# Legal ethics and the lawyer-client relationship in South Africa: A proposal for reform using local values

A thesis submitted in fulfilment of the requirements of the degree of

DOCTOR OF PHILOSOPHY

of

RHODES UNIVERSITY

by

Helen Julia Kruuse

ORCID ID: 0000-0002-4757-5851

http://orcid.org/

March 2021

## ABSTRACT

This thesis develops an approach to ethical decision-making for legal practitioners in South Africa that, it is argued, meets the ends and values of its relatively new constitutional democracy. The thesis starts by identifying that neutral partisanship was, and continues to be, the prevailing conception of role for legal practitioners in South Africa. The study focuses on how this approach is problematic for a number of reasons, the most important of which are: (1) because neutral partisanship allows lawyers to become ethically disengaged, and (2) the approach does not fit with the values of South Africa's Constitution. The study proceeds to consider alternatives to the neutral partisanship model, analysing their underlying premises and 'fit' with the South African context. The study argues that the work of William Simon, a US scholar, is the most suitable approach to adopt in South Africa. This is because of its emphasis on the need for legal practitioners to exercise discretion in ethical decision-making, to take responsibility for their actions, and ultimately to seek justice as understood within the legal system in which they operate. The study then shifts to a consideration of how Simon's approach needs to be contextualised given that it has been developed from a western/Global North perspective. To do this, I consider the content of the indigenous value of Ubuntu and its incorporation into the South African legal system. I then consider how Ubuntu could assist in the development of legal practitioners' understanding, purpose and execution of their duties within a transformative constitutional democracy. In doing this, I develop inward- and outward-looking factors based on traditional and constitutional values directing legal practitioners in their ethical decision-making. Finally, the study closes with a consideration of how the approach can be institutionalised. The study proposes certain ways in which code regulation and education can support the success of the approach.

## ABBREVIATIONS AND AN EXPLANATORY NOTE

I have abbreviated sources in the following way:

- South African law journal articles: I have abbreviated the titles of all South African law journals in the footnotes and bibliography. The full titles can be found in the list below.
- Law journal articles from other jurisdictions & non-law journals: I have kept the full titles of these journals in the footnotes to assist the South African reader in particular.
- Roman and Roman-Dutch authorities: These authorities are cited in the text according to the accepted convention. For example: Gaius *Inst* 4 11. The full source from which the text is quoted is set out under the reference list at the end of the thesis.
- The names of the various divisions of the High Courts in South Africa have undergone various changes over the years. For example, the name of the Appellate Division was changed to the Supreme Court of Appeal in terms of the final Constitution. I use the name of the particular court at the time that the judgment was handed down. The older names of the courts are contained in the general abbreviation list, with a special list at the end setting out the current court names and their abbreviations.

| | |
|---|---|
| AC | Appeal Cases (UK) |
| AD | Appellate Division (SA) |
| Adv | Advocate |
| *AHRLJ* | *African Human Rights Law Journal* |
| AJ | Acting Judge |
| AJA | Acting Judge of Appeal |
| aka | also known as |
| All ER | All England Reports |
| All SA | All South African Law Reports |
| art | article |
| BALR | Butterworths Arbitration Law Reports (SA) |
| B-BBEE | Broad-Based Black Economic Empowerment |
| BCLR | Butterworths Constitutional Law Reports (SA) |
| BK | Close Corporation (SA) |
| BLLR | Butterworths Labour Law Reports (SA) |
| Bpk | Public Company (SA) |
| Buch | Buchanan Reports (SA) |
| Buch AC | Buchanan Appeal Court Reports (SA) |
| *C* | Codex of Justinian |
| CA | Court of Appeal (UK) |
| CC | Close Corporation (SA); or Constitutional Court (SA) |
| CCMA | Commission for Conciliation, Mediation and Arbitration (SA) |
| *CCR* | *Constitutional Court Review* |
| Cf | Compare |
| CFA | Contingency Fee Agreement |

| | |
|---|---|
| Ch | Chancery Division Reports (UK) |
| *CILSA* | *Comparative and International Law Journal of Southern Africa* |
| CJ | Chief Justice |
| *CLOSA* | *Constitutional Law of South Africa* |
| Co | Company |
| CPD | Cape of Good Hope Provincial Division Law Reports (SA) |
| *D* | Digest of Justinian |
| DP | Deputy President |
| ed | edition; or editor |
| EDC | Eastern Districts Court Reports (SA) |
| EDL or | Eastern Districts Local |
| EDLD | Division Reports (SA) |
| (Edms) Bpk | Private Limited Company (SA) |
| EHRR | European Human Rights Reports |
| eg | for example |
| Eq | Equity Court (UK) |
| ER | English Reports (Reprint) |
| *et al* | and others |
| ff | and following |
| fn | footnote |
| HL | House of Lords (UK) |
| IC | Industrial Court (SA) |
| ie | that is |
| *ILJ* | *Industrial Law Journal* |
| ILR | International Law Reports |
| J | Judge; or Justice |
| *J* | *Journal* |
| JA | Judge of Appeal |
| *JJS* | *Journal for Juridical Science* |
| JSC | Judicial Service Commission |
| KB | King's Bench Division Reports (UK) |
| LAC | Labour Appeal Court (SA) |
| *LAWSA* | *The Law of South Africa* |
| LC | Labour Court (SA) |
| LPC | Legal Practice Council |
| *LJ* | *Law Journal* |
| LJ | Lord Justice |
| *LR* | *Law Review* |
| Ltd | Public Company (SA) |
| NAC | Native Appeal Court Cases (SA) |
| *NO* | *Nomine officii* |
| NPD | Natal Provincial Division Reports |
| NUMSA | National Union of Metalworkers of South Africa |
| obo | on behalf of |
| OPD | Orange Free State Provincial Division Reports |
| para | paragraph |
| *PELJ* | *Potchefstroom Electronic Law Journal* |
| (Pty) Ltd | Private Limited Company (SA) |
| (Pvt) Ltd | Private Limited Company (Zimbabwe) |
| QB | Queen's Bench Division Reports (UK) |

| | |
|---|---|
| S | State |
| s | section |
| SA | South Africa, or South African Law Reports |
| SA… (A) | Appellate Division |
| SA… (B) | Bophuthatswana Supreme Court |
| SA… (C) | Cape Provincial Division |
| SA… (CK) | Ciskei Supreme Court |
| SA… (D) | Durban & Coast Local Division |
| SA… (E) | Eastern Cape Division |
| SA… (GW) | Griqualand West Local Division |
| SA… (N) | Natal Provincial Division |
| SA… (NC) | Northern Cape Division |
| SA… (Nm) | High Court of Namibia |
| SA… (NmS) | Supreme Court of Namibia |
| SA… (O) | OFS Provincial Division |
| SA… (SE) | South-Eastern Cape Local Division |
| SA… (Tk) | Transkei Supreme Court |
| SA… (V) | Venda Supreme Court |
| SA… (ZH) | High Court of Zimbabwe |
| SA… (W) | Witwatersrand Local Division |
| SAAPIL | South African Association of Personal Injury Lawyers |
| SALDA | South African Law Deans' Association |
| *SALJ* | *South African Law Journal* |
| SALLR | South African Labour Law Reports |
| SALRC | South African Law Reform Commission |
| *SAPL* | *South African Public Law Journal* |
| SC | Cape Supreme Court Reports (SA); or Senior Counsel |
| ss | sections |
| *Stell LR* | *Stellenbosch Law Review* |
| T | Transvaal Provincial Division (SA) |
| t/a | trading as |
| TH | Transvaal High Court Reports (SA) |
| *THRHR* | *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* |
| TPD | Transvaal Provincial Division Reports (SA) |
| TRC | Truth and Reconciliation Commission |
| TS | Transvaal Supreme Court Reports (SA) |
| *TSAR* | *Tydskrif vir Suid-Afrikaanse Reg* |
| UK | United Kingdom |
| US | United States of America |
| viz | that is |
| Vol | Volume |
| W | Witwatersrand Local Division (SA) |
| WLD | Witwatersrand Local Division Reports (SA) |

**Current Court Abbreviations**

| | |
|---|---|
| CC | Constitutional Court |
| SCA | Supreme Court of Appeal |
| ECB / ECBHC | Eastern Cape High Court (Bhisho) |
| FB / FSHC | Free State High Court (Bloemfontein) |
| WCC / WCHC | Western Cape High Court (Cape Town) |

| | |
|---|---|
| KZD / KZDHC | KwaZulu-Natal High Court (Durban) |
| ECG / ECGHC | Eastern Cape High Court (Grahamstown) |
| GJ / GPJHC | South Gauteng High Court (Johannesburg) |
| NCK / NCHC | Northern Cape High Court (Kimberley) |
| KZP / KZPHC | KwaZulu-Natal High Court (Pietermaritzburg) |
| ECP / ECPEHC | Eastern Cape High Court (Port Elizabeth) |
| GP / GPPHC | North Gauteng High Court (Pretoria) |
| LT / LMPHC | Limpopo High Court (Thohoyandou) |
| ECM / ECMHC | Eastern Cape High Court (Mthatha) |
| NWM / NWHC | North West High Court, Mafikeng (Mmabatho) |

**TABLE OF CONTENTS**

## ACKNOWLEDGEMENTS

We live in interesting times. When I started this thesis five years ago, I did not know what a pandemic was, only one of my two children had started 'big' school, and my sister – a wonderful human being – was still alive. Student protests on sexual violence and #FeesMustFall had not yet taken place. Less personally: simmering under the surface during this time was the rise of Trumpism in America, state capture in South Africa, Brexit, and a worldwide angst on issues related to social justice.

Despite all this (or because of it), I am so grateful to have managed to complete this thesis. In particular, I would like to thank:

(1) Two exceptional supervisors, Graham Glover and Donald Nicolson. Thank you for your unwavering support and intellectual contribution in the writing process. Above all, thank you for being caring and kind human beings.

(2) To my two mentors (even if they do not know it!): Philip Genty for instilling in me a life-long passion for the subject of legal ethics; and Clive Plasket for listening patiently to my general complaints about law, life and legal ethics.

(3) My colleagues at the Rhodes Faculty of Law (and the greater university community) for their encouragement during this process. Thank you especially to Andrea Comley, Fezeka Mwellie and Chad Gill for assisting me with weird IT and MS word issues.

(4) My employer (Rhodes University) and especially the Rhodes Research Office for the financial and time assistance during the writing of this thesis. Thank you especially to Jaine Roberts who always had time to respond promptly and positively to my requests.

(5) My extended family and friends who have endured a largely absent daughter, sister, niece, aunt, and friend during this time.

(6) My boys: Jay, Oliver and Adam. Thank you from the bottom of my heart for your love and support. Thank you especially for going on all those fishing and camping trips to leave your wife and mum to work – hopefully I can join you now!

# CHAPTER 1: INTRODUCTION

> ' … [L]awyers are often quite receptive to jeremiads lamenting their decline and fall from a profession to a business, because the jeremiads, like country-and-western songs about disappointed love, make them feel better about feeling bad and don't ask them to do anything.'[1]

## 1.1 THE PURPOSE OF THE STUDY

The primary purpose of this study is to develop an approach to ethical decision-making for lawyers in South Africa (SA) that meets the ends and values of its relatively new constitutional democracy.

In the last few years, an increasing chorus of complaints has been levelled against the South African legal profession. The most serious of these complaints is that the South African legal profession is in an 'ethical crisis'. While jokes about lawyers' unethical conduct have abounded for years, and the words 'crisis', 'challenge' and 'collapse'[2] have been used to characterise lawyers' conduct in the South African context since the late 1700s,[3] the South African legal profession is now at a critical juncture. Questions relating to the adequacy and sufficiency of existing professional legal ethics in South Africa have emerged from within and outside the profession, from the public and the private sector, and institutions of higher learning.[4] Recently, lawyers have been accused of acting as 'enablers' of major systemic political and economic corruption, leading to a loss of at least R1.2 trillion in money earmarked for public services over the last few years.[5]

This study is undertaken within the context of these allegations and complaints. Given the important role that lawyers play in the attainment of justice in South Africa,[6] these complaints have serious implications for the success of South Africa's constitutional democracy and for

---

[1] RW Gordon 'The radical conservatism of *The Practice of Justice*' (1999) 51 *Stanford Law Review* 919 at 932.
[2] T McAnearney 'The steady erosion of ethics' 2008 (May) *Without Prejudice* 38; GJ Roussouw 'Why professional ethics in the legal profession' 1998 *TSAR* 56 and G Radloff 'Professional ethics' 1996 (October) *De Rebus* 524.
[3] See JH van Zyl 'The Batavian and Cape Placaaten' (1907) 24 *SALJ* 132, 241 & 366; (1908) 25 *SALJ* 4, 128 & 246 and L Wildenboer 'For a few dollars more: Overcharging and misconduct in the legal profession of the Zuid-Afrikaansche Republiek' (2011) 2 *De Jure* 339 for references to these early complaints.
[4] For a discussion of these complaints and concerns, see 2.2 and 8.3.
[5] This systemic corruption has taken on the terminology of 'state capture'. For a discussion of this phenomenon, see 3.3.3.
[6] H Kruuse 'A South African response to ethics in legal education' in M Robertson (ed) *The Ethics Project in Legal Education* (2011) 102 at 103.

the needs of its people. It is clear that the courts, and those who appear in them, are expected to act as the main vehicles for protecting and realising constitutional rights.[7] If lawyers are compromised, this negatively influences the number of people who have access to justice, and this has implications for the general social, economic and political health of the country.

