

The pliability of legal texts under a transformative constitution in perspective

Mansingh v President of the Republic of South Africa
2012 6 BCLR 650 (GNP)

1 Introduction

A long-standing thorny controversy is whether legal texts constrain judges or whether extra-legal factors influence judges in spite of the provisions of law. There is evidence to suggest that most legal practitioners trained under the conservative common law culture do believe in the objective reality of the law and the constraining power of legal texts.¹ There are others, however, like the scholars of the Critical Legal Studies movement (CLS scholars) who believe that legal texts do not constrain judges.²

The main argument of the CLS scholars is that, when confronted with a legal dispute, the judge invariably has to interpret the applicable law. According to them, this interpretive function of the court is influenced by many factors outside of the provisions of the law. These factors may include the judge's view of how the case should come out, the judge's legal culture, the judge's knowledge, the material available to the judge, the time available to the judge to research the law applicable to the issue in dispute, and the political climate,³ among other things.

¹Weschler 'Towards neutral principles of constitutional law' (1959) 73 *Harvard LR* 1; Pollack 'Racial discrimination and judicial integrity: A reply to Professor Weschler' (1959-1960) 108 *Univ Pennsylvania LR* 1; Klare 'Legal culture and transformative constitutionalism' (1998) 14 *SAJHR* 146 at 149.

²Tushnet 'Critical legal studies: A political history' (1990-1991) 100 *Yale LJ* 1515; Tushnet 'An essay on rights' (1983-1984) 62 *Texas LR* 1363; Kennedy 'Freedom and constraint in adjudication: A critical phenomenology' (1986) 36 *Journal of Legal Education* 518; Kennedy 'Strategizing strategic behavior in legal interpretation' (1996) *Utah LR* 785.

³The importance of the factor of political climate in constitutional adjudication has, in fact, been underlined by Mendes who opines: 'As a condition of intelligent and effective decision-making, if not of institutional survival itself, courts need to be perceptive and reactive to the surrounding political climate. Constitutional decisions may face resistance and cannot but rely on the allegiance of political partners to be enforced. A court that is insensitive towards this fact is less capable of

These extra-legal influences, it is argued, reduce or negate the assumption of the constraining power of legal texts.

In fact, Duncan Kennedy, a notable CLS scholar, illustrates the foregoing argument through his 'The way I want it to come out' thesis.⁴ Sometimes, in Kennedy's view, judges already have a preconceived idea of, or have determined, how they want a case to come out. This predetermination may be based upon the judge having received a bribe and intending to keep his end of the bargain; the judge may think that a particular decision would be popular within his community; the decision might be based on what the judge thinks an appellate court will do in the case on appeal; it might be based on the judge's notion of what the equity of the particular case requires; it may simply be that the judge thinks the applicable law is unfair or inflexible; or it might be as result of the judge's political opposition to the applicable rules of law.⁵

For the decision to come out the way the judge wants, however, will depend on many factors including the intuition of the judge as to social justice, the material available to the judge, the judge's intelligence or experience, the time available to the judge to research the law on the issue in dispute, among others.⁶ Kennedy, therefore, concludes that it is possible for one judge to reach a legally justifiable and legitimate decision opposite to one that may be reached by another judge.⁷

While scholars continue to disagree with the CLS point of view, analyses of the decisions of courts in such cases as *Mansigh v President of Republic of South Africa*, which I will examine shortly, continue to validate and confirm the arguments of CLS scholars about the pliability and plasticity of legal texts.

In a situation where courts continue to validate the plasticity and pliability of legal texts, the question and immediate worry of legal theorists, among others, should be: What becomes of the transformative objectives and goals of a transformative constitution like that in South Africa, which requires that its provisions be interpreted in a certain way. The founding values which should govern the interpretation of the Constitution of the Republic of South Africa (the Constitution) are contained in section 1 of the Constitution. According to section 1:

carrying out its constitutional mandate. It must avoid, therefore, impolitic moves that erode its reservoir of authority and legitimacy. Indeed, the attempt to be anti-political may undermine its very political viability. Courts, therefore, do not only pursue correct decisions from the standpoint of law. Political survival is also a primary pragmatic concern'. Mendes 'Fighting for their place: Constitutional Courts as political actors. A reply to Heinz Klug' (2010) 3 *Constitutional Court Review* 34 at 39.

⁴Kennedy 'Freedom and constraint in adjudication' (n 2).

