matched to process?[87]

A tipping point is reached about institutional deficiencies in *Mwelase*. In appointing a special master, the CC remarked that the 'Department's tardiness and inefficiency in making land reform and restitution real have triggered a constitutional near emergency'.[88] It reminded itself not to 'self-sensor',[89] but to exercise 'a powerful discretion.'[90] This means considering 'a wide range of available options, each of which is equally permissible.'[91] Then courts would have a choice beyond binaries.[92]

Furthermore,

'[70] A remedy of the kind the Land Claims Court granted was designed to fix persistent institutional failings that repeatedly resulted in non-compliance with court orders. It was directed to systemic functioning – rather than to any individuals' attitudes or defaults. This diminishes any personal sting the remedy may seem to imply. Instead, it recognises our joint responsibility, as a country, for sustaining and growing and strengthening our institutions. And it acknowledges our judicial complicity in

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[85] Merry (1986-1987) *Harv. L. Rev.* at 2066.
[86] Merry (1986-1987) *Harv. L. Rev.* at 2066.
[87] Carrie Menkel-Meadow 'Pursuing Settlement In An Adversary Culture: A Tale Of Innovation Co-Opted Or "The Law Of ADR"' 19 Fla. St. U. L. Rev. 1 1991-1992; Carrie Menkel-Meadow 'Introduction: What Will We Do When Adjudication Ends? A Brief Intellectual History of ADR' 44 UCLA L. Rev. 1613 1996-1997.
[88] *Mwelase and Others v Director-General for the Department of Rural Development and Land Reform and Another* [2019] ZACC 30 para 49.
[89] *Mwelase* para 65.
[90] *Mwelase* para 67.
[91] *Mwelase* para 68.
[92] *Mwelase* para 68.

institutional and systemic dysfunction that impedes our attainment of shared constitutional goals and aspirations.'

In Chapter 3 I show that 'Form and Substance' interconnect in a spiralling confluence of ever-changing cause and effect. Reengineering bespoke DSDs would fit different processes appropriately to maximise the gains for conflict management. Without bespoke DSDs, the legal actors make do with hybridising litigation with other processes like negotiation, mediation and now the appointment of special masters to help fix dysfunctional institutions.[93] Meaningful engagement is such a hybrid. Supporters of hybridisation argue, correctly in my view, that hybridisation enable the form of litigation to work more precisely in tandem with its substance. However, these court-initiated modifications of the form of litigation are stopgap measures to fill the lack of an efficient, predictable DSD.

By reengineering litigation, I do not mean changing its form such that its definition also changes. I mean creating a cultural ecosystem intensely conscious of solving problems. For this, reengineering means much more than tinkering with the rules of procedure. Rules would easily fall in line once strategic problem-solving aims of litigation are built into an effective DSD.[94]

By DSD I mean a carefully crafted combination of processes that include consensus- seeking, adjudication, balloting and use of power that apply flexibly to any dispute, however complex or simple. As litigation is seldom suitable for unravelling unarticulated premises, other processes better fit for this purpose should be accessible through the DSD.

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[93] *Mwelase* para 70.

[94] DSD involves the creation of a set of dispute resolution processes to help an organization, institution, nation-state, or other set of individuals better manage a particular conflict and/or a continuous stream or series of conflicts. *Dispute Systems Design* https://en.wikipedia.org/wiki/Dispute_Systems_Design (accessed 30/09/2015). DSD is the process of identifying, designing, employing, and evaluating an effective means of resolving conflicts within an organization. To be effective, dispute systems must be thoroughly thought out and carefully constructed: http://www.pon.harvard.edu/tag/dispute-system-design/ (accessed 30/09/2015). https://www.pon.harvard.edu/daily/dispute-resolution/what-is-dispute-system-design/ (accessed 1 November 2018).

Substantive reengineering means acknowledging and acting on all elements of consciousness and culture that conduce to articulated and unarticulated reasons or influences in the chain of choice of decision-makers. Redesigning, redeveloping and customising form would free litigation to do the work it is meant to. It would enable litigants to generate bespoke remedies to conduce to manage causes of conflict and solve problems efficiently.

To engineer transformative outcomes, appropriate forms of conflict management must exist. I do not mean alternative dispute resolution (AIDR) but appropriate dispute resolution (ApDR) mechanisms. ApDR values the integrity and usefulness of each process in and of itself and not as an alternative or adjunct to litigation.