What, exactly, is the crisis in the profession about? This question is not answered easily since there is very little evidence (apart from reported judgments, media reports and law society statistics) about how lawyers actually practise.[8] However, it is fairly clear that the concern raised about lawyers' conduct is not merely a public perception issue. Apart from reports and criminal matters dealing with explicit criminal conduct by lawyers (such as lying, cheating and stealing), courts have increasingly criticised the manner in which lawyers conduct themselves and represent their clients. These criticisms include comments on excessive or undeserved fees, delaying tactics, and the abuse of rules.[9] Why is this happening? I believe that South African lawyers continue to cling to an outdated and insufficient notion of their role as one of 'neutral partisan', and more pejoratively as the 'hired gun' role. As such, another purpose of this study is to uncover whether this is the case, and to consider the effect that this role has on the community, clients and lawyers themselves.[10]

After investigating the role and impact of neutral partisanship on the South African legal system, I consider the alternatives to this approach developed by theorists in other jurisdictions, notably the US and former commonwealth countries. The purpose of this portion of the thesis is to consider whether these alternatives could be applied in SA more successfully than that of the neutral partisanship role. I consider the context in which these approaches have been developed, and question whether these contexts make them equally applicable in South Africa. While there is great value in many of the theorists' insights, I find that one theorist's approach,

[7] See K Klare 'Legal culture and transformative constitutionalism' (1998) 14 *SAJHR* 146 at 147, M Robertson and H Kruuse 'Legal ethics education in South Africa: Possibilities, challenges and opportunities' (2016) 32 *SAJHR* 344 and the discussion at 2.3.

[8] There has not been the type and size of empirical research in South Africa such as that undertaken in the United States and elsewhere as to the actual practice of lawyers. However, there have been smaller studies devoted to discrete issues such as transformation. See 2.7.

[9] See chapter 3 for a discussion of these sources.

[10] What separates South Africa from most other commonwealth jurisdictions (and makes this topic worth addressing) is the lack of critique of, and engagement with, the dominant role of the lawyer in our society, or legal ethics in general. Moreover, there is not much literature that considers alternatives based on the country's specific socio-economic, political and constitutional context.

William Simon, holds the most promise for SA. This is because of his focus on discretionary judgement and his approach to responsibility for justice.

The next important aim of this work is then to examine local values within the South African legal system, and to develop Simon's ethical discretionary approach to suit South Africa's unique historical, social and legal context. I consider the application of Ubuntu, an African value, by the courts and consider whether, and how, this value could influence the decision-making role of the South African lawyer.

The final objective of this work is to consider how Ubuntu's influence on the lawyer's role in South Africa can be harmonised with the existing duties of a lawyer in relation to her client – found in the contract of mandate. I offer some suggestions on how one could characterise these factors that should influence the lawyer's role (viz as outward- and inward-looking factors respectively). In the final stages, I make some proposals for how to instantiate the approach through education and regulation.

## 1.2 STRUCTURE

Chapter 2 examines the history and context of the South African legal profession in an attempt to find evidence of the prevailing approach to lawyering. I find that the influences of liberalism and formalism have led legal practitioners to accept neutral partisanship lawyering as the dominant and standard conception of their role, a role that has continued to the present day.

Chapter 3 considers the harms and justifications for neutral partisanship. I find that the justifications do not outweigh the harms in general. I also find that there are three reasons why South African lawyers should be cautious of this approach. Apart from the misplaced reliance on autonomy in the individualistic sense, I suggest that the neutral partisanship role appears to be at odds with the values of the South African Constitution. Far from being a liberal and 'codifying' document as some constitutions have been described, I suggest that the South African Constitution can best be described as transformative, and foregrounded in substantive equality. I argue then that the lawyer's role should be derived from this foundational document and the values embedded in it.

Chapter 4 considers alternatives to neutral partisanship that theorists have developed in other jurisdictions, in particular, the US, the UK, New Zealand and Canada.

Chapter 5 considers whether the content and use of the African value of Ubuntu in the jurisprudence of SA courts holds any promise. Chapter 6 then considers whether Ubuntu could be used as part of an alternative approach to lawyering. It is in this chapter that I then develop outward-looking factors for legal practitioners to consider when dealing with ethical questions. In chapter 7, I consider how the contract of mandate can be used, both as a source of persuasion for lawyers to adapt their role, but also to develop inward-looking factors to complement the factors developed in chapter 6. In the concluding chapter (chapter 8), I consider what must be done in regulation and education to instantiate the approach developed in the thesis.

## 1.3 THE SCOPE OF THE WORK

This thesis examines the work of the legal profession across its various components. Its primary focus is on lawyers and legal practitioners. The terms 'lawyer' and then later 'legal practitioner' are normally used in South Africa to refer to attorneys (what would be known in the English tradition as solicitors) and advocates (what would be known in the English tradition as barristers), since South Africa has traditionally had a divided legal profession. As far as possible, I treat both branches of the profession in the same manner. Where the context applies to only one branch of the profession, I shall use the specific words 'attorney' or 'advocate'. In addition, and where necessary, references will be made to the judiciary and to other actors in the legal firmament, such as state prosecutors or in-house legal counsel.

Since a theme of the thesis is a critique of neutral partisanship, the concept does require definitional clarification at the outset. This is important because the term 'neutral partisanship' is not a common one in SA, even if my thesis is that South African lawyers currently adopt its content as the predominant conception of what a lawyer's role is and ought to be.

This approach is often referred to in the US as the 'standard conception'[11] or the 'dominant view'.[12] The approach gives a relatively clear answer to lawyers as to what to do in most situations: lawyers should advance their client's partisan interests with the maximum zeal permitted by law, without considering the morality of the client's goals.[13]

---

[11] This term is taken from the US literature: see, for example, D Luban 'Introduction' in D Luban (ed) *The Ethics of Lawyers* (1994) xiv.

[12] WH Simon *The Practice of Justice: A Theory of Lawyers' Ethics* (1988) 7.

[13] WB Wendel *Lawyers and Fidelity to Law* (2010) 30. Cf T Dare 'Mere-zeal, hyper-zeal and the ethical obligations of lawyers' legal ethics' (2004) 7 *Legal Ethics* 24, where Dare challenges critics who say that maximum zeal as of right includes the possibility of abusing process on behalf of a client even if undertaken in a 'barely legal' way. See a discussion of Dare's alternative conception at 4.3 below.

Theorists generally agree on three characteristics that make up the 'value-trinity' of the neutral partisanship approach, these being partisanship, neutrality, and non-accountability.[14] Wendel suggests that the first characteristic means that 'lawyers are directed to seek to protect or advance the legal rights of their clients'.[15] The second characteristic, that of neutrality, requires that lawyers are not to consider 'their own views of the moral merits of their clients' positions'.[16] The final characteristic, non-accountability, means that lawyers can 'rest assured that they will not be subject to justified moral criticism by observers'.[17]

Luban sees this model as showing up lawyers to be

> 'hired guns, whose duties of lawyers to their clients means they must, if necessary, do everything that the law permits to advance their client's interests – regardless of whether they are worthy or base and regardless of how much collateral damage the lawyer inflicts on third parties.'[18]

The approach is often termed 'amoral' because it denies that 'common' or 'ordinary' morality is relevant to lawyers' ethics, preferring that the lawyer adopt a 'role morality'.[19] Thus, when proponents use the term 'amorality', they do not apply its ordinary meaning: as an adjective describing a person as having 'no moral quality' or 'nonmoral, without moral standards or principles'.[20] Instead, the term is used to explain 'the lawyer's immunity from the task of scrutinising the morality of particular client acts'.[21] According to this approach, lawyers as role occupants 'aspire to judgement of their actions pursuant to role-specific rather than orthodox

[14] S Vaughan & E Oakley '"Gorilla exceptions" and the ethically apathetic corporate lawyer' (2016) 19 *Legal Ethics* 50 at 52.
[15] WB Wendel 'Three conceptions of roles' (2011) 48 *San Diego Law Review* 547 at 548.
[16] Ibid.
[17] Ibid. The term 'professional non-accountability' is included as part of the conception. But it should be noted that this characteristic focuses on providing guidance to *others* on how to judge lawyers, rather than a directive to lawyers themselves about how to act. It provides that a lawyer should not be judged on the basis of the morality of the client and/or the client's ends. See A Salyzyn 'Positivist legal ethics theory and the law governing lawyers: A few puzzles worth solving' (2014) 42 *Hofstra Law Review* 55 at 66.
[18] D Luban *Legal Ethics and Human Dignity* (2007) 9.
[19] G Postema 'Moral responsibility in professional ethics' (1980) 55 *New York University Law Review* 63 and R Wasserstrom 'Lawyers as professionals: Some moral issues' (1975) 5 *Human Rights* 1.
[20] *Collins English Dictionary* (online edition) available at https://www.collinsdictionary.com/dictionary/english/amoral. When Simon criticised Pepper for implying this exact outcome, Pepper responded to this criticism by clarifying that he meant the focus to be on exemption from moral responsibility rather than justifying a lawyer's immoral conduct. See S Pepper 'Integrating morality and law in legal practice: A reply to Professor Simon' (2010) 23 *Georgetown Journal of Legal Ethics* 1011.
[21] R Atkinson 'How the butler was made to do it: The perverted professionalism of *The Remains of the Day*' (1995) 105 *Yale Law Journal* 177 at 188.

moral criteria'.[22] In the lawyer's role, then, a lawyer must pursue his or her client's ends, however morally questionable, with the role exempting the role occupant from moral responsibility for the content and the ends of her client's instructions.[23]

The general justification for this approach is that clients need lawyers to help them navigate the complexities of the legal system.[24] If lawyers denied clients access on the basis that the lawyer did not deem the client's claim morally 'worthy', then clients would effectively be denied access to the legal system. In order to provide maximum access to the law, lawyers are then relieved of the moral responsibility for actions taken on behalf of their clients, and are required (or are at least free) to express 'indifference to a wide variety of ends and consequences that in other contexts would be of undeniable moral significance'.[25]

In terms of adopting role-differentiated morality, lawyers acting in their professional role are not without *any* constraint in perpetuating wrongdoing on behalf of their clients. However, the approach recognises that the role may impose demands that are inconsistent with the obligations of ordinary, non-professional morality.[26] In this context, then, the neutral partisan lawyer may (and, in some proponents views' *should*) enthusiastically undertake 'to bend; stretch; punch loopholes in; and nullify by obstruction, concealment, and delay the legal and regulatory constraints in the path of a client's desires and interests'[27] if this conduct does not technically fall outside of the bounds of the law.

Proponents of this model recognise that neutral partisanship will lead to a few cases of harm and immorality, but argue that it is a necessary evil in that it does more good than harm.[28] In

[22] D Markowits *A Modern Legal Ethics – Adversary Advocacy in a Democratic Age* (2008) 157-62. Cf T Dare *The Counsel of Rogues? A Defence of the Standard Conception of the Lawyers Role* (2009) 154 who argues that, strictly speaking, if 'the moral defence of the standard conception is successful an adequate ordinary morality will encourage respect for the demands and permissions of professional roles'.

[23] S Dolovich 'Ethical lawyering and the problem of integrity' (2002) 70 *Fordham Law Review* 1629 at 1632. Webb usefully describes the basis of the role-differentiation thesis: '[Role-differentiation] assumes that the different social roles that we experience in our lives (child, parent, teacher, lawyer, etc) create different moral contexts. Consequently it proposes that the "rightness" or "goodness" of our response to a situation can only properly be measured against what is appropriate for that role, rather than against a generic standard of "common morality"'. See J Webb 'Being a lawyer/Being a human being' (2002) 5 *Legal Ethics* 130 at 131.

[24] In this sense, lawyers are seen as 'supertechnocrats' in that they 'possess a special set of talents and techniques which they deploy for the advantage of those people who hire them'. See A Hutchinson 'Calgary and everything after: A postmodern re-vision of lawyering' (1995) 33 *Alberta Law Review* 768.

[25] Wasserstrom 1975 *Human Rights* 6.

[26] See WB Wendel 'Legal Ethics' in H LaFollette *International Encyclopaedia of Ethics* (2013) 2984 at 2984 and T Dare 'Mere-zeal, hyper-zeal and the ethical obligations of lawyers' legal ethics' (2004) 7 *Legal Ethics* 24.

[27] RW Gordon 'The citizen lawyer – A brief informal history of a myth with some basis in reality' (2009) 50 *William & Mary Law Review* 1169 at 1175.

[28] D Nicolson & J Webb *Professional Legal Ethics: Critical Interrogations* (1999) 182.

line with this type of thinking, arguments for the neutral partisanship role are usually framed in consequentialist terms, viz it is the best way to benefit society overall.[29]

As indicated in 1.1 and 1.2, the thesis critiques this neutral partisanship role, considers its philosophical alternatives, and from there constructs an alternative, uniquely South African conception of the lawyer's role, with reference to indigenous value systems. Although the thesis closes with a discussion of the potential role of regulation and legal education in concretising an alternative approach, it has not been possible, considering the already extensive scope of this work, and its research focus on theories and frameworks, to consider these two issues in detail.

## 1.4 SOURCES AND APPROACH

This thesis reflects the law as stated in the sources available to me as at 1 March 2021. Given that there is a dearth of scholarship dealing with legal ethics in South Africa, the work relies on comparative scholarship deriving from the US, UK, Canadian and Australian jurisdictions, among others, in considering arguments for, and alternatives to, the neutral partisanship model of lawyering. These sources are complemented by – what I believe to be – evidence in the case law and legal discourse showing neutral partisanship to be the prevailing conception of lawyering in SA.

Given that South African law has its origins in Roman law, Roman-Dutch law, English law and indigenous law, most of my research relies on typical legal sources, such as legislation and case law. However, it also relies heavily on scholarship around legal ethics. Where possible and appropriate, I also consider sources in the disciplines of history, sociology and philosophy. My study of ideas in African thought in turn relies on the early studies by anthropologists and the later discussion of their studies by contemporary scholars. While I recognise the limitations of this approach, I also look to the description of Ubuntu by various communities through various sayings and metaphors – again captured by various scholars over the years.