⁵*Id* 519.

⁶*Id* 520.

⁷*Ibid*. The controversy regarding the pliability or otherwise of law is much more complex than I have mentioned. The proper contours of the controversy can only be understood through a thorough a study of development of legal thought from Langdell's systematisation effort to 21st century development of post-modern jurisprudential thought.

The Republic of South Africa is one, sovereign, democratic state founded on the following values. (a) Human dignity, the achievement of equality and advancement of human rights and freedoms. (b) Non-racism and non-sexism. (c) Supremacy of the constitution and the rule of law. (d) Universal adult suffrage, a national common voters' roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.

The values that should inform the interpretation of the Bill of Rights are specifically set out in sections 39(1) and (2) of the Constitution as follows. Section 39(1):

When interpreting the Bill of Rights, a court, tribunal or forum; (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) must consider international law; (c) and may consider foreign law.

Section 39(2) on its part provides:

When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and object of the Bill of Rights.

Thus, the Constitution requires that its provisions be interpreted to realise the constitutional values of human dignity, equality, human rights and democracy, among others.

Having regard to the fact that the pliability of legal texts is a tool available to both the progressively minded and the conservatively minded judge to deploy as they see fit, and while the progressively minded judge may deploy the tool to advance the transformative goals and objectives of the transformative constitutional regime, the conservatively minded judge may also deploy the plasticity of the texts to render the transformative agenda of a transformative constitutional regime moribund. The problem, therefore, becomes how the law may unleash the progressive judge while constraining the abortive tendencies of the conservative judge under a transformative constitution.

Therefore, in a constitutional regime with specific goals and objectives the constraining power of legal texts, or its lack, becomes not only an academic or theoretical issue but a problem of practical importance with which theorists should start directly to engage and theorise upon with a view to finding solutions. It is in the light of the foregoing and the desire to contribute to the ongoing call for a more robust engagement with the issue of the pliability of legal texts under transformative constitutional regimes⁸ that I critically examine the case of *Mansingh v President of Republic of South Africa*⁹ in this short note. In section two of this article, I explain the facts and analyse the grounds for the decision of the court. In section three, I explain that given another judge, who was so minded,

⁸Of course, the issue of pliability of legal texts is not relevant only to transformative constitutional regimes. This is because all laws, statutory and constitutional alike have certain ends. The issue is, however, more pertinent under a transformative constitutional regime.

⁹2012 6 BCLR 650 (GNP).

a contrary decision on the same facts and law could have been reached. Finally, in section four I theorise on the solution to the plasticity of legal texts under a transformative constitutional regime. Section five concludes the note.

2 Facts of the case and the decision of the Court

The applicant, a practicing advocate, sued for the determination of the question as to whether the South African President's power to confer honours under section 84(2)(k) of the Constitution includes the power to confer the status of senior counsel on practicing advocates.¹⁰ The Court held that the constitutional power of the President to confer honours in terms of section 84(2)(k) does not include the power to confer the status of senior counsel on practicing advocates. The court based its conclusion on four different grounds. Each of the grounds will now be examined in turn.

First, the court held that the power to confer the honour of senior counsel was a prerogative power exercisable by Presidents before the coming into effect of the 1993 interim Constitution and the 1996 Final Constitution. The Court states in this regard as follows:

The Crown, in 'fear' of loosing [*sic*] cases of interest to its land rights, thought of securing the barristers who are articulate and clear in law to be on its side. The main function of such appointed barrister was to advice [*sic*] the crown on land laws. The barristers appointed as QC were respected by the Crown. The barristers felt honoured by the appointment to the office and by being the bearers of patent. The appointment of QC was the King/Queen's prerogative power. This prerogative power to appoint the QC was enacted in the 1961 Constitution under section 7(4). The said prerogatives were incorporated in the 1983 Constitution under section 6(4) and not in the interim and final Constitution.¹¹

Thus, the Court was of the view that, historically, senior counsels were basically appointed to the service of the Crown and needed the leave of the Crown to appear against the Crown in court.¹²

Second, the Court pointed out that the prerogative powers under which Presidents under the pre-1993 Constitution appointed senior counsels have been omitted in the 1993 Interim and 1996 Final Constitutions¹³ with the intention that the President will no longer exercise such powers under the extant Constitution.¹⁴

¹⁰Section 84(2)(k) is under the part of the Constitution titled 'Power and Functions of President'. Section 84(2)(k) of the Constitution specifically provides that: 'The President is responsible for – (k) conferring honours'.