Dispute resolution pyramids scale up processes between consensus at the base (negotiation, facilitation, conciliation, mediation, facilitation), force or power at the apex (petitions, demonstrations, pickets, strikes, boycotts) and adjudication (arbitration, litigation) in between. Equidistant, horizontal parallel lines between each process illustrate that most disputes should be resolved by consensus and fewest by resort to power. The pyramid enables DSD practitioners to match process to substance along a continuum of high to low risk options.

In an ideal system, most disputes should be resolved consensually, some by arbitration, few by litigation and the least by recourse to power. Fewer disputes should escalate beyond the baseline consensus-seeking processes. High on the list of reasons to justify a consensus-emphasizing, participatory model are the financial, emotional and administrative cost savings, the speed of resolving disputes, and the degree of acceptance and compliance with the outcomes. Some of these considerations also apply to non consensus-seeking dispute resolution processes. Binaries like the constitutionality of the death penalty and same-sex marriages fit better into the mould of litigation. If mediation is effective, the load on litigation will abate. By ‘load’, I mean not only the quantity of cases but also the quality of issues for determination through litigation. Simultaneously, the model should also recognise adjudication and resort to

power as effective and legitimate processes for resolving some disputes. A one-day strike or boycott may be the quickest, smartest way to stop an obviously egregious violation of human rights, rather than an urgent interdict that might be protracted by legalism over several tiers of judicial hearings. Strikes and stayaways are high risk processes. Protestors go without pay. Enterprises and institutions shut down temporarily or even permanently. Negotiation and mediation carry low risks. If an agreement is not reached, other options are available. Notwithstanding, the context might suggest that a short stayaway is more likely to yield the best outcomes than a protracted, costly (bad faith) mediation. Ultimately, context determines the appropriate match between process and substance.

### 4.4 Facilitation

Of all processes, facilitation stands out as one that fits well with litigation, with or without redesigning the DSD. By facilitation, I mean a process during which an independent, impartial, experienced, third party facilitator intervenes. A judge can comfortably fit this purpose without disqualifying herself from adjudicating. The facilitation would be on the record as an additional safeguard for a judge facilitator. Facilitation that shores up underlying and real causes of conflict enables litigants to frame or characterise their disputes more precisely by separating the chaff of rhetoric from the wheat of rationality and pragmatism. Exposing the real causes of conflict assures of more targeted, tailored and precise remedies than the pleadings anticipate.

Although facilitation may result in settlement, its purpose is also diagnostic. The facilitator can channel issues in dispute into appropriate processes for resolution. For instance, relationship issues may be referred to mediation to remedy antagonism, distrust, racism and the like. Disputes about the interpretation or validity of a law can be processed through litigation. A demand for housing might include a referral to the prosecuting authorities or a commission of enquiry into corruption, in addition to any other remedies. Agreements on the choice of a forum would neutralise jurisdictional and procedural challenges.

Facilitators have toolboxes of techniques to diagnose, distil and direct conflict, to guide and to persuade disputants to make mutually beneficial and progressive choices. They would not issue instructions, orders or directives without the consent of the affected parties or in terms of the Uniform Rules of Court. An example of an effective tool is scenario sketching or reality testing. In collaboration with the participants, the facilitator develops a range of theoretically possible rational process and substantive outcomes. By reflecting on and anticipating all the possible consequences of particular choices, the participants can make informed decisions about the most effective processes to yield the best outcomes. 'Best' is measured against a set of gaols ranged in order of preference. Probing questions put to disputants about, say, the consequences of their choices for development and their on-going relationships, would test the merits of their cases and their readiness for trial. The flexibility of facilitation is suited for striking better balances between competing claims for social justice. Facilitation also presents an opportunity for the facilitator to resolve tensions between the original litigants and *amici* if the latter hijack the case for their own causes. Importantly, facilitation minimises the risk of judges misunderstanding the issues and making mistakes.