[29] For example, in the criminal defence paradigm, Edmundson argues that there are generally three justifications for any prima facie harm created by the lawyer in his or her neutral partisanship role. These are: 'a preponderance of some social good, or the moral dignity of the criminal defendant trumps any such harm, or any such harms are part of social arrangements that self-interested individuals would assent to ab initio'. See R Atkinson 'A skeptical answer to Edmundson's contextualism: What we know we lawyers know' (2002) 30 *Florida State Law Review* 25.

My approach is distinctly constructive. I recognise and appreciate the lessons learnt from critical theorists, particularly the work of Hutchison, Atkinson and Nicolson & Webb,[30] in relation to legal ethics. However, at the same time, I consider it possible for lawyers to agree to and commit to adopting common foundational commitments.[31] I believe it is necessary to construct, as Wilkins suggests, a 'normative community'[32] of South African lawyers based on South African constitutional values.

For the sake of convenience and avoiding grammatical awkwardness, I have followed the style of using the female pronoun throughout. Please note that this usage includes the male and neuter genders.

Finally, while I recognise that race is a social construct, South Africa's history and its current commitment to substantive equality means that I need to refer to race to give a proper context to the thesis. As a result, when I refer to 'black people', it is per the definition set out in a number of Acts in South Africa,[33] being: 'a generic term which means Africans, Coloureds and Indians…'

[30] See discussion of the work of these theorists in 4.x.
[31] D Davis & K Klare 'Transformative constitutionalism and the common and customary law' (2010) 26 *SAJHR* 403 at 410.
[32] DB Wilkins 'In defense of law and morality: Why lawyers should have a prima facie duty to obey the law' (1996) 38 *William & Mary Law Review* 269 at 274.
[33] See for example, the Employment Equity Act 55 of 1998 and the Broad-Based Black Economic Empowerment Act 53 of 2003.

# CHAPTER 2: TRACING THE HISTORY OF NEUTRAL PARTISANSHIP IN SOUTH AFRICA

> 'It is true that some lawyers are dishonest, arrogant, greedy, venal, amoral, ruthless buckets of toxic slime. On the other hand, it is unfair to judge the entire profession by a few hundred thousand bad apples.'[34]

## 2.1 INTRODUCTION

In the first chapter, I asserted that certain factors appear to have contributed to the current crisis in the legal profession, for example, the naked self-interest of a few legal practitioners, but more pertinently, the adoption of neutral partisanship by South African legal practitioners. Before focusing on evidence of neutral partisanship in current times, in this chapter I give a brief overview of the historic and social setting of the South African legal profession. This is helpful since it provides a context for why and how the legal profession has adopted neutral partisanship as the prevailing approach to lawyering in SA. This requires considering the nature of the legal profession as it has manifested at different times of SA's history. It also requires considering the different origins of South African law and its ramifications for the structure and norms of the legal profession, those origins being Roman law, Roman-Dutch law, English law and indigenous law.[35] In this overview, I briefly cover the different territories of SA and subsequent nuances in legal practice,[36] the apartheid period,[37] and the period before and after the coming into force of SA's democratic Constitution.

---

[34] JD Gordon III 'How not to succeed at law school' (1991) 100 *Yale Law Journal* 1679 at 1680.

[35] Hahlo & Kahn have likened the South African legal system as a 'three-layer cake'. See HR Hahlo & E Kahn *The South African Legal System and Its Background* (1968) 284. See also WJ Hosten, F Bosman, C Nathan and AB Edwards (eds) *Introduction to South African Law and Legal Theory* (1977) 131. The South African system is influenced by so many other legal systems that, in 1887, a commentator noted that '[t]o say that there is not a book of law in the whole civilised word which may not possibly be an authority in the … [South African] Courts, is not to go beyond the truth.' See F du Bois & D Visser 'The influence of foreign law in South Africa' (2003) 13 *Transnational Law and Contemporary Problems* 593 (quoting V Sampson 'Sources of Cape Law' (1887) 4 *Cape Law Journal* 109 at 109-10). See also R Zimmerman & D Visser 'South African law as a mixed legal system' in R Zimmerman & D Visser (eds) *Southern Cross: Civil Law and Common Law in South Africa* (1996) 1. J Meierhenrich *The Legacies of Law: Long-Run Consequences of Legal Development in South Africa, 1652-2000* (2008) 92 calls South African law 'a complicated genealogy' of an amalgam of traditions 'the result of the interaction between European common law and African customary law'. See also DH Sampson *Randall & Bax: The South African Attorneys Handbook* 3 ed (1989) 1.

[36] For example, the existence of a dual versus divided legal profession. The legal profession was divided into attorneys and advocates in the Cape under Batavian rule as well as English rule. In contrast, a dual legal profession operated in Natal, the Orange Free State and the Zuid-Afrikaansche Republiek. Furthermore, it appears that a different 'class' of lawyer operated in the 1800s onwards, under the name of 'law agent'.

[37] The difficulties that arise in assessing lawyers' approaches in this period is manifold, least of which is the fact that public discourses about law (and lawyers) were driven by the state who sought to establish and maintain the advantages of racial rule (see M Chanock *The Making of South African Legal Culture 1902-1936: Fear, Favour*

The purpose of this chapter is not to reproduce the history of the legal profession generally, but to consider how and in what way neutral partisanship has become the dominant mode of lawyering in SA. The different origins of law in SA is essentially a tale of three stories. One story regales the Roman and Roman-Dutch heritage of SA legal practitioners, where there is plenty of material to suggest that neutral partisanship was not dominant in the early years, although it is based mainly on anecdotal evidence without much more. The other story is of the influence of the English law on practice in SA running through to the end of English colonial rule, SA's independence as a Republic, and the advent of apartheid. I will argue that in this space, the influences of liberalism and formalism led legal practitioners to accept neutral partisanship lawyering as the dominant and standard conception of their role, a role that has continued to the present day. Finally, there is the least known story of the resolution of disputes in indigenous communities before colonisation. The fact that this story is least known in the context of a text about lawyering is not surprising: lawyers (as we understand the role today) played no part in the resolution of disputes before colonisation. However, I argue that this story needs to be told since – even if no lawyer appeared in this story – advisors were moved by certain principles applicable to the resolution of disputes, and it is those principles that may find application and use for this thesis in contemporary times.

One challenge with the current historical record of the legal profession is its politicised nature. No doubt this is a problem in many jurisdictions, but it is exacerbated in SA. Thus, in what follows, I express some caution regarding the current materials available, but nonetheless attempt to derive meaning from what is said, and what is not said. Thereafter, I attempt to balance out a historic bias against indigenous law by considering the history and context of dispute resolution prior to colonialism.[38] I then look at the features of the colonisers' early legal systems only in so far as how these systems influenced the content and role of attorneys and advocates of SA (now 'legal practitioners' under SA's latest legislation).[39] Against the backdrop of this history, I consider the norms of the legal profession at various stages, and consider whether these norms demonstrate neutral partisanship. Written discourse on

*and Prejudice* (2001) 526). The essence of colonial law is described by Bhabha as 'a spirit of calm violence' (HK Bhabha 'In a spirit of calm violence' in G Prakash (ed) *After Colonialism: Imperial Histories and Postcolonial Displacements* (1995) 342). For more detail, see below.

[38] For example, see Constitutional Court's comments in *MEC Health and Social Development, Gauteng v DZ obo WZ* 2018 (1) SA 335 (CC) at para 39: 'Western legal systems form only part of our heritage, and … one of the great challenges of our new legal order is indeed to bring about the Africanisation of the common law.' further discussion in chapter 3 below.

[39] The Attorneys Act 53 of 1979 and the Admission of Advocates Act 74 of 1964 were repealed by the Legal Practice Act 28 of 2014. See 2.6 for a discussion of this change.

professional ethics is vital and, where possible, I look to the *placaaten*[40] and codes that govern the lawyers' conduct.

## 2.2 SOME CAUTIONARY REMARKS ABOUT THE RECORD OF THE SOUTH AFRICAN LEGAL PROFESION

It is now trite that the courts (and those officers of the court), in both the colonial period and under apartheid, were vehicles in the maintenance of the political– specifically regarding relationships between race.[41] As a result, it is necessary to understand that who says what about whom to whom, articulates a particular narrative from a particular perspective or view.[42] Chanock explains this point succinctly: 'South African legal historiography is still largely trapped in a sub-category of white colonial and national narrative'.[43] Moreover, one needs to be sceptical about the sources of 'knowledge' created by insiders, outsiders, and those with agendas, writing about legal practice. For example, it is not difficult to find highly jingoistic, self-congratulatory rhetoric in lawyers writing about lawyers.[44] By contrast, one should also be vigilant about laypersons' views of legal practice, given that the context in which people encounter legal practitioners is often unpleasant, and that legal practitioners can sometimes become scapegoats for real and perceived injustices delivered by the courts, or even the legal system as a whole.[45]

---

[40] *Placaaten* refers to legislation passed in Holland and applied as part of the received Roman-Dutch common law in South Africa as one of Holland's colonies.

[41] See in general, Chanock *The Making of South African Legal Culture* and A Sachs *Justice in South Africa* (1973). See also E Fagan 'Roman-Dutch law in its South African historical context' in R Zimmerman & D Visser *Southern Cross: Civil Law and Common Law in South Africa* (1996) 33. Maisel notes that '[t]he South African legal system was one of the pillars of apartheid and was utilized to enforce State mandated inequality' in P Maisel 'Expanding and sustaining clinical legal education in developing countries: what we can learn from South Africa' (2007) 30 *Fordham International Law Journal* 374 at 379. See also T Madala 'Rule under apartheid and the fledgling democracy in post-apartheid South Africa: the role of the judiciary' (2001) 26 *NCJ International Law and Com Reg* 743 at 748 where he states: 'The [apartheid] system created a society in which the majority came to regard the courts, judges and the administration of justice with suspicion and anger. In the eyes of the oppressed, the system came to represent an enforcement of injustice and a denial of protection'. See also T Ngcukaitobi 'The forgotten origins of public interest litigation in South Africa' (2016) April *Advocate* 34 at 36 where he characterises the courts as 'one of the most venerated institutions of colonialism'.

[42] See for example, L White 'Between Glucksman and Foucault: Historicizing rumour and gossip' (1994) 20 *Social Dynamics* 75 at 80 who notes that '[t]he question of who is reporting what experiences in which way is crucial …'.

[43] Chanock *The Making of South African Legal Culture* 3 at fn 1.

[44] G Randell's books: *Gentleman of the Law* (1982) and *Bench and Bar of the Eastern Cape* (1985) are such examples. This is not to say that there is great value in the books from the perspective of recording certain historical events, but the portrayal of individuals must be understood in a certain paradigm. See RW Gordon 'Historicism in legal scholarship' (1980-81) 90 *Yale Law Journal* 1017 at 1020 noting the claim that scholarship can distort reality if it fails 'to take adequate account of the social and historical contingency of the materials'.

[45] M Robertson & H Kruuse 'Legal ethics education in South Africa: Possibilities, challenges and opportunities' (2016) 32 *SAJHR* 344.

In between these perspectives, an accurate picture of the South African legal profession is also marred by the lack of incisive critical inquiry into the role of the lawyer in the early years, but particularly during the apartheid period. Apart from the challenges in unravelling self-congratulatory discourse on the one hand, and highly critical views on the other hand, I believe that this lack of critical inquiry is the result of two further issues that are prevalent in SA's legal history. First, as will be discussed below, research on the legal profession has been, and continues to be, focused on judges rather than legal practitioners when assessing the social consequences of law and legal practice.[46] Further, while autobiographies of legal practitioners can be insightful, they too present difficulties of their own.[47] In particular, the life history of personal narrative that is present in autobiographies rests on the basic assumption that 'people are the most accurate chroniclers of their own lives, and that experience is evidence of the most reliable sort'.[48] However, this view has been criticised, and rightly so.[49] For example, in the autobiographies of legal practitioners over South African history, there are several indications of how different perspectives can influence the record. While these autobiographies can give us insight into the practices of those in the legal profession at the time, one always has to question the credibility and culpability of the author looking back.[50] Along the same lines, Basner suggests that, in narrating their own stories, people 'often read history backwards', for example in attributing to themselves beliefs or opinions or motives at an earlier stage than they actually held them.[51]

---

[46] See chapter 1 for an assessment of why this was the case. Chanock *The Making of South African Legal Culture* 525-26 warns of the danger of seeing courts and judges as the only repository of information about legal culture, ignoring the 'discourse about law in the culture at large, about institutions, practices and values'. Here, I would add the 'discourse about lawyers'. There has been some promising indications that research in this sphere is slowly increasing. See J Klaaren 'South Africa: A profession in transformation' in RL Abel, O Hammersley, H Sommerlad, U Schultz *Lawyers in 21st Century Societies* vol 1 (2020) 535 (and the SA sources cited therein).

[47] In writing about the story of the bullish tactics of a particular lawyer in the 1920s-1930s, Peires states his difficulty of recording the activities of the lawyer who 'wasn't such a fool as to leave anything lying around on paper'. See J Peires 'The legend of Fenner Solomon' in B Bozzoli (ed) *Class, Community and Conflict: South African Perspectives* (1987) 65.

[48] White 1994 *Social Dynamics* 80

[49] AL Stoler 'In cold blood: Hierarchies of credibility and the politics of colonial narratives' (1992) 37 *Representations* 151-189. See also J W Scott 'The evidence of experience' (1991) 17 *Critical Enquiry* 773-797.