¹¹*Mansingh v President of Republic of South Africa* (n 9) para 23.

¹²*Id* para 22.

¹³Under both the 1961 and 1983 Constitutions of the Republic of South Africa, there was a saving clause expressly reserving to the State President powers exercisable by the Queen in England by way of prerogative: s 7(4) of both the 1961 and 1983 Constitutions.

¹⁴*Mansingh v President of Republic of South Africa* (n 9) paras 45 and 46.

According to the Court:

I do not think that section 84(2)(k) proposes a system of awarding any professional who attained an advanced skill in forensic work in his or her profession a status of seniority. If conferring honours envisaged in terms of section 84(2)(k) does include awarding the seniority status to the legal profession, I am afraid, the President will be responsible for conferring honours of seniority to accountants, doctors, auditors, to mention but a few, of 12 years' experience with trace [*sic*] records of 'good quality work'.¹⁵

In the Court's opinion, therefore, if the President is held empowered by section 84(2)(k) of the Constitution to confer the title of senior counsel on practicing advocates, that will also mean that the President is entitled to confer honours of seniority on members of other professional bodies.¹⁶

Third, the Court pointed out that conferment of the honour of a senior counsel is not one of the honours conferable by the President as gathered from the content of the President's website. The Court, as it is entitled to do, made use of external aid – the content of the President's website – to determine the scope of honour-conferring powers of the President under section 84(2)(k) of the Constitution. In the Court's view, senior counsel is not listed as one of the National Orders/Honours conferable by the President as stated on the President's website. The Court pronounces in this regard thus:

Considering the submissions made by the parties, I am of the view that the argument advanced by the applicant that non-inclusion of conferment of senior counsel status on the presidency website is not one such 'honour' as envisaged in terms of section 84(2)(k), is correct. I am further of the view that the submission is not misplaced. The Order of the Baobab, for instance, is awarded to South African citizens for services distinguished beyond the ordinary call of duty. It is an 'honour' awarded for exceptional and distinguished contribution in community service. I am reluctant to accept that the framers of our autochthonous Constitution were comfortable that the President is empowered in terms of section 84(2)(k) to confer the status of senior counsel on practicing [*sic*] advocates.¹⁷

The omission of the status of senior counsel from the website is, in the Court's opinion, a confirmation of the fact that section 84(2)(k) does not confer such powers and that the President likewise does not understand that his office has such powers.¹⁸

¹⁵*Id* para 47.

¹⁶This reasoning of the court that holds that the President is entitled to confer the honour of Senior Counsel on a qualified advocate will automatically also entitle him to confer similar honours of seniority on members of other professional bodies in terms of s 84(2)(k) of the Constitution is, in my opinion, legally suspect. This is because that consequence will not necessarily follow the validation of the President's power under the provision.

¹⁷*Mansingh v President of Republic of South Africa* (n 9) para 37.

¹⁸This reasoning is to me also legally suspect. The honours listed on the President's website are not intended to be exhaustive of the honours the President can constitutionally confer. Support for this viewpoint is found in the fact that the honour conferred by the President on Police Officers that

The fourth and final ground of the Court's conclusion is that conferment of the title of senior counsel is, in fact, not an honour because the recipient cannot be said to have performed the exceptional good associated with the honour. The Court in this regard reasoned that to qualify as a recipient of the 'honour' of the title of senior counsel a person must have rendered services or made contributions that are exceptional or beyond the ordinary call of duty to society. The Court posed the following question:

Are the services and contributions made by practising advocates exceptional or beyond the ordinary call of duty that warrant an award of the status of senior counsel? Can an award of the status of senior counsel be equated with, for instance, Order of Luthuli or Order of the Baobab, the latter being awarded to South African citizens with distinguished service that is way above or beyond the ordinary call of duty?¹⁹

The Court thus reasoned that since the conferment of the title of senior counsel is grounded upon the integrity and honourable conduct of the recipient such cannot be regarded as an honour similar to the ones the President is constitutionally empowered to confer.²⁰ In conclusion, the Court held that the conferment of the title of senior counsel is not within the contemplation of section 84(2)(k) of the Constitution. The Court also held that conferment of senior counsel since the commencement of the 1993 interim Constitution is invalid.²¹