Single text facilitation is a technique that focuses all the participants around a draft. President Jimmy Carter famously generated a single text at Camp David in 1978 that became the peace agreement between Israel and Egypt.[95] After ascertaining the interests and concerns of the participants, the facilitator generates a draft that anticipates consensus around procedural and substantive remedies. Focusing on a single text shifts the deliberations from the general to the specifics, from positional bargaining to mutual interests, from technicalities to solution seeking. It is negotiating without giving in. If reading in or striking out of legislation is at issue, the facilitator may test a draft with the parties. Single text facilitation applies not only as between the courts and

[95] 'Time to adopt a new approach to the One/Single Text procedure? http://panglongenglish.blogspot.com/2014/12/time-to-adopt-new-approach-to-onesingle.html; 'Camp David Third Party Intervener' https://www.negotiations.com/case/third-party/ (accessed 28 July 2019).

litigants but also amongst panel judges. Assigning a member of a panel court to scribe the judgment typifies the benefits of single text facilitation. Chief Justice Warren's strategic election to scribe the judgment in *Brown* personally, is legendary. Without assistance from law clerks he circulated drafts cautiously for comment so that no one but he had the text.[96]

Facilitation could be an add-on to or independent of judicial case management. Promoting judicial case management for administrative efficiency of the judicial system is not new. Lord Woolf recommended reforms to civil procedure in England and Wales. The Woolf reforms were implemented in the form of the Civil Procedure Rules of 1998. They strongly advocated settlement at a formative stage of litigation. Early settlements lowered litigation costs. Conversely, non-settlement and consequently, having to comply with pre-trial protocols 'forward loaded' costs.

Taking over in January 2009, Lord Justice Jackson commenced a review of the increased costs of civil litigation. In May 2009 he published his committee's preliminary report on the review of the rules and principles governing the costs of civil litigation and a final report in December 2009.[97] Of relevance for current purposes is his finding that 'no win, no fee' or contingency fee agreements are the major contributor of disproportionate costs, depriving successful claimants of proper compensation in personal injury cases.[98] Pegging contingency fees and the costs of 'fast track' cases are some of the ways in which access to justice is enabled. In South Africa, contingency fee arrangements earned from litigating against dysfunctional institutions pose a disincentive to fixing them. Conversely, eliminating such arrangements would deny indigent people access to justice altogether. Regulation, oversight and enforcement seem to be the way to go.

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[96] Lackland H Bloom Jr *Do Great Cases Make Great Law?* 229.
[97] R Jackson 'Review of Civil Litigation Costs' 21 December 2009. https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf (accessed 25 June 2019).
[98] Jackson 'REVIEW OF CIVIL LITIGATION COSTS' at xvi.

In *The Review of the Working Methods of the European Court of Human Rights* (2005), Lord Woolf recommended various steps to improve the efficiency of that court. They included increasing the use of ombudsmen and AIDR. He urged the court to establish a 'Friendly Settlement Unit' attached to the registry 'to initiate and pursue proactively a greater number of settlements.'[99]

In July 2009, Justice David Campbell addressed South African judges on the efforts of US courts to manage cases for improved administrative efficiency. He too emphasised settlement as the preferred method of dispute resolution. He gave an account of exporting the US experience to Botswana. In one year, the civil court in a single division in Botswana managed to reduce its trial load by sixty-six per cent.

These studies make the case for facilitation for both administrative efficiency and expeditious, substantive justice. Compulsory, independent and impartial pre-litigation and pretrial facilitation should be built into our court services. Judges should facilitate pretrial conferences with a view to conflict management and problem solving instead of the limited aims of dispute resolution. Uniform Rules of Court aim primarily to expedite matters and alleviate congested court rolls. They also create opportunities under 'judicial case management' for the more expansive problem-solving capabilities of facilitation in complex cases.[100]

Mechanisms already in practice to bolster dialogue include a generous approach to standing, joinder of parties who have constitutional rights and obligations in relation to the issues in dispute, admission of parties who have no personal interest in the dispute, such as experts and friends of the court, appointment of curators to investigate and report to the court on complex matters, appointment of special masters to represent the court to fix

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[99]Lord Woolf ' Review of the Working Methods of the European Court of Human Rights' https://www.echr.coe.int/Documents/2005_Lord_Woolf_working_methods_ENG.pdf Recommendation 3 at 5 (accessed on 7 July 2019).