[50] J Jackson's text *Justice in South Africa* (1980) is an example of this contingency as he explains both law society and court disciplinary proceedings against him as an attempt to undermine his practice in the Pass Courts. Another example can be found in a 23 page document constituting the unfinished memoirs of Percy Yutar, the lead prosecutor in the Rivonia Trial (the trial in the 1960s where Mandela and other opponents of apartheid were convicted of sabotage). In the preface of his document, and written some 30 years after the trial and in very different circumstances, Yutar records that he charged the accused with sabotage rather than with treason 'in an attempt to save their lives' (since at that time, a treason conviction carried the death penalty). The accuracy of this statement is contested: with legal practitioners on the other side calling such rationale 'rubbish', and an attempt to reposition himself in history.

[51] Miriam Basner *Am I an African? The Political Memoirs of HM Basner* (1993) xvii. Of course, in considering autobiographies and other materials, it is also wise to constantly remind oneself of Thompson's famous caution

The argument in this chapter is that, over time, neutral partisanship has become favoured as the standard conception of the lawyer's role in SA, not only because of the influence of formalism and liberalism, but also because of the politics of apartheid. It will be argued that, by adopting neutral partisanship, legal practitioners found a way to eschew responsibility for their actions within that system by rationalising that their role was an apolitical and amoral one. In this way, SA legal practitioners resembled Gordon's description of lawyers at the turn of the 20th century in New York. Gordon described these lawyers as having 'no ideology save that of craftsmanlike client service'.[52] In this way, legal practitioners could use neutral partisanship as a 'safe haven' for operating in the problematic spaces like apartheid without justifying their conduct. While Chanock (and others) emphasise legal practitioners' complicity in furthering discrimination and oppression, Zimmerman & Visser suggest, similar to Gordon's description above, that the South African lawyer's neglect of these issues arose by virtue of their misplaced trust in their craft. Zimmerman & Visser uses a Bugatti motor car metaphor to explain this neglect:

> 'Much in the same way of a mechanic who carefully tends a well preserved Bugatti motor car, a lawyer who works with a finely tuned legal system is liable to develop a somewhat irrational passion for the object of his attention. That is, of course, because his intimate knowledge of how it is put together reveals it is as more than the sum of its parts: as a work of art; and naturally the lawyer, like the mechanic, will want to overlook the weaknesses that the machine might have. Indeed, *in South Africa it was all too often overlooked that most of those who saw the magnificent old vehicle drive past could not afford it and would have been better served had it been not a Bugatti but an omnibus.'*[53]

Related to the neglect described above, scholarship has tended to focus on the common law and its use by legal practitioners in typical doctrinal 'black letter law' cases. It is here that Meierhenrich's study of the South African legal system gives us particular insight into what he calls the 'dual state'.[54] Relying on this concept, Meierhenrich sets out how the practice of law

---

against the tendency to judge those facing difficult predicaments from the comfort of an easier age; what he called the 'enormous condescension of posterity' See EP Thompson *The Making of the English Working Class* (1963) 18.

[52] R Gordon '"The ideal and the actual in the law": Fantasies and practices of New York City lawyers, 1870-1910' in GW Gawalt (ed) The New High Priests: Lawyers in Post-Civil War America (1984) 51 at 65-66.

[53] R Zimmerman & D Visser (eds) *Southern Cross: Civil Law and Common Law in South Africa* (1996) 5. My emphasis.

[54] J Meierhenrich *The Legacies of Law: Long-Run Consequences of Legal Development in South Africa, 1652-2000* (2008). Meierhenrich acknowledges Ernst Fraenkel's text: *The Dual State: A Contribution to the Theory of Dictatorship* (1941) as the source of his theoretical framework.

occupied distinctive (and sometimes overlapping) areas. Meierhenrich asserts that research and interest focused in SA was on the practice of law in the 'white oligarchy' with its 'formally rational law' rather than on the 'disenfranchised majority'[55] with its 'substantially irrational law'.[56] He suggests that this research and interest continued at least until the 1970s, when scholars such as Dugard and others began to question the role of legal practitioners in the legal system.[57] Meierhenrich's concept allows us to understand then how the majority of law practice was excluded from the scrutiny of scholarship.

Finally, it is necessary to recognise that much of the commentary on the lawyering role (especially in the 1900s) placed enormous focus on the legal practitioners' use of Roman-Dutch versus English authorities. This focus originated from an underlying nationalism during a time of great tension between those advocating for a purist approach using Roman-Dutch authorities only, as opposed to those who welcomed the English influence in the law.[58] Within this domain, scholars were obsessed about origin and not the actual actions or ethics of the legal practitioners. For example, Corder & Davis suggest:

> 'The preoccupation with the European origins of our legal system is … to be seen in almost every judgment of our courts, in the textbooks and other legal writings …, and in the much discussed "purist-pragmatist" dispute which often assumes exaggerated proportions in the literature.'[59]

At first glance, this focus may seem irrelevant or at least peripheral to this thesis. However, Zitzke makes a compelling argument that this debate has continued in another guise, which I believe has had an effect on the way in which legal practitioners' perceive their role in

[55] In other words, the African, Indian and 'Coloured' population.
[56] Meierhenrich *The Legacies of Law* 5. If one considers that this focus, together with the fact that there were separate and special courts (for example, the Commissioner's Courts) dealing with the 'disenfranchised' – often with no legal representation – it is not surprising that there was little attention paid to lawyers' practice in this area. Dial Ndima's work *The Law of Commoners and Kings: Narratives of a Rural Transkei Magistrate* (2004) provides a unique window into practice in the disenfranchised category.
[57] See in general J Dugard *Human Rights and the South African Legal Rights Order* (1978) and the discussion below.
[58] See AS Mathews *Law, Order and Liberty in South Africa* (1971) 294-95 for a discussion of nationalism and racialism in South African politics which permeated the South African legal system. In the context of the private law, see E Zitzke 'The history and politics of contemporary common-law purism' (2017) 23 *Fundamina* 185. Zitzke quotes Visser in suggesting that the debate arose due to the "cultural forces" at play during its inception, inter alia,
[59] See H Corder and D Davis 'Law and social practice: An introduction' in H Corder (ed) *Essays on Law and Social Practice in South Africa* (1988) 1 at 4. They also note (at 7) the 'often bitter exchanges … concerned … with the value of the contributions of English and Roman-Dutch law to the development of South African private law'.

contemporary times.[60] His argument is that the common-law purism focus was rejuvenated in the early post-Constitution days in SA and took on a contemporary form in that

> 'the goal of the movement was no longer to purify Roman-Dutch law from English "stains"; instead, the objective became to shield the common law against a human-rights inspired Constitution'.[61]

Zitzke argues that this has had the result that scholars have tended to ask: what is the law on a matter, without further endeavouring to ask 'what does justice demand?' He suggests then that the approach allows legal practitioners to approve of the law implicitly given its origin, no matter how unjust that law may be.[62] Zitzke further suggests that even where lawyers have progressive mind-sets, and are committed to the transformative potential of the Constitution, this might stifle the realisation of their own political goals because they have been trained to think and reason the private law in a 'pure' form.[63]

In considering the more general recording of legal history in SA, it is useful to note (in the light of Chanock's remarks set out at the start of this chapter) that many textbooks dealing with the history of South African law (and by default, the legal profession) spend much time on the history of the profession in Roman, and Roman-Dutch times.[64] These textbooks then seamlessly transport readers to the 1970s onwards, where a technical appreciation of the division of the profession, and duties as prescribed by legislation, is set out.[65]

Given the emphasis on gauging the conduct of the professional lawyer (hence the failure to consider dispute resolution prior to 1652), the consideration of the Roman and Roman-Dutch lawyers should not come as a surprise. However, what is more interesting is the general lack of incisive enquiry and critique of the legal profession in particularly the 18th and 19th century

---

[60] Zitzke 2017 *Fundamina* 185.
[61] Ibid 187.
[62] Ibid 221.
[63] Ibid 189.
[64] Even in this context, Tuori notes challenges in the proper consideration of historical sources by Roman law scholars. He notes, in interpreting Roman historical sources to support modern ideals: 'History is not fiction, but the writing of history has some characteristics of creative writing', especially where historical sources are in short supply. See K Tuori *Ancient Roman Lawyers and Modern Legal Ideals: Studies on the Impact of Contemporary Concerns in the Interpretation of Ancient Roman Legal History* (2007) 181.
[65] For example, Hosten (ed) *Introduction to South African Law* and K Van Dijkhorst 'Advocates' in WA Joubert (ed) *The Law of South Africa* 2 ed (2007) para 111ff. Corder and Davis report that approach dominated teaching in law faculties as well, emphasising that among the study of the Greeks, Romans and so forth, there was 'little attempt to discover whether aspects of the theories … might be of use in helping us to understand the nature of our own legal system (or not, as the case may be)'. See Corder & Davis in *Essays on Law and Social Practice* (1988) 1 at 5.

in SA. This chapter attempts to draw diverse sources[66] together to provide an account of the legal profession in this time, as it saw itself, and as the public perceived it.[67] Where possible I attempt to put both views in perspective. I also attempt to put the actions of the various organisations representing legal practitioners into perspective. This is important given the largely neglected issue in SA of the politics of professionalism.[68].

## 2.3 PRE-1652 SOUTH AFRICAN LEGAL PRACTITIONERS?

Most texts on the history of South African law take their point of departure from the arrival of Jan van Riebeek in 1652.[69] The focus is then to unpack how justice was administered by the Dutch East India Company who, by virtue of Van Riebeeck's employment, and the 1602 *Octrooi,*[70] was delegated the power to maintain law and order.[71] This point of departure is based on the idea that no sophisticated legal institutions previously existed.[72] While legal institutions in the western sense may not have existed, it seems important to try to identify what legal system was in place, and whether there were any legal advisors/intermediaries/mediators in the

[66] Chanock is a major source, as are some ethnographic studies, specifically by Murray and Peires, in the form of: C Murray *Black Mountain: Land, Class & Power in the Eastern Orange Free State* (1992) and J Peires 'The legend of Fenner Solomon' in B Bozzoli (ed) *Class, Community and Conflict: South African Perspectives* (1987) 65. Chanock describes Peires's piece as 'the best piece of writing on South African legal practice' (Chanock *The Making of South African Legal Culture* 235 at fn 5).

[67] For example, see Wildenboer's comparison of the opposing views held of the lawyers of the old ZAR discussed below. See L Wildenboer 'For a few dollars more: Overcharging and misconduct in the legal profession of the Zuid-Afrikaansche Republiek' (2011) 44 *De Jure* 339 at 340 and 361.

[68] Referred to as the 'sociology of lawyering', there is a rich literature in other jurisdictions (rooted in Weberian, Marxist and Durkheimian traditions) which examines, inter alia, the education, mores, values, working practices, systems of self-regulation, efforts to sustain the monopoly in service delivery and social status of lawyers. The literature challenges the legal profession's claims of exclusivity and superior social status ostensibly in exchange for high ethical standards and specialist expertise. See for example recent works in the UK and US respectively: R Abel *English Lawyers between Market and State: The Politics of Professionalism* (2003) and J Moliterno *The American Legal Profession in Crisis: Resistance and Responses to Change* (2013). For older but excellent examples, see J Heinz & E Laumann *Chicago Lawyers: The Social Structure of the Chicago Bar* (1983) and T Halliday *Beyond Monopoly: Lawyers, State Crises and Professional Empowerment* (1987). Klaaren makes a related point regarding the dearth of scholarship in this area in South Africa in his presentation 'A texture of legality: The legal profession in South Africa, v 1' *Research Circle on the Role of Law in Developing and Transitional Countries* 23-25 April 2010, University of Wisconsin-Madison (copy of unpublished paper on file with author).

[69] Hahlo & Kahn *The South African Legal System* and Hosten (ed) *Introduction to South African Law*. It should be noted that both these texts in fact start with the theories of law in Graeco-Roman times through to medieval canon law, natural law, the Renaissance and English legal positivism, the European historical school and American realism. Chanock *The Making of South African Legal Culture* fn 1 critiques this approach in what it leaves out.

[70] Jan van Riebeeck was an employee of the *Vereenigde Geoctroyeerde Oost-Indische Compagnie* (the Dutch East India Company) who landed at the Cape of Good Hope and established a refreshment station for the company.

[71] Hosten (ed) *Introduction to South African Law* 186. See also L Wildenboer 'The origins of the division of the legal profession in South Africa: A brief overview' *Fundamina* 16 (2010) 199 at 214.

[72] See Hosten (ed) *Introduction to South African Law* 186 and sources cited below for a debate about whether the legal system of the Netherlands was 'brought' or 'received' into South Africa, with its obvious implications of the existence (or lack of) a pre-existing legal system.

broad sense. In other words, prior to colonisation, were there persons assisting others in the resolution of their disputes, either before a court of some kind, or in the negotiation of a dispute?

The importance of undertaking such an enquiry as to what legal systems may have existed in pre-colonial times is because we should be looking at sources more broadly in ascertaining a legal culture and how that legal culture shaped (or did not shape) the legal profession. This view is supported by the idea that matters resolved in formal courts constitute a small fraction of legal disputes that there are in any society, with most disputes being settled by negotiation by parties using the law and its culture as bargaining tools.[73] It must also be re-emphasised that the history of the South African legal profession is usually discussed exclusively with reference to Rome and Renaissance Europe rather than the European encounter with Africa, and the subsequent development of the legal system based on 'white rule over African'.[74] This is problematic given the obvious influence of environment on those operating in the legal context.