3 How another Judge may legitimately have reached an opposite decision

As mentioned earlier, the pliability of legal texts is played out in this case. A critical examination of the facts and the applicable law reveal that another Judge who is so minded would be able to reach a legitimate decision opposite to that reached by the Court on the following four grounds:

First, there was evidence before the Court that there is intention to constitutionalise the prerogative powers under which the honour of senior counsel is conferrable by the President and one of the respondents' counsels presented a memo before the Court to that effect.²² The Court in the instant case rejected this external aid to the interpretation of section 84(2)(k) of the Constitution. However, this is the kind of evidence that could have been utilised by another so minded Court in order to validate the power of the President under section 84(2)(k) of the Constitution.

distinguished themselves during the 2010 World Cup is nowhere listed on the website and this was conferred by the President.

¹⁹*Mansingh v President of Republic of South Africa* (n 9) para 38.

²⁰*Id* para 40.

²¹*Id* para 52.

²²*Id* para 21. The court's interpretation of the word 'honour' in the instant case appears to me to be rather narrow.

Second, the external aid utilised by the Court in the instant case to find for the applicant – the President’s website – to my mind carries less interpretive weight than the memo the Court rejected when determining the scope of the President’s power to confer honours under section 84(2)(k) of the Constitution.

Third, the court appears to acknowledge implicitly the constitutionality of the withdrawal of the award of senior counsel by the President under section 8A of the Admission of Advocates Act 74 of 1964.²³ This means the President can withdraw the honour but cannot confer it. This appears to me to be logically inconsistent with the position of the Court on the matter.

Finally, there is no provision for the conferment of the honour either under the Constitution or any other law. Not only did the decision create a lacuna in the law, the Court also invalidated all such honours conferred since the commencement of the 1993 Interim Constitution. The fact that there is no other authority or body vested with the power to confer this honour is a matter that would have weighed heavily with another Court desirous of validating the power of the President. Such a court would have, on this fact alone, presumed that the legislature intends that the President continue to exercise the power to confer the honour.

4 Engaging with the plasticity of legal texts under a transformative constitution

In the light of the established plasticity of legal texts, which way do we go under a transformative constitution which requires that its provisions be interpreted in a particular way? Do we appoint judges based on their perceived ideological or political leanings with the hope that the appointees will carry into effect the objectives and goals of a transformative constitution? Or do we expressly recognise extra-legal influences like ideology and politics in adjudication and constitutionally require judges to avail us of the ideological and political underpinnings of their decisions for more robust accountability and democratic participation? These questions I intend to engage with in this section.

Klare has aptly described transformative constitutionalism as connoting ‘...an enterprise of inducing large-scale social change through non-violent political processes grounded in law’.²⁴ He has also argued, correctly in my view, that a post-liberal reading, a reading that ‘... takes account of and accords interpretive legitimacy to background moral and political values’ is the best legal reading of the South African Constitution.²⁵ What this means in essence is that law and politics are inter-twined and cannot be separated as such under a transformative constitution contrary to what liberal-legal ideology will have us believe. Klare, therefore, concludes as follows:

²³*Id* para 45.

²⁴Klare (n 1) 150.

²⁵*Id* 156 (footnote omitted).

To be transformative and transparent, rights discourse and legal reasoning need to be more candid and self-conscious about the politics of adjudication, indeed, they need to make a virtue of what has traditionally been thought of as a dilemma. Lawyers can best address problems concerning the democratic legitimacy of judicial power by honesty about and critical understanding of the plasticity of legal interpretation and of how interpretive practices are a medium for articulating social visions.²⁶

Thus, since there are already seeds of politics in transformative constitutionalism,²⁷ the express recognition of the role and influence of extra-legal factors in adjudication will evidently be a step in the right direction. This reading of the South African Constitution has been confirmed by other eminent scholars and jurists as I endeavour to show below.