[100] Rule 37A (11) of the Uniform Rules of Court Rules Regulating the Conduct of the Proceedings of the Several Provincial and Local Divisions of the High Court of South Africa (*Government Gazette* No. 999) GNR 842 GG 42497 dated 31 May 2019 w.e.f. 1 July 2019 (Amended Uniform Rules of Court).

dysfunctional institutions, and directives to the litigants to engage meaningfully.[101]

Rules of court procedure that anticipate dialogue during litigation already exist. If not before, then the delivery notice of intention to litigate and the exchange of pleadings should initiate meaningful dialogue to settle the dispute, or at least narrow down the issues. Then pre-trial preparation offers another opportunity. Rule 37 (Pre-trial Conference) and Rule 37A (Judicial Case Management) of the Uniform Rules of Court[102] direct litigants to seek admissions from the other party, to record that the parties have exchanged requests and responses to offers of settlement and to canvass a range of issues with a view to limiting the disputes for determination at the trial. A pre-trial conference before a judge could 'promote the effective conclusion of the matter.'[103] Yet in practice, the quality and quantity of dialogue before, during and after litigation is largely a box-ticking exercise. Are the rules of court or the way they are applied deficient? Or is the will to apply them lacking?

[101] Brand 'Judicial Deference and Democracy in Socio-economic Rights Cases in South Africa' in *Law and Poverty* at 190-195.
[102] http://www.justice.gov.za/legislation/rules/UniformRulesCourt[26jun2009].pdf (accessed 7 August 2017); Amended Uniform Rules of Court.
[103] Rule 37(8)(c) of the Amended Uniform Rules of Court.

# Chapter 5: Conclusion

Lon Fuller inspired my research topic. *Forms and limits* filled many gaps in my understanding of legal process theory. His grounding of litigation in social theory and exposition of its forms and limits as a process, resonated with my personal experiences at two levels. Together, they constitute the assumptions on which my thesis rests.[1]

First, the traditional form of litigation described as the process of presenting proofs and arguments resulting in a reasoned decision,[2] is unsuitable for resolving all problems. The choice of process informs the outcome. Second, and arising from the first assumption, litigation is symbiotically interconnected with society. Consequently, any reengineering of the one implicates the other. Compelled by the demands of the ever-changing social context, litigation's forms and limits have evolved in various ways.[3]

Both assumptions originate from my life experience. Most of what I know and practice about conflict management originate in my 10 years or so as a panellist with IMSSA. Before that, as an activist in the late seventies and eighties, I was schooled in the politics of community organising through the practice of OCMS.

Missing from my assumptions was the influence of factors extraneous to the legal materials upon which judgments were made. As it is ingrained in my legal culture and consciousness that litigation permits only the application of law to the facts, I was guarded about elevating extraneous influences to assumptions, without evidence. Nevertheless, in my research proposal I foreshadowed such influences on adjudication.

By embarking on this research, I genuinely set out to discover what and how

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[1] Research proposal at 3.
[2] Fuller 'Forms and Limits' (1978) 92 *Harv. L. Rev* 353.
[3] Chapter 1 and Chapter 3 of thesis.

extraneous factors influence judges. This curiosity coincided with my unease about my outdated, unstructured self-taught studies in jurisprudence. Simultaneously, the challenges that lawfare and complex cases posed for the Bench pushed their limits of litigation beyond traditional outcomes. Dysfunctional institutions became regular respondents in litigation by ordinary citizens seeking to compel the delivery of basic services, like the issuing of passports to citizens, residence permits to immigrants and social welfare grants to the indigent. Malpractice suits and contingency fee arrangements encouraged a legal culture and consciousness that impeded transformative culture. Why were litigants and their lawyers preferring individualism over the altruism that symbolised our constitutional revolution?[4] Whither the promise of a caring state committed to realising constitutional values? Once these questions troubled me, it was time for me to upgrade, to be fit for the new challenges.

After studying *Barnard* through four tiers of the judiciary, 'evidence' emerged to prove the influence of extraneous factors on litigation. Chapter 2 Part B illustrates how the same facts and law in the four courts produced seven different judgments in *Barnard*. All the judgments met the requirements of litigated outcomes – legality, rationality, reasonableness. Which judgment is the best outcome for a litigated conflict in the objective and subjective conditions then prevailing?

Still, something else was missing. What was the engine that sparked judges to choose one influence over another, one rule or fact instead of another? It was not until my sabbatical at Harvard Law School that the penny dropped. Discussions with professors there inspired the lexicon to enable me to articulate key factors that inform litigation. Chapter 2 Part A emerged.