The task of ascertaining how law was practised in pre-colonial times is difficult, given the fact that the indigenous people of SA relied on the oral tradition.[75] Furthermore, the notion of a 'lawyer' is tied up with a particular western model of the legal world, in which 'state laws stand in an hierarchical relationship to a wide variety of customs, and in which courts render authoritative decisions …'.[76] Also, the notion of a 'professional' who is granted monopoly[77] over a service in exchange for certain obligations related to high ethical standards is a relatively recent social product.[78] As such, an investigation of such a social product does not fit neatly into the practices of the South African indigenous communities, where any man could be called

[73] M Galanter 'Justice in many rooms: Courts, private ordering, and indigenous law' (1981) 19 *Journal of Pluralism and Unofficial Law* 25. See also RBG Choudree 'Traditions of conflict resolution in South Africa' (1999) *African Journal on Conflict Resolution* 9.
[74] Chanock *The Making of South African Legal Culture* xi.
[75] This relates not only to issues of research, but in fact, of evidence. In *Salem Party Club & others v Salem Community & others* 2018 (3) SA 1 (CC) at para 65, the Constitutional Court quoting the Supreme Court of Canada's judgment in *Delgamuukw,* suggested that '"[t]he difficulties with the features of oral histories is that they are tangential to the ultimate purpose of the fact-finding process at trial – the determination of historical truth". Oral history is not only concerned with historical facts, but also the values and convictions of the community it recollects.' In addition to this issue, parties in matters may claim that the record of oral history was not 'acceptable'. For example, in *Richtersveld Community & others v Alexkor Ltd & another* [2001] ZALCC 10 at paras 19, 64 & fn 65, the claimants argued that the court could only accept 'oral history' where the proper methodology was followed.
[76] M Chanock 'Law, state and culture: Thinking about customary law after apartheid' 1991 *Acta Juridica* 68 at 68-69.
[77] M Sarfatti Larson *The Rise of Professionalism: A Sociological Analysis* (1977) 166 sets out that the legal profession is the 'epitome of social stratification'.
[78] Ibid 2.

upon to assist a person in a dispute. These challenges notwithstanding, there are some important works by anthropologists, and insights which may be gleaned from other texts, which provide a picture, albeit blurred, of the administration of justice and the presence (or not) and modus operandi of those who assisted in the resolution of those disputes in pre-colonial times.

Mnyongani states that the use of lawyers was historically alien to customary law in SA.[79] Despite this view, it is useful to look at the procedures involved to get a sense of how justice was administered. Sachs provides some insight into the issue when he states that

> 'in traditional society every man was his own lawyer, and his neighbours too, in the sense that litigation involved whole communities and all the local men could and did take part in the forensic debate. When pre-judicial attempts to resolve disputes failed, the arguments could be pressed to judgement before the chief, whose word was law; but the chief invariably acted as spokesman for his councillors, who in turn sought to uphold and reinforce the established norms of the tribe' [80]

Similarly, Ramose explains the administration of justice in pre-colonial Africa:

> 'The traditional African democratic tradition was by no means based upon the adversarial principle as this operates in the context of Western democratic politics. On the contrary, it was predicated upon the premise that each participant in the *kgotla* was capable of weighing both the negative and positive sides of any matter under dispute. This capability would culminate in the delivery of an objective, virtually impartial judgement.'[81]

It is perhaps apt at this point to call this early stage the 'pre-formal' stage in SA since, while there were no 'lawyers' in the Dutch and English sense, there were certainly men[82] who played the part of advisors to both the wronged individual and the tribunal/Chief hearing the dispute. A few examples suffice of this type of representation, namely Schapera's study of the handling

[79] He states: 'Customary law knows of no class of people called lawyers and has no role for them in its processes and procedures'. See F Mnyongani 'Duties of a lawyer in a multicultural society: a customary law perspective' (2012) 2 *Stell LR* 352 at 353. See also Khunou & Mogomotsi where they state (at 49) that, pre-colonialism, there was 'no institution of professional representation'. Interestingly, the authors comment that women were afforded representation, but this is likely to have been a result of the patriarchal nature of the culture and the view of women as perpetual minors, rather than due to a perceived need for professional representation. See F Khunou & K Mogomotsi 'Law and traditional justice system in South Africa: A hybrid of historical and constitutional discourse' (2013) *Journal of Global Peace and Conflict* 49.

[80] Sachs *Justice in South Africa* 96-97.

[81] MB Ramose *African Philosophy through Ubuntu* rev ed (2002) 21-2.

[82] I use his gendered term deliberately as customary law did not involve women in decision-making. I comment on this issue below.

of civil and criminal wrongs according to Tswana law and custom,[83] M nnig's study of Pedi tribal law,[84] and Hammond-Tooke[85] and Krige's[86] separate (but similar) investigations of Lovedhu dispute resolution.

In the case of a civil wrong in Tswana law, Schapera's study found that the victim was allowed a representative at the local court at the stage where the victim's direct negotiation with the wrongdoer failed.[87] In criminal matters, it appears that the victim did not have a representative. However, 'senior male relatives' of the Tswana chief presiding over the court provided the chief with advice 'where the man feels aggrieved by some action or decision of the Chief'.[88] While these relatives could effectively be described as 'assessors' in the present usage of the term,[89] the implication of Schapera's findings is that the advisors would have had to have known that the man felt aggrieved and therefore acted as his representative in transmitting this information to the Chief.[90]

Mőnnig's investigation of Pedi law reveals the dynamic of negotiation (prior to involving the chiefs) by families. It is clear that families played an integral role in the resolution of disputes. Mőnnig notes that the importance of the relative's work in that 'matters may be postponed so that the parties involved can secure the assistance of yet more relatives to assist them.'[91]

In describing the resolution of disputes in the Lovedhu community, Hammond-Tooke describes the intervention of an 'emissary' as follows:

> 'Important here is the Lovedu custom of Lu Khumela [to beg pardon of one another] by which reconciliation is reached by an emissary who intervenes between two parties usually accompanied by the slaughtering of a goat [Nguni hlamba ritual]. This granting of pardon stops court procedures and … it is estimate[d] that about 80 percent of disputes are solved in this way without ever coming to court …'.[92]

---

[83] I Schapera *A Handbook of Tswana Law and Custom* (1955).
[84] HO Mőnnig *The Pedi* (1967).
[85] WD Hammond-Tooke "World view I: A system of beliefs" in Hammond-Tooke (ed) *The Bantu Speaking People of Southern Africa* (1974) 318.
[86] EJ Krige 'Some Aspects of the Lovedhu judicial arrangements' 1939 *Journal of Bantu Studies* 144.
[87] Schapera *A Handbook of Tswana Law and Custom* 47.
[88] Ibid 76.
[89] In South Africa, judges and magistrates have a choice of appointing assessors to assist their decision-making in certain matters. See, for example, s 145 of the Criminal Procedure Act 51 of 1977 and s 93 of the Magistrates' Courts Act 32 of 1944.
[90] Schapera *A Handbook of Tswana Law and Custom* 76.
[91] Mőnnig *The Pedi* 316.
[92] Hammond-Tooke in Hammond-Tooke (ed) *The Bantu Speaking People of Southern* 318 & 362.

It appears generally then, from Hammond-Tooke and Krige's work, that the resolution of disputes took place in an inquisitorial method. This stands in strong contrast to the idea of the adversarial system as practised today. Significantly, one of the reasons why the accused/defendants/respondents played the primary role in a hearing, was that they were considered a valuable source of information.[93] As Krige notes, the accused was not only the object of enquiry but a full procedural subject:

> 'The bare legal principle is only one factor in the situation. More often than not it must give way to what is far more important than legal principle that is to the friendly re-adjustment of the disputing parties. The great aim is not to adjudicate upon conflicting rights according to strict law but to use the principles of justice wisely in order to effect reconciliation and to re-establish good relations. Legal procedure is thus not absolute, it was subservient to the human situation and man was not made for law but law was made for man.'[94]

From these examples above, it is clear that, while there were no 'lawyers' as such, systems of law systems of law enforcement based on rational procedures were well entrenched in traditional society.[95] These systems continued in parallel to the systems slowly introduced in the Cape upon arrival by the Dutch. The Cape Law Journal (now named the South African Law Journal) reported in the late 1800s that a typical 'Kafir Law Suit' (as it was referred to then) displayed 'the Socratic method of debate … in all its perfection'.[96] Soga, writing in 1932, discussed the nature of the dispute in similar terms, but added that offences were considered to be against the community or tribe rather than the individual, and punishment of a constructive or corrective nature was administered for disturbing the balance of tribal life.[97] What is clear is that the resolution of disputes operated on an inquisitorial and reconciliatory basis[98] and that, at this point, some representation was present – but not in the way that we understand the role of the legal practitioner in SA today.

[93] Khunou & Mogomotsi 2013 *Journal of Global Peace and Conflict* 49.
[94] Krige 1939 *Journal of Bantu Studies* 144.
[95] For a discussion of how courts have drawn inspiration from these procedures, see 5.4-5.5.
[96] 'A Kafir Law Suit' (1889) 6 *Cape Law Journal* 87 at 89.
[97] JH Soga *The Ama-Xosa: Life and Customs* (1931) 46.
[98] Khunou & Mogomotsi 2013 *Journal of Global Peace and Conflict* 49.

## 2.4 1652-1827: THE CAPE COLONY AND BATAVIAN RULE

The Cape was governed by Batavian rule from 1652 by virtue of the *Octrooi* ('charter') of the Estates-General of 20 March, 1602.[99] The law that applied was the law of Holland (the main province in the United Provinces of the Netherlands) which, in turn, was Roman-Dutch.[100] However, legal practitioners – as understood in Holland – did not practice in SA until at least the 17th century. Instead, Cowen describes this period as one where the administration of justice under the Dutch East India Company[101] was 'either subordinated to the commercial interests of shareholders or sunk in lethargy'.[102] Sachs illustrates the lack of a proper legal system with his reference to the fact that the first court, the *Raad van Justitie*,[103] was effectively run by the Commander and his advisory council, who acted as the legislature and the executive as well (and made no claim to be otherwise).[104] Thus the *Raad van Justitie* had laypersons presiding and appearing before it[105] similar to the resolutions of dispute discussed in 2.3 above. When local governments of landdrost and heemraden were set up, they served too as courts of law in petty civil and criminal cases. However, the procedures in these courts were informal, and legal

[99] HR Hahlo & Ellison Kahn *The Union of South Africa: The Development of its Laws and Constitution* (1960) 10 and Fagan in Zimmerman & Visser *Southern Cross* 35.

[100] This characterisation is made as a result of the amalgamation between medieval Dutch law (mainly of Germanic origin) and the Roman law of Justinian. See Woolman & Swanepoel "Constitutional history" in Woolman & Bishop (eds) *Constitutional law* (2014) para 2.2(*d*); Thomas 2004 *Fundamina* 188-189. See also Fagan 'Roman-Dutch law in its South African historical context' in R Zimmerman & D Visser (eds) *Southern Cross* (1996) 38-39; De Vos *Regsgeskiedenis* (1992) 229-230; Hahlo & Kahn *South African Legal System* (1991) 571ff; Visagie *Regspleging en reg aan die Kaap* (1969) 63-78; Visagie 1963 *Acta Juridica* 149; Hahlo & Kahn *Union of South Africa* 13; Lee *Introduction to Roman-Dutch law* (1953) 2.

[101] It should be noted that it was not the Republic of the United Netherlands that directly governed the colony, but the Dutch East India Company (the *Vereenigde Geoctroyeerde Oost-Indische Compagnie* 'VOC') – a subject of that republic. By virtue of the charter, the company was empowered to manage a variety of services necessary for the maintenance of good order and justice, and the advancement of trade in the colony.

[102] D Cowen 'Early years of aspiration to the 1920s' in D Cowen and D Visser *The University of Cape Town Law Faculty: A History 1859-2004* (2004) 1 and the references quoted therein, especially EB Watermeyer on his *Lectures on the Government of the Dutch East India Company* (1857) 57 in which he spoke of the VOC's 'despotic misrule'. The failure to set up a proper legal system at this stage may have been a result of the VOC's 'very limited territorial ambitions' in the Cape, seeing it as no more than providing fresh victuals en route to more important and exotic destinations. See Fagan in Zimmerman & Visser *Southern Cross* 36.

[103] Initially, the administration of justice at the Cape was managed by a tribunal consisting of Van Riebeeck and employees of the Dutch East India Company. Neither this tribunal nor the *Justitie ende Chrijghsraet* (which followed it) could really be characterised as anything more than a company disciplinary body. However, with the introduction of the *Raad van Justitie,* the company started exercising jurisdiction over *freeburghers*, slaves, manumitted slaves and indigenous people.

[104] Sachs *Justice in South Africa* 18. See Fagan in Zimmerman & Visser *Southern Cross* for a discussion of the rudimentary judicial system set up prior to the *Raad van Justitie* at 38.