Support for the recognition of the role and influence of extra-legal factors in adjudication is found with no less an eminent jurist than the former Chief Justice of the Constitutional Court of South Africa, Justice Pius Langa. In his view, the move away from the culture of authority to a culture of justification that the post-apartheid transformative Constitution of South Africa requires therefore demands that judges transparently acknowledge the role that politics, values and ideas play in their decision-making.²⁸ According to Langa:

Under a transformative Constitution, judges bear the ultimate responsibility to justify their decisions not only by reference to authority but by reference to ideas and values. This approach to adjudication requires an acceptance of the politics of law. There is no longer place for assertions that the law can be kept isolated from politics. While they are not the same, they are inherently and necessarily linked. At the same time, transformative adjudication requires judges to acknowledge the effect of what has been referred to elsewhere as the 'personal, intellectual, moral or intellectual preconceptions' on their decision-making. We all enter any decision with our own baggage, both on technical legal issues and on broader social issues. While the policy under apartheid legal culture was to deny these influences on decision-making, our constitutional legal culture requires that we expressly accept and embrace the role that our own beliefs, opinions and ideas play in our decisions. This is vital if respect for court decisions is to flow from the honesty and cogency of the reasons given for them rather than the authority with which they are given.²⁹

Justice Dikgang Moseneke stated a similar sentiment earlier.³⁰

²⁶*Id* 187

²⁷By 'politics', I mean extra-legal influences as theorised by the CLS scholars.

²⁸Langa 'Transformative constitutionalism' (2006) 17/3 *Stellenbosch LR* 351.

²⁹*Id* at 353 (footnote omitted).

³⁰According to Justice Dikgang Moseneke:

Even so, personal intellectual and moral pre-conceptions of judges do intrude into their adjudication. Outside the terrain of Constitutional interpretation, judges also make value-laden choices in the routine of adjudication. They are responsible for the social and distributive consequences that result from these choices and should be judged accordingly. If so, adjudicators should perhaps acknowledge their political

In addition to the foregoing, Mendes³¹ has also opined that courts do not pursue correct decisions from the standpoint of law alone. According to him, there is 'esoteric morality'³² underlying constitutional decision-making. The recognition by these eminent jurists and scholars of extra-legal influences in adjudication has made it imperative that we require judges to avail us of the real underpinnings of their decisions for reasons with which I will engage with shortly.

Granted, not all theorists support the idea that judges should publicly disclose the 'esoteric morality'³³ underpinning their decisions. While some are of the view that there is nothing sacrosanct about political choices made by the courts and that they should be publicly disclosed as the only way to ensure judicial responsibility,³⁴ others, like Mendes himself, have argued that such disclosure may negatively impact on the effective adjudication by the courts. According to him:

The reasons that ground some political choices cannot be publicised because their secrecy is the very source of their potential success. A court cannot declare: 'We will not go as far as we take the Constitution to require because we do not have enough political capital to enforce it.' Confessing its political weakness is an unwise way of constructing and managing its public reputation.³⁵

Thus, scholars differ as to the desirability of requiring judges to disclose the *extra-legal* basis of their decisions.

In spite of these divergent viewpoints, however, I am of the opinion that acknowledgement of the 'esoteric morality' behind the decisions of courts is a constitutional imperative under a transformative constitutional regime. This is so not only because it will ensure judicial openness, responsibility and accountability, which is a constitutional imperative under a transformative constitutional regime,³⁶ but also because it will enable the engagement and participation of citizens which is another constitutional imperative under South Africa's democratic regime. Judicial openness and accountability, and participation and engagement by citizens are, I think, two sides of the same democratic coin. This is because while judicial openness and accountability enables participation and engagement by citizens in judicial decision-making, participation and engagement by the populace also promotes the openness, responsibility and accountability of the judiciary.

and moral responsibility in adjudication. They should strive for transparent justification of their judicial choices. (Moseneke 'The fourth Bram Fischer memorial lecture: Transformative adjudication' (2002) 18 *SAJHR* 309 at 317 (footnote omitted).

³¹Mendes (n 3) 34 at 39.

³²Esoteric morality, according to Mendes, refers to considerations that cannot be publicly disclosed by the court.

³³To borrow the phrase from Mendes.

³⁴Mendes (n 3) 40.

³⁵*Ibid.*

³⁶Points already made by both Langa and Moseneke above.

Furthermore, participation by citizens in public decisions is regarded as the whole essence of democracy.³⁷ With regard to the ability and entitlement of citizens to participate and engage with judicial decisions under a democratic regime, there are two understandings or models of law.³⁸

The first model, or understanding, of law views law as order associated with unequivocal meaning and enforcement of rules; that is, law as finality. The second model or understanding of law views law as open debate, as the possibility to change the status quo; that is, law as open debate or law as openness.