My prior readings about legal culture and consciousness, traditional ways of teaching and learning law dovetailed with my exposure to literature on ideology. Previously, ideology was a word that was intuitively avoided when discussing

[4] Chapter 2 Part A of thesis.

legal process theories. However, Duncan Kennedy's *Phenomenology* resonated precisely with my personal encounters on the Bench. Ideology could no longer be ignored. At least, not if one is genuinely committed to conflict management and problem solving. Literature on critical legal realism helped me to diagnose my personal ideological and jurisprudential disposition.

On reading any judgment it is usually hard to tell what, if any, extraneous influences were at play. In litigation, they tend to remain unidentified and even unidentifiable, sometimes even to the decision makers. Acknowledging their existence creates a basis for dialogue. Four factors – ideology, binaries, the nature of the judicial function and judges as humans – kickstart the dialogue in Chapter 2 Part A.

I had embarked on this research with the muddled idea that something had to be done to the form of litigation. Process innovation that followed the school discrimination cases egged this idea on. Seemingly, litigation was not meeting social needs. However, I now accept unreservedly that litigation is what it is because it has value in its form which is designed to serve a particular function. Modifications like hybridisation with ADR, structural interdicts, special masters and the like, do not substitute Fuller's identification of the essentials of litigation: the adversarial nature of the process, the role of lawyers, and the rationality of decisions.[5]

*Barnard*, read with Fuller's description of litigation, fortifies my two-pronged thesis above. Embellishing my thesis is evidence of the role of the litigants and their representatives; they are co-responsible with the judges for the ensuing judgments. Largely responsible for the evidence and arguments, litigants and their representatives put into litigation what is converted into the legal materials; their shortcomings shore up ultimately in judgments. Leaving them out of the analysis and criticism to which judges and their judgments are subject, results in incomplete analyses of jurisprudence. Worse still, a vital source or cause of

[5] Chapter 1: Introduction; Fuller 'Forms and Limits' (1978) *Harv. L. Rev.* at 382-392.

bad judgments goes unnoticed and unchecked. The opportunity for dialogue for learning, teaching and practising law is missed.

Fiss adds another dimension to the role of litigants and their representatives. They speak 'not just for themselves, but also for a group, for example, the present and future users of the institution.'[6] Improper representation produces consequences 'that far transcend the interests of the participants. The court may be led into error.'[7] The interests of the groups represented in the litigation may be compromised in ways that cannot be easily cured in subsequent proceedings.[8]

These discoveries about litigation in Chapter 2 had to be externalised in some way. Chapter 3 was the result. Why should we care about litigation was a question that helped me reinforce my own commitment to reinvigorating the institution I serve. Then it was a matter of evaluating the strengths and shortcomings of previous efforts at innovating and renovating legal process theory.

Intuitively, I sensed that as with most sources of social transformation, litigation too had to find its source in the communities it served. Nothing short of changing the milieu, the ecology, in which litigation was practiced was required. Ambitious, perhaps idealistic as this objective seems, nothing short of such a dramatic change, a revolution of substance, will yield the transformative aspirations of the Constitution. Communities concerned about their livelihood rights know and articulate what works and what does not. If litigation is community driven, then how law is learnt and taught, who and what law is practiced, what remedies are devised to fix dysfunctional institutions would fall into place.

Turning to best practices for engineering social change, in Chapter 4 I recommend lessons from OCMS. Notwithstanding that much has changed

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[6] Owen M. Fiss 'The Forms of Justice' (1979) 93 *Harv. L. Rev.* 1 at 25.
[7] Fiss 'The Forms of Justice' (1979) 93 *Harv. L. Rev.* 1 at 14.
[8] Fiss 'The Forms of Justice' (1979) 93 *Harv. L. Rev.* 1 at 14.

since it was practiced more than 30 years ago, its basic tenets of constantly diagnosing subjective and objective conditions would guide who, what, when and how OCMS is implemented. In tandem with deep level social engineering of the kind envisaged by implementing OCMS, some process innovation is necessary. Redesigning the DSD and encouraging facilitation as a practice for problem solving before, during and even after litigation, complete my recommendations. And my thesis.

I commenced my research with my two-pronged thesis about the interconnectedness of process, substance, litigation and society. Now I have an appreciation of articulated and unarticulated extraneous factors on the legal materials that cumulatively influence both the process and outcomes of litigation. Thus sensitised, my consciousness and conscience are alive not only to the legal materials but also about how I respond to them, intuitively and intellectually. Articulating my experiences will, hopefully, provide others with the lexicon to reciprocate.

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***Index of legislation and international instruments***

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