[105] Hosten (ed) *Introduction to South African Law* 187. See also C Graham Botha 'Sir John Andries Truter' (1918) *SALJ* 135 at 136ff.

representation was not permitted, unless the party to an action could show illness or other good reason for not appearing in person.[106]

The first South African advocate seems to have been admitted to practice by the Governor and Council of Policy 36 years after the landing by Van Riebeeck in 1652, and the next one in 1706.[107] These first practitioners were guided by the position in the Netherlands, which operated on the basis of a divided profession but were part of a largely inquisitorial procedure.[108] We cannot be sure, but given the position in the Netherlands, it is likely that these early advocates had to have a doctor of laws degree, but received no legal training or examination as such.[109] Given the jurisdiction of the VOC, the first rules of conduct for legal practitioners were derived from a *placaat* in Van Diemen's Code (the 'Statutes of Batavia') of 1642.[110] Essentially this code stated that 'counsel were to lodge security against malpractice, plead bareheaded, and to refrain from fees, verbose pleadings, chasing clients and taking on an excess of work'. In 1781, similar but more detailed rules were framed 'after complaint by the *Raad van Justitie* of "*onkundigheid* [ignorance] *en nonchalance*" of practitioners'.[111] It is important at this point to note the history, methodology and intellectual tradition of Roman-Dutch procedural law and style that influenced the practice of advocates in this time.[112] Based on the continental procedural system (which was mainly inquisitorial), one cannot identify neutral partisanship as this point. This was to change with the influence of the next coloniser, the British.[113]

The British first occupied the Cape in 1795 in order to prevent Napoleon from seizing the Cape for France.[114] During this occupation (1795-1803) the British made various changes to the

[106] Hahlo & Kahn *The Union of South Africa* 201. See also C Graham Botha 'The early inferior courts of justice at the Cape' (1921) *SALJ* 406.
[107] J Gauntlett 'The rule of law and an independent legal profession: A South African perspective' (2010) *Advocate* December (2010) 55. See also Sachs *Justice in South Africa* 19, and HJ Erasmus 'The beginnings of a mixed system or, advocates at the Cape during the early nineteenth century: 1828-1850' (2015) 21 *Fundamina* 219.
[108] JW Wessels *History of Roman-Dutch Law* (1908) 191.
[109] Erasmus 2015 *Fundamina* 221, and Hahlo & Kahn *The Union of South Africa* 202.
[110] Antonio van Diemen was the then Governor-General of Batavia. See Hahlo & Kahn *The Union of South Africa* 15.
[111] Van Zyl records that these subsequent rules were never officially passed, but were generally complied with and considered binding. See JH van Zyl 'The Batavian and Cape Placaaten' (1907) 24 *SALJ* 132, 241 & 366; (1908) 25 *SALJ* 4, 128 & 246.
[112] See HJ Erasmus 'The interaction of substantive law and procedure' in R Zimmerman & D Visser *Southern Cross: Civil Law and Common Law in South Africa* (1996) 141 at 148 who refers to AT von Mehren 'The significance for procedural practice and theory of the concentrated trial: Comparative remarks' in *Europaisches Recgtsdenken in Geschichte und Gegenwart: Festchrift fur Helmut Coing* (1982) vol II 361-71.
[113] Erasmus in Zimmerman & Visser *Southern Cross* 150.
[114] Hahlo & Kahn *The Union of South Africa* 5.

administration of justice, but did not change the position of legal practitioners at this point.[115] There was a brief interlude of 3 years when the British returned the colony to the Batavian Republic (1803-1806). In this time, noting the 'sorry state' of the legal system, Commissioner-General de Mist sought to regulate the admission of legal practitioners: these regulations included a requirement to pass an examination set by the court's commissioners, while advocates had to have graduated in law in a Dutch university.[116]

The regulation and role of legal practitioners operating in this time differed in that account has to be taken of those legal practitioners operating in the Cape Colony, but also legal practitioners who practised in the newly formed republics in the interior of South Africa, and in Natal (as a separate District of the Cape Colony, annexed in 1845).[117] Fagan notes that there is little in the record that followed to suggest that the lawyer's role in the republics differed markedly from the Cape Colony where 'British notions of justice' continued to be applied. If anything, the republics main goals were to conserve Dutch/Afrikaans values and traditions.[118]

### *2.4.1 Cape Colony*

The material about legal practitioners in the Cape Colony, where the literature is the most extensive, makes it clear that the approach to lawyering and perceived role of lawyering had different origins for the different divisions of the profession. The advocates' profession was dominated by British legal traditions, whereas attorneys were less so. Another type of legal advisor existed, named law agents. There is very little written about them except to say that they were admitted by magistrates' courts simply on payment of a 10 pound fee, and their

[115] In the English case of *Campbell v Hall* (1774) 1 Cowp 204 at 209, 98 ER 1045 at 1047, the court found that, in the colonies, the British colonial authorities should maintain the legal status quo subject to incremental changes.
[116] Article 130 of the *Provisionele Instructie van den Raad van Justitie aan de Kaap de Goede Hoop* (1803). See, further, Hahlo & Kahn *The Union of South Africa* 203-204; GG *Visagie Regspleging en Reg aan die Kaap van 1652 tot 1806* (1969). See also Fagan in Zimmerman & Visser *Southern Cross* 47.
[117] The republics were formed when the Cape was formally ceded to Great Britain in terms of the Convention of London in 1814. White Afrikaners, in the main, trekked into the interior in the 1830s in an attempt to get away from British government, British taxes, the emancipation of slaves, and British notions of justice. See L Berat (ed) *Thompson's History of South Africa* 4 ed (2014) 52; Hahlo & Kahn *South African legal system* (1991) 570; and Hahlo & Kahn *Union of South Africa* 5.
[117] Fagan, relying on comments made by Piet Retief in a manifesto published in the *Graham's Town Journal,* opines that it is the emancipation of slaves that played a leading, if not the leading, role in the trekkers wanting to leave the Cape colony. See Fagan in Zimmerman & Visser *Southern Cross* 54.
[117] Sachs *Justice in South Africa* 68.
[118] Fagan in Zimmerman & Visser *Southern Cross* 54.

presence was deemed necessary due to the absence of officially qualified attorneys in many country districts.[119]

Before 1827 (when the first Charter of Justice was promulgated), the advocates in the Cape Colony had to fulfil the requirements set out by De Mist, specifically that of obtaining a law degree from a Dutch university. This was due to the established practice of the British colonisers that laws of a conquered country, if suitably 'civilised', remained in force until the conqueror of that country altered them.[120] Given that legal practitioners' training was in the Netherlands, it is likely that they followed the continental inquisitorial method, which entailed a much more disinterested, passive legal representative.[121]

After the first Charter of Justice, however, the advocate's profession in the Cape became distinctly British in its culture and operation.[122] This was, in the main, due to the first Charter of Justice. While it provided for the continued practice of those advocates admitted under De Mist's regulation of advocates,[123] it provided for admission of those who were already admitted as

> 'barristers in England or Ireland or Advocates in the Court of Sessions of Scotland, or to the Degree of Doctor of Laws at Our Universities of Oxford, Cambridge, or Dublin'.[124]

These advocates were to practice in the new Cape Supreme Court, which replaced the *Raad van Justitie*, and which was presided over by four full-time judges imported from Britain.[125]

---

[119] Hahlo & Kahn *The Union of South Africa* 220. However, it is noted that their numbers declined from 1885 and further admission of law agents ended in 1896.

[120] Thomas 2008 *Fundamina* 134; Bennett *Customary law* (2004) 35 esp fn 4; De Vos *Regsgeskiedenis* (1992) 243; Hahlo & Kahn *South African legal system* (1991) 575; De Wet *Ou skrywers in perspektief* (1988) 29-30; Hahlo & Kahn *Union of South Africa* 17. For the origin of this rule, see *Calvin's Case* (1572-1616) 7 Co rep 1a, 77 ER 377 at 17B, 398.

[121] Harris *et al Law of the European Convention on Human Rights* (2005) 165. Erasmus lists some of those who graduated at Dutch universities and practiced as advocates in the Cape, all graduates of Dutch universities. Notably, one of them, being Hendrik Cloete not only took his LLD at Leiden in 1811 under Van der Keessel, but was also called to the Bar by Lincoln's Inn in 1812. He was later a Natal judge (1846-1855) and a puisne judge in the Cape (1855-1866). See Erasmus 2015 *Fundamina* 221.

[122] Erasmus (1996) notes that the Charters of Justice entailed a fundamental change in the nature of legal representation at 148-50. Hahlo & Kahn *The Union of South Africa* 205 records that the first Charter of Justice was preceded by a damning report on the administration of justice in South Africa by Henry Ellis, then Deputy Colonial Secretary in 1821. He spoke particularly of 'exhorbitant legal charges' charged by the lawyers at the time.

[123] Section 18 of the first Charter of Justice.

[124] Section 17 of the first Charter of Justice. However, the Charter of Justice did preserve the admission of those who had practised as advocates in the former Court of Justice, see Erasmus 2015 *Fundamina* 224.

[125] In time, it was reduced to three judges. See SD Girvin 'The establishment of the Supreme Court of the Cape of Good Hope and its history under the Chief Justiceship of Sir John: I' (1992) 109 *SALJ* 293 ff. and its second part in (1992) 109 *SALJ* 652ff.

As a result, many aspirant advocates went to the Inns of Court in London to be trained before returning back to the colony.[126] In fact, all but two advocates (out of thirty who had been admitted after 1828) had qualified by virtue of having been called to the Bar either in London, Edinburgh or Dublin.[127] As a result, the Cape Bar was small, elitist and strongly influenced by British styles, traditions[128] and legal philosophy. In particular, these advocates were strongly influenced by legal positivism,[129] a philosophy to which I will revert later on in the chapter. A tradition that was also imported from Britain was the idea of lawyer zeal, expressed in the now-famous statement of Lord Brougham defending Queen Caroline against George VI's permission for divorce:

> 'An advocate, by the sacred duty that he owes his client, knows in the discharge of that office but one person in the client and none other. To save that client by all expedient means, to protect that client at all hazards and costs, to all other others, and among others to himself, is the highest and most unquestioned of his duties; and he must not regard the alarm, the suffering, the torment, the destruction which he may bring upon any other. Nay, separating even the duties of a patriot from those of an advocate, and casting them, if need be, to the wind, he must go on reckless of the consequences, if his fate it should unhappily be to involve his country in confusion of his client's protection.'[130]

It is inevitable that South African advocates would have been influenced by the zeal that advocates would be expected to display on behalf of their clients in Britain. Other commentaries talked about the need for zeal to be as 'warm as [their] heart's blood',[131] and the need for legal practitioners 'to exert every faculty and privilege and power in order that [they] maintain [their] clients right'.[132] Given their training in London, Edinburgh and Dublin, it is

---

[126] Hahlo & Kahn *The South African Legal System* 20.
[127] Sachs *Justice in South Africa* 46.
[128] Ibid. Van der Riet presciently comments on one such tradition, being that every Queen's Counsel had to have a junior (a practice followed in South Africa until the Competition Authority found it to amount to anti-competitive conduct): 'I have always found the English practice something of an anomaly, leaving his junior to hold the fort, with sometime shattering results for the junior … [S]uch situation … is ridiculous, and hardly in the interests of the client'. See EF van der Riet *Favoured by Fortune* (self-published and undated) 71-72.
[129] I Kroeze 'Legal positivism' in C Roederer & D Moellendorf (eds) *Jurisprudence* (2006) 62-83.
[130] Quoted *inter alia* in S Rogers 'The ethics of advocacy' (1899) 15 *Law Quarterly Review* 2. Nicolson & Webb recognise that this 'melodramatic piece of rhetoric was probably intended as a "menace" to George VI' (ie used for political ends), a view which Brougham himself admitted to in 1859. Notwithstanding, it is generally accepted as the predominant role of the advocate then and now. See D Nicolson & J Webb *Professional Legal Ethics: Critical Interrogations* (1999) 162. See also G Robertson *The Tyrannicide Brief: The Story of the Man who sent Charles I to the Scaffold* (2005) for a fascinating account of the barrister John Cooke's prosecution of Charles I in the 1600s and its usefulness in assessing the challenges in the lawyering role in contemporary times.
[131] *Queen v O'Connell* (1844) 7 Ir LR 261, 312.
[132] *Kennedy v Broun* (1863) 13 CB(NS) 677, 737-8. See in general, S Landman 'The rise of the contentious spirit: Adversary procedure in eighteenth century England' (1989-1990) 75 *Cornell Law Review* 496 at 532, J Beattie 'Scales of justice: Defense counsel and the English criminal trial in the eighteenth and nineteenth centuries' (1991)

inevitable that these early advocates would have been influenced by the type of zeal displayed by their brethren overseas. It is inevitable that they would have also adopted other traditions such as the so-called cab-rank rule,[133] a rule which is one of the strongest expressions of neutral partisanship,[134] being: advocates are not simply entitled, but required to represent clients irrespective of moral considerations.[135]

In contrast to advocates, there is hardly any evidence of the role of attorneys at this time. All emphasis was put on the advocates, specifically in the Cape Colony. However, this trend started to change with the Charters of Justice,[136] which imposed, inter alia, admission requirements for attorneys.[137] The Charters required that prospective attorneys had to serve five years' apprenticeship as articled clerks in order to practice.[138] However, the Charters exempted persons qualified as solicitors in England, Ireland and Scotland from this requirement: allowing them, in effect, to practice automatically.[139] The difference in routes to admission means that the Cape side-bar (viz attorneys) – despite the above exemption – were far less affected by English methods and traditions than advocates. The location of these attorneys also meant that they operated differently. Advocates were located in Cape Town while attorneys featured 'in nearly every town, village and hamlet'.[140] The attorneys dealt predominately with land: acting as auctioneers and estate agents in addition to negotiating and drafting sale agreements with little regulation or oversight.[141]

---

9 *Law and History Review* 221 at 239, and T Smith 'Zealous advocates: Historical foundations of the adversarial criminal defence lawyer' (2012) 2 *Law, Crime and History* 1.

[133] Humphries mentions an early statement of the rule issuing from the Scottish Court of Session in 1532 as follows: 'No advocate without very good cause shall refuse to act for any person tendering a reasonable fee, under pain of deprivation of his office of advocate'. The defence of Tom Paine by Lord Erskine is also commonly referred to as one of the earliest statements of this rule (*R v Paine* (1792) 22 State Trials 412). See M Humphries 'Past and Present and Future' (2009) *Law Society Gazette,* available at http://www.lawgazette.co.uk/53308.article.

[134] Nicolson & Webb *Professional Legal Ethics* 165.