Antonie Peters explained the difference between these two understandings or models of law as follows:

In the first view law is mainly the responsibility of legal specialists, whose authority is based on their expertise in handling received doctrines and set procedural routines and whose activity is, on the whole, subservient to established power. The second view embraces a broader conception of legal life. This is appreciated especially in its progress, its continuous self-transcendence. Law is not seen as exclusive domain of professional jurists, but as the inalienable responsibility of all citizens. Very important in this perspective, is the role played by non-professional legal critics: intellectuals, individuals, and groups who contest the established social order. Not only the enforcement and application of existing law, but also the struggle – legal and illegal, parliamentary and non-parliamentary, reformist – against the law, for a different law, is part of legal life. It is, more truly, its very essence.³⁹

Thus, while the first model regards law as the exclusive preserve of legal specialists, the second conception or model of law regards it as every citizen's business.

Additionally, Anthony Giddens has posited that passive trust in expert knowledge and systems⁴⁰ is no longer sufficient under modern theories of democracy because we now live in a 'socially reflective era', in a world of clever people.⁴¹ Therefore, 'expertise is no longer the sole prerogative of experts'.⁴² According to Giddens, in a socially reflective era, there must be 'active trust'.⁴³ To generate active trust, however, expert systems must be capable of being democratically validated through the engagement and participation of citizens via dialogue and critique, second and third opinion;⁴⁴ thus, the proposition by Giddens of the concept of

³⁷See Jeremy Waldron's discussion of the fundamental importance of citizens' participation in decisions that affect them in a democracy. Waldron 'A right-based critique of constitutional rights' (1993) 13 *Oxford Journal of Legal Studies* 18.

³⁸Peters 'Law as critical discussion' in Teubner (ed) *Dilemmas of law in the welfare state* (1986) 250.

³⁹*Id* 251.

⁴⁰Which, according to Peters' exposition above, courts decisions.

⁴¹Giddens *Beyond left and right: The future of radical politics* (1994) 94.

⁴²*Id* 95.

⁴³*Id* 96.

⁴⁴*Ibid*.

'dialogic democracy'. Giddens's concept of dialogic democracy has, of course, been trenchantly criticized by Chantal Mouffe as not being agonistic or radical enough and therefore not profound enough to transform existing power relations so that it would create new hegemony. She, therefore, proposes a radical/agonistic type of democracy as a substitute.⁴⁵ I am, however, of the opinion that the validation of expert systems through citizens' participation, and through second and third opinion as suggested by Giddens, should be a feature of both the dialogic democracy and the radical/agonistic democracy proposed by both Giddens and Mouffe respectively. This will vindicate the fundamental nature of citizens' participation in democratic theory and make for more accountable expert systems.

Participation and engagement of citizens' approach to public decision-making is a concept that is, in fact, not alien to the South African transformative Constitution. There is robust literature that the democratic ideals underpinning the Constitution by virtue of sections 1 and 7(1) of the Constitution actually require it.⁴⁶ According to Henk Botha, understanding democracy as a pluralist, deliberative and dialogic system between the people and the government represents the best understanding of democracy under the South African Constitution. This understanding also represents the best for empowering the poor.⁴⁷ In Danie Brand's view, the South African Constitution demands more than a formal or procedural conception of democracy.⁴⁸ He is of the opinion that:

A collection of democratic institutions and processes (elections, representative decision making bodies, processes for direct participation in decision making) is not democracy itself. Such institutions and processes constitute only the structure within which democracy operates, the mechanisms, if you will, through which democracy operates. Rather than that it consists of this collection of institutions, processes and structures, democracy is what must happen within these institutions, processes and structures. Democracy is in this sense a value system, a discursive practice, a societal grammar, a mode of political action (a 'politics') or a culture – in short, a way of doing things.⁴⁹

Solange Rosa also subscribed to the view of the foregoing scholars⁵⁰ and states that the South African Constitution envisages a participatory model of

⁴⁵Mouffe *On the political* (2005) 51-54.

⁴⁶Brand 'The "politics of need interpretation" and the adjudication of socio-economic rights claims in South Africa' in Van der Walt (ed) *Theories of social and economic justice* (2005) 17; Botha 'Equality, plurality and structural power' (2009) 25 *SAJHR* 1; Liebenberg *Socio-economic rights: Adjudication under a transformative constitution* (2010) 28-34 and 36-42; Botha 'Representing the poor: Law, poverty and democracy' (2011) 22/3 *Stellenbosch LR* 521; Brand 'Judicial deference and democracy in socio economic rights cases in South Africa' (2011) 22/3 *Stellenbosch LR* 614; Rosa 'Transformative constitutionalism in a democratic developmental state' (2011) 22/3 *Stellenbosch LR* 542.

⁴⁷Botha 'Representing the poor' (n 46) 522-523.

⁴⁸Brand 'Judicial deference and democracy in socio economic rights cases in South Africa' (n 46).

⁴⁹*Id* 623-624 (footnotes omitted).

⁵⁰Rosa (n 46).

democracy which requires ‘...vigorous discussion, debate and activism in the process of transformation...’.⁵¹ It is clear from the foregoing that engagement and participation by citizens in public decisions is part and parcel of the ideal of democracy contemplated by the transformative Constitution of South Africa.

Judicial decisions are species of expert systems and knowledge and a variant of public decisions in which citizens are entitled to participate through comments, critiques and dialogues, among others. In order for citizens to participate effectively, however, court decisions will have to be devoid of legal sophistry. Judges will have to be more honest and open about the political, ideological and the moral premises of their decisions and avail the citizens of the same, and not merely reel off constitutional or statutory provisions as the bases for their decisions. This is the only way that the twin ideals of citizen engagement and judicial accountability in a democratic regime will be realized. It is also the only way to expose the latent transformative issues in adjudication, effectively curb retrogressive tendencies of conservative forces and empower progressive forces for the attainment of the transformative goals of the Constitution.

Without the honest exposition of the transformative issues that are bound up in adjudication under a transformative Constitution, the ability of the participatory and engagement process under the Constitution to curb conservative forces or empower progressive forces will be greatly hampered. In *Mansigh v President of Republic of South Africa* itself, there were various and important transformative issues hidden in the case. For instance, one is curious as to why the plaintiff instituted the action in the first place? Could it be that she just disliked the idea of the President of the Republic appointing senior counsel? Or was the case intended to address a more fundamental issue of latent discrimination and lack of equal opportunities among practicing advocates along racial or even gender lines? Did she hope that if the appointment were liberalised by vesting the power in a body rather than in an individual office bearer it would address her concerns? These possible reasons are, I think, more than likely.

With regard to the decision itself, does the Judge also share the equal opportunity and access concerns of the plaintiff? Why did the Judge, for instance, backdate the effect of his invalidation order to the 1993 Interim Constitution when he would ordinarily make the order prospective and which actually is the normal practice? Could it be that he too, as a former practicing attorney before his elevation to the Bench, felt short-changed in the appointment of senior counsel and now saw an opportunity to redress a wrong? If the foregoing questions are true or at least likely, why was the case conducted and the decision reached as if there were no underlying issues that weighed more with the parties than black letter law? Why were none of these fundamental issues mentioned, not even in passing, throughout the proceedings?

⁵¹*Id* 547.

The above questions about the latent transformative issues in the case of *Mansingh* bring into sharp relief the desirability of the express recognition of the influence and role of politics, ideology and morals in adjudication and decisional law as eminent jurists and scholars have counselled. The disclosure of the real basis of the decision in *Mansingh* would have brought to the fore the weighty and pertinent issues of transformation embedded in the case. This disclosure would have allowed the South African society to openly and critically engage with these issues once and for all and to find a lasting solution, which may not necessarily lie with the legal arena, to the problem(s). It is, therefore, suggested that there should be express recognition of the influence and role of politics, ideology and morals in adjudication and decisional law. There should be a constitutional obligation imposed on judges to disclose the political, ideological and moral bases of their decisions. This, I believe, will make for a more accountable and responsible judiciary and deepen democracy in South Africa.

5 Conclusion

I have in this short note demonstrated, once again, the plasticity of legal texts through the critical examination and analysis of the case of *Mansingh v President of Republic of South Africa*. I have also pointed out that the pliability of legal texts is a serious challenge under a transformative constitution which is worthy of closer scrutiny and more robust attention than has it has been given presently. I have also theorised on the likely solution to the problem.

In conclusion, it is my opinion that the express recognition of the influence and role of politics and ideology in adjudication and decisional law coupled with the imposition of a constitutional obligation on judges to disclose the political, ideological and moral bases of their decisions will enhance the accountability of the judicial arm of government, improve citizens' participation, deepen democracy and further the constitutional goals of transformation in South Africa and elsewhere.

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