[135] Ibid. The cab rank rule is currently expressed in paras 601 and 602 of the English and Wales Bar Standard Board's Code of Conduct (2012), available at https://www.barstandardsboard.org.uk/regulatory-requirements/bsb-handbook/ and in the General Council of the Bar of South Africa's Uniform Rules of Professional Conduct (2012) at paras 2.1 and 3.1, available at http://www.sabar.co.za/GCB-UniformRules-of-Ethics-updated-July2012.pdf. The cab-rank rule is codified in the current code of conduct at para 26.

[136] First Charter of Justice of 1827 and the Second Charter of Justice of 1832.

[137] D Pont 'Die opleiding van die juris in Suid-Afrika' 1961 *Acta Juridica* 58 at 62. Hahlo & Kahn *The Union of South Africa* 206;

[138] Set out more particularly in the Rule of Court 149, promulgated on 4 Sept 1829.

[139] Sachs *Justice in South Africa* 49.

[140] Ibid.

[141] Sachs refers to these attorneys as men 'of the veld' in *Justice in South Africa* 50 who, according to various reports in the *Cape Law Journal* (as reported by Hahlo & Kahn) were inclined to occasionally relax their ethics '*to meet competition coming from law agents, estate agents and trust companies'.* See Hahlo & Kahn *The Union of South Africa* 219 and the particular reports in the *Cape Law Journal* at (1899) 16 *Cape Law Journal* 242; (1900) 17 *Cape Law Journal* 91; and (1903) *Cape Law Journal* 258.

[141] Sachs *Justice in South Africa* 50.

In 1883, shortly after the formation of the Incorporated Law Society of the Cape of Good Hope,[142] law agents were no longer admitted into practice;[143] a move that the society described as being due to a 'lack of ethics' of law agents, whom attorneys at the time called 'adventurers'.[144] While it is beyond the scope of this thesis, this raises the interesting question as to whether this move was motivated by a true concern for ethics, or simply replicated the suppression of competition by US lawyers at the end of the 1800s.[145]

### *2.4.2 Natal and the Voortrekker republics: the Orange Free State Republic & the Zuid-Afrikaansche Republiek (ZAR)*

The British influence expanded around the coast of Southern Africa and Natal was annexed by the British in the early 1840s. What of the legal profession in this colony? It is well known that Natal was the only colony to endorse a dual practice for lawyer: advocates could function as attorneys and vice versa, a fact that set the Natal Bar and Side-Bar apart, and determined its essential character.[146] As with the Cape Colony, the Natal Bar was open to English and Irish barristers, and Scottish and Cape advocates.[147] Because of a lack of attorneys in the colony, rules for admission were very basic until the establishment of the Natal Supreme Court in the 1860s.[148] As a result, commentators suggested that the standard of the profession was 'low'[149] and 'limiting in quality and expertise'.[150] Towards the end of the 1800s, the admission requirements were increased[151] and the Incorporated Law Society of Natal was established shortly thereafter.[152]

---

[142] In terms of the Incorporated Law Society Act 27 of 1883.
[143] Hahlo & Kahn *The South African Legal System* 248; and J Church 'Attorneys, Notaries and Conveyancers ' in WA Joubert (ed) *The Law of South Africa* 2 ed (2007) para 149. See Act 27 of 1883 in which the Society was entrusted with regulating the uniform practice, discipline and training.
[144] Hahlo & Kahn *The Union of South Africa The Union of South Africa* 220.
[145] R Gordon '"The ideal and the actual in the law": Fantasies and practices of New York City lawyers, 1870-1910' in GW Gawalt (ed) The New High Priests: Lawyers in Post-Civil War America (1984) 51.
[146] P Spiller *A History of the District and Supreme Courts of Natal: 1846-1910* (1986) 53. See in general *Ex parte Stuart, Ex parte Geerdts* 1936 AD 418; Hahlo & Kahn (1960) 224-225. This practice came to an end in 1932, see Wildenboer 2010 *Fundamina* 218.
[147] Section 15 of Ordinance 14 of 1845 (C); s 16 of Law 10 of 1857; and s 71 of Act 39 of 1896.
[148] These admission rules were set out in an 1845 ordinance which provided that any attorneys of the District Courts could act as advocates. In turn, attorneys were to be drawn from UK solicitors and Cape attorneys or, from 'persons of good fame and credit within Natal', a reference to the possibility that one could become an attorney with no legal knowledge or training whatsoever. After the establishment of the Supreme Court, its rules (the Rules of Court of 7 April 1863) allowed for admission on the basis of having attended the sittings of the Supreme Court for a prescribed period of time. Spiller *A History of the District and Supreme Courts of Natal* 53-54.
[149] Hahlo & Kahn *The Union of South Africa* 225.
[150] Spiller *A History of the District and Supreme Courts of Natal* 56.
[151] Ibid 57-61.
[152] Act 10 of 1907 (Natal).

Meanwhile, further colonial expansion into the interior of South Africa resulted in the establishment of the two Voortrekker republics: the Orange Free State and the Zuid-Afrikaansche Republiek (ZAR).[153]. There is not much material on the type of role adopted by legal practitioners in these territories at this time. However, sources indicate that there was a shortage of people with legal qualifications.[154]

In the Orange Free State, it appears that rules developed over time to allow persons to practise if they had certain qualifications,[155] or completed certain examinations.[156] There were also rules to allow automatic recognition[157] to practice. Two law societies were set up towards the end of the century: first in 1885 and then in 1903. While the rules had allowed dual practice for some time in the republic, this ended in 1903.[158]

In the ZAR, rules also developed over time for legal practitioners practising there.[159] Anyone purporting to act as a *procureur* (attorney) had to acquire an *acte van toelating* (admission) from the Executive Council. A person had to be a member of the *Nederduitsche Gereformeerde Gemeente* (the Dutch Reformed Church)[160] and show proof of 'ability', without defining what ability referred to. Whilst those appearing without being properly admitted were subject to a hefty fine, so-called 'law agents' could appear in the lower courts by acquiring a license from a *landdrost.* In order to become a 'law agent', one had to be of good character and pass an examination.[161] As with the Cape Colony and the Orange Free State, the role of law agents gradually diminished over time.[162]

Again, there is very little indication as to the role adopted by legal practitioners in the ZAR. Even if there is no indication as to their approach, there is a suggestion in the literature that legal practitioners enjoyed a particularly bad reputation, which Sir HR Haggard famously

[153] PJ Thomas 'Harmonising the law in a multilingual environment with different legal systems: Lessons to be drawn from the legal history of South Africa' (2008) 14 *Fundamina* 133 at 139.
[154] Hahlo & Kahn *The Union of South Africa* 245.
[155] For example, those with a doctor of law from Holland. Ibid.
[156] Applicants had to pass an exam conducted by a *landdrost* and one or more attorneys. Ibid.
[157] Advocates and attorneys practising in the Cape Colony were automatically admitted. Ibid.
[158] In terms of Ordinance 9 of 1903.
[159] Bijlage No 3 to the 1858 Constitution, as approved by the Volksraad 1859-09-20 as recorded by Wildenboer 2011 *De Jure* 342.
[160] This requirement was later relaxed in 1876 to include membership of any P*rotestantsche* church.
[161] Art 1 of Law 1 of 1874. See *Van Diggelen v Wepener* reported in (1894) 11 *Cape LJ* 218-22 which discusses prescription against fees of a law agent.
[162] Church in Joubert (ed) *LAWSA* para 149. Hahlo & Kahn *The Union of South Africa* 240.

captured in his autobiography.[163] In his position as the registrar of the Transvaal Supreme Court, he recalls the habitual overcharging of clients by their attorneys, and in some cases, the reported collusion with fellow attorneys in an attempt to increase costs of suit.[164] Corder notes in turn that towards the end of the ZAR republic, the struggle between the executive and the judiciary in the ZAR gave legal practitioners practising there an opportunity to consider their role – particularly in relation to government and society as a whole. This occurred when its Chief Justice (Kotze CJ) attempted to declare invalid a particular legislative procedure used by the ZAR parliament (the 'Volksraad').[165] Chief Justice Kotze was dismissed by President Kruger (who associated this attempted testing right with 'the Devil's contest with divine authority'). Whether legal practitioners in fact used the opportunity to consider their role is a matter for conjecture,[166] but in the light of the actions of legal practitioners to follow, it is doubtful this moment caused legal practitioners much pause for thought, except to criticise Kotze's attempts to use foreign court practice to do so.[167] This response ties in with Zitzke's argument (mentioned above) that legal practitioners' obsession with the origin of the law deflected their attention from much more fundamental matters, such as justice.[168] This – as I will argue later – took on a different focus in the apartheid years.

[163] Hahlo & Kahn *The Union of South Africa* 231 and Wildenboer 2011 *De Jure* 339 at 339. See Haggard (quoted by Wildenboer at 340) who remembered lawyers as 'not the most eminent of their tribe', who had come to the ZAR because of 'difficulties that had attended them in other lands' and that not only were they 'under qualified' but they were 'infamous for overcharging'. See RH Haggard *The Days of My Life: An Autobiography* (1926) 114. See also O Rogers *Lawyers in Turmoil: The Johannesburg Conspiracy of 1895* (2020) for an account of the involvement of lawyers in the Jamieson Raid and its aftermath.

[164] Haggard reminisces: 'I remember that in one case, a very important divorce action which occupied the court for more than a week, the petition was dismissed not because the adultery was not proved but on the ground of collusion. Of this collusion the parties were innocent, but the evidence showed that the petitioner's solicitor had actually drafted some of the pleas for the defendant's solicitor and in other ways had been the source of the said collusion, thus causing his client to lose the case'. See Haggard (1926) chap 6 available at https://ebooks.adelaide.edu.au/h/haggard/h_rider/days/chapter6.html. Wildenboer, in her work on the legal profession in the ZAR (Wildenboer 2011 *De Jure*), contrasted Haggard's views with the Chief Justice Kotze's 'pleasant recollections' in his early experiences on the Bench of good service and loyalty 'of these old practitioners. In her work, she prefers the evidence of Kotze above Haggard, given the latter's lack of legal qualification. Whether this is a justified distinction is questionable – Kotze as Chief Justice would not have been party to the taxing of costs, and could only speak to his interaction in court with practitioners rather than the daily interaction with clients and bills.

[165] *Brown v Leyds NO* (1897) 4 Off Rep 17. See LM Thompson 'Constitutionalism in the South African Republics' (1954) *South African Law Review* 57-73.

[166] As Corder puts it in Corder *Judges at Work* 8.

[167] See Dugard *Human Rights* 22-24 for a record of some of the criticism against Kotze at the time.

[168] Zitzke 2017 *Fundamina* 185.

### *2.4.3 After the South African War and the Union of SA*

After the South African War was concluded in 1902 in favour of the British, SA consisted of four British colonies – the Cape, Natal, the Transvaal and the Orange Free State. At this time, the Incorporated Law Society of the Transvaal was established.[169]

Chanock notes that, particularly in the reconstruction of the Transvaal province (viz the old ZAR), there was an active attempt to remake the public and legal institutions of the state. This, Chanock suggests, was in an attempt to project a powerful generalised image that the state (which the British had just defeated) had been corrupt in all of its public practices, including the practices of the legal profession – a view that Haggard attested to in relation to the abuse of billing practices earlier. The nature of legal practice changed with the rapid growth of the gold-mining industry and a new Supreme Court bench had to preside over 'an energetic policing at the limits of professionalism in the free-wheeling commercial life of the Rand'.[170] With this growth in commerce, the legal profession began to act collectively in the Union for the first time. They formed societies and associations which sought to increase requirements for entry into the profession, and to influence what practices within the profession should be considered 'unprofessional'.[171]

The first case heard by the newly formed Supreme Court after the SA War[172] reversed the established practice which permitted partnerships between attorneys and local agents and auctioneers, an arrangement which was particularly important to rural legal practitioners. However, the Supreme Court held that it was 'inconsistent with proper professional practices', formulating a test (still used today) for distinguishing between conduct by a practitioner that the court thought was intrinsically unprofessional, and conduct that may be unprofessional and undesirable 'only because of the contingent conditions of legal practice within which it occurs'.[173]

---

[169] Proc 18 of 1902 cited by Hahlo & Kahn *The Union of South Africa* 240.
[170] M Chanock 'The lawyer's self sketches on establishing a professional identity in South Africa: 1900-1925' in R McQueen and W Pue *Misplaced Traditions: British Lawyers, Colonial People* (1999) 61.
[171] See above for a description of when law societies were first begun in the Transvaal, Free State, Natal and the Cape.
[172] *Pienaar and Versfeld v Incorp Law Society* 1902 TS 11.
[173] In this regard, Innes JP asked: 'Has [the Court] the power to prohibit conduct on the part of practitioners, which though not in itself immoral or fraudulent, may yet in the opinion of the Court be inconsistent with the proper position of its practitioners and calculated, if generally allowed, to lead to abuses in the future?'. For a discussion of recent applications of this test, see TC Maloka 'Protecting the foundation and magnificent edifice of the legal profession: Reflections on *Thukwane v Law Society of the Northern Provinces* 2014 5 SA 513 (GP) and *Mtshabe v Law Society of the Cape of Good Hope'* (2015) 18 *PELJ* 2643.

However, after the War and through the Union period we see a trend in establishing law societies in which legal practitioners start asserting norms and standards on the profession, with the result of restricting practice to a few white men, with the contemporary phasing out of law agents in the rural areas.[174] Chanock argues convincingly that the increasingly strict regulation of legal practitioners and restrictions in practice (ostensibly in the name of higher ethical standards) led to the courts protecting the interests of the elite (in this case, the richer metropolitan attorneys) and being far less sympathetic to the interests of lesser members of the profession in both country and city.[175] In contemporary literature in the UK and the US, scholars have recognised and criticised this approach as increasing social inequality because of the fact that 'the social elite has greater access to the better-educated and professionalised legal personnel',[176] and that the maintaining of so-called 'professional standards' became a tool for the profession to restrict access to justice.[177] Thus, the South African legal profession fits into the picture painted by sociologists elsewhere of the legal profession generally using its power 'to preserve the status quo, favour those with high social status and pursue self-regulation for self-interest rather than for any so-called public interest'.[178] How this argument fits with the idea of neutral partisanship is dealt with in in chapter 3. At this juncture, it is sufficient to note that it did not appear that these associations actually improved standards of practice or access to justice.[179]

[174] The assertion of norms and standards occurred at both the educational and regulatory levels. In addition to the legislation governing admission, law faculties were created at recently constituted universities in South Africa. As a result, a law degree became a central component in the training of South African legal practitioners. See D Pont 'Die opleiding van die juris in Suid-Afrika' 1961 *Acta Juridica* 58.

[175] Chanock *The Making of South African Legal Culture* 223. See *Incorp Law Society v de Jong* 1904 TS 283.

[176] SJ Levine & RG Pearce 'Rethinking the legal reform agenda: Will raising the standards for bar admission promote or undermine democracy, human rights, and rule of law' *Fordham Law Review* 77 (2009) 1635 at 1635 fn 1.

[177] Rhode was a leading critic of strict American rules against unauthorised practice of law and described the detrimental effect these regulations have had on access to justice. See DL Rhode 'The delivery of legal services by non-lawyers' (1990) 4 *Georgetown Journal of Legal Ethics* 209 and DL Rhode 'Professionalism in perspective: alternative approaches to non-lawyer practice' (1986) 22 *New York Law Review of Law and Social Change* 701.

[178] H Kruuse & P Genty 'The state's role in the regulation and provision of legal services in South African and the United States: Supporting, nudging or interfering?' (2018) 42 *Fordham International Law Journal* 373 at 374. For an overview of this argument generally, see LM Friedman 'Lawyers in Cross-Cultural Perspective' in RL Abel & PSC Lewis (eds) *Lawyers In Society: Comparative Theories* (1989) 1 at 20-21.

[179] Together with Meierhenrich argument about the legal profession's concern with 'formal rational law' (see discussion in 2.2, it appears that there was a general lack of care or attention paid to what Meierhenrich calls the disenfranchised majority with its 'informal irrational law'.

## 2.5 1910: THE UNION AND THE LEGAL PROFESSION (STATE-MAKING)

### *2.5.1 The Union of SA*

Following deliberation at a national convention, the South Africa Act of 1909 established the Union of South Africa, comprising four provinces equating to the former colonial territories. The Act provided for a single Supreme Court, consisting of a number of provincial and local divisions, and the first Chief Justice was Sir Henry (later Lord) de Villiers, the long-serving Chief Justice of the Cape Colony. At this stage, the Act made no mention of the professional requirements for legal representatives except to preserve the status quo of attorneys and advocates practising in each of the provinces.

Chanock remarks that the features of the SA legal profession in the early 1900s were recognisable 'from any study of lawyers' worldwide, albeit with the addition of the context of white minority rule over a majority black population.[180] Chanock remarks that the legal profession espoused a formalist approach to the law, expressed a distaste for women at the bar or side-bar,[181] and also black persons.[182] It appears that the profession continued its struggle for status, income and increasing competition, with rare exceptions. In terms of legal practitioners' daily practice, it appears that the client's instructions, irrespective of legal necessity, carried the day, except if the client was poor, or when a lawyer's own benefit took precedence.[183] Two perspectives from either ends of a continuum of legal practice suffice:

---

[180] Chanock *The Making of SA Legal Culture* 239.

[181] At provincial and appellate levels in the 1900s, the courts refused to admit women to the profession. See *Schlesin v Incorporated Law Society* 1909 TS 363 and *Incorporated Law Society v Wookey* 1912 AD 623. For some interesting views on *why* women were deemed unsuitable for legal practice, see M de Villiers 'Women in the legal profession' (1918) 35 *SALJ* 289.For a historical overview of women in the SA profession, see K Blum 'Portia today: No need for "drag"' 1990 (April) *Consultus* 12 and P Bracher 'The slow rise of women in the legal profession 2020 (Sept) *De Rebus* 14.

[182] While there was nothing prohibiting black persons from practice at this time, there were – in reality – many informal barriers standing in the way of practice. The first black advocate in the Cape Colony was a Trinidadian, Henry Sylvester Williams, in 1903. He returned to his erstwhile practice in England in 1905 finding that clients, briefs and colleagues were sparse. See T Ngcukaitobi *The Land is Ours: Black Lawyers and the Birth of Constitutionalism in South Africa* (2018) 38ff. For insight into the type of thinking at the time, see *Magena v Law Society* 1910 TPD 309 where the Law Society opposed the admission of Magena, a black South African, on the basis that, as an African he was unlikely to attract legal work and, in addition, his presence would encourage litigation between 'natives', which was then 'against government policy'. The court rejected these arguments and Magena was admitted. For a discussion of this time, see Chanock *The Making of SA Legal Culture* 227.

[183] Van der Riet *Favoured by Fortune* 93. Van der Riet recounts appearing in court against a counsel in what he terms 'over-zealous' representation in the cross-examination of a wife in a divorce case on the 'most unpleasant and immodest gambolling in their marital relations' which van der Riet comments 'for what purpose it was difficult to understand'.

(1) First, there was the perspective of sociologists and anthropologists, who claimed that legal practitioners in the first half of this century significantly contributed to the dispossession of black people of land in the rural areas. In particular, Murray[184] and Peires's[185] case studies of law agents and attorneys operating in the Eastern Cape and Eastern Orange Free State, respectively, set out a grim picture of legal practitioners as central agents in separating black people from their land and resources. Far from acting in their client's interests with zeal or hyperzeal, it appears that legal practitioners were acting in their own interests, which happened to coincide with the government's interests of oppressing black persons. The plot line of these cases of dispossession would usually start with a black owner of land approaching a lawyer to assist him in resolving his debt.[186] The lawyer would then set up a mortgage bond over the property. When, as was frequently the case, the black client could not pay, the land was lost.[187] This is a tale that could be told in any century in any country without any obvious indictment of wrong-doing on the part of the lawyer. However, and as the scholars point out, the problem lay in the fact that many (but not all) legal practitioners took up the opportunity to act as both representative and financier of the bond, leading to accusations of these 'cute lawyers' becoming 'successful farmers',[188] and with the law agents taking up the substantial opportunities for personal gain. Additionally, anthropologists (in the main) claimed at that time that any serious crimes committed by black persons were generally unprofitable for legal practitioners and, as a result, such clients were not assisted. Thus, while legal practitioners were keen to assist clients with bonds and transfers, they generally did not render assistance in criminal cases, or cases where personal gain was not involved.[189]

The story around land policies, law and legal practitioners described above appears equally applicable to the poor white people, with the exception that the latter were not the subject

[184] C Murray *Black Mountain: Land, Class & Power in the Eastern Orange Free State* (1992).
[185] J Peires 'The legend of Fenner Solomon' in B Bozzoli (ed) *Class, Community and Conflict: South African Perspectives* (1987) 65.
[186] In the early 1900s, black persons were allowed to own land in terms of various legislative arrangements.
[187] Further, there are instances where black clients thought they were renting out their land, only to find out later that they signed a sale agreement selling their land. In this it appears that there was a lack of proper communication and care between lawyers and clients – with verbatim transcripts of interviews with dispossessed landowners conveying the sense of a failure to explain to the client the ramifications of a bond over their property, let alone in the hands of their own lawyer. See for instance Murray *Black Mountain* at 290-292 which sets out the interview transcript with a Mr Ngakantzi. Murray's stated rationale for setting out the interview verbatim is to convey the sense of confusion, misunderstanding and lack of appreciation of the consequence of his instruction to his lawyer.
[188] WM MacMillan *Complex South Africa* (1930) 76.
[189] Murray points out the 'stupidity' of minimum fees where young advocates remaining idle and inexperienced while Africans and other poor people were deprived of proper defence in serious cases (except for those carrying the death penalty, where the State had to provide legal aid). See Murray *Black Mountain* 44.

to the added dimension of colour-obsessed officials and racial bias.[190] In a scathing attack on legal practitioners, the historian MacMillan criticised the economic and political role legal practitioners played in land policies in rural South Africa, accusing a considerable number of legal practitioners of being 'waxed fat on lapsed or lapsing mortgages'.[191] Murray calls the law agents of the time 'spiders at the heart of the web' of dispossession of poor landholders.[192] The Carnegie Commission (on 'the poor white problem') in 1932[193] accused the profession of cheating farmers and acting dishonestly, hence the derogatory term 'Boere verneukers' (ie cheaters of farmers) being applied to legal practitioners at the time. The Carnegie Commission set out that unbusinesslike farmers were abused or fleeced by 'unscrupulous lawyers',[194] indicating self-interest rather than neutral partisanship.

(2) On the other side of the continuum of legal practice is evidence that there were legal practitioners who were clearly moral activists, notwithstanding 'the political mood of the day'.[195] For example, WP Schreiner, defended the Zulu king Dinizulu despite Schreiner having to renounce his position as part of the Cape delegation selected to negotiate at the 1909 Convention (which set up the SA Union).[196] Instead, Schreiner undertook the defence of Dinizulu, who was charged with treason in Natal. Understanding Dinizulu's arraignment as being one of political revenge (arising from the Bambata rebellion of 1906), Schreiner felt that the trial was a 'persecuting political trial' and he needed to represent Dinizulu in an effort to maintain the 'natives' trust in the impartiality of 'white man's justice'.[197] Dinizulu was eventually only found guilty of three of the twenty-three counts of treason, though Schreiner had to navigate many disturbing irregularities in the pre-trial stage.[198]

---

[190] Basner *Am I an African?* 19.
[191] Macmillian *Complex South Africa* 76.
[192] Murray *Black Mountain* 44.
[193] JFW Grosskopf, RW Wilcocks, EG Malherbe, WA Murray and JR Albertyn *The Poor White Problem in South Africa. Report of the Carnegie Commission* (1932).
[194] Ibid 42.
[195] Dugard *Human Rights* 242. Dugard lists a number of advocates who acted as counsel in these matters, such as Sir John Wessels, Gey van Pittius, FET Krause, Tielman Roos, PU Fischer,O Pirow and Cillie among others.
[196] Recorded by EA Walker *WP Schreiner: A South African* (1937). Dugard *Human Rights* 251 and J Stuart *A History of the Zulu Rebellion, 1906, and of Dinizulu's Arrest, Trial and Expatriation* (1913).
[196] Walker *WP Schreiner* 288-300.
[197] Ibid.
[198] Dugard *Human Rights* 251 records these irregularities as involving limited access to defence counsel in Zululand to search for evidence, highly suspect handling of witnesses by the prosecution, restrictions of the interpreter to the case, and fears of bias on the part of the presiding magistrate.

An interesting issue in this time – given the assertion that neutral partisanship is necessary for the protection of 'individual dignity, autonomy, and equality'[199] – is how lawyering for black persons developed after 1910. There is evidence to suggest that, at the time, the overwhelmingly white legal profession displayed a particular type of parochialism towards the black local population, and that they were slow to assist accused black persons, and in some instances, showed blatant hostility to the black population.[200] By 1910, it appears that there were those lawyers (like Schreiner) who acted on behalf of black persons on political conviction alone, thus allowing their moral preferences to influence the cases they took on.[201] There were then a different group of lawyers who appeared to represent black persons conveniently for both political conviction and profit, given the general abhorrence of the law profession in this type of work.[202] Another group of lawyers then were described as 'touts and the drunken, dishonest, crew of broken down lawyers'[203] who dominated practice among black persons. However, much of the discourse on lawyers acting on behalf of black persons is hard to decipher because of the politics involved, the attempts to create a more aloof profession, and general lack of concern on how this affected access to justice. For example, it became a practice in Johannesburg for attorneys to 'tout' for business by employing black agents to attend court and advise black persons of the services of a white attorney who was willing to assist them.[204] While this practice had its advantages in providing access to justice (given the context of a racially-biased society), the court was strong in condemning the practice as objectionable. In one matter, for example, the court struck an attorney off the roll for this practice.[205] The attempt to strike other attorneys off the roll were not as successful, particularly when the court was able to recognise the difference between 'professional harassment' by the law society and misconduct justifying disciplinary proceedings.[206]

---

[199] Pannick as quoted by Nicolson & Webb *Professional Legal Ethics* 191.
[200] Spiller records some advocates in Natal as stating that 'Kafirs' (sic) were of no use and 'were not wanted in the colony' and it was said of a particular advocate that his 'intolerance of the Asiatic was only exceeded by his distrust of the Native'. See Spiller *A History of the District and Supreme Courts of Natal* 56.
[201] For example, Percy Bunting. Basner *Am I an African?* at 33 recalls Bunting's comment that he 'gave up music to study law, not to earn a better living but because he confused law with justice'.
[202] For example, Hyman Basner and Cecil Cowley. In terms of the latter, he was not highly regarded by his own profession: while he did an important job in creating access to justice for the ICU (Industrial Commercial Union), Bradford reports that lawsuits were 'astronomical' in cost, and fees were 'exorbitant', but, so one union member states, ' …he fought. Eh, that man he fought for the African people' (See H Bradford *A Taste of Freedom: The ICU in Rural South Africa, 1924-1930* (1988) 136).
[203] Basner *Am I an African?* 49-50.
[204] Chanock *The Making of South African Legal Culture* at 62-3. Basner *Am I an African?* 17-18.
[205] *Incorporated Law Society v Zimmerman* 1907 TS 637.
[206] *Transvaal Law Society v Basner* 1952, not reported, available in the archives at the University of the Witwatersrand, and as recorded in Basner (1993) at xvii.

During this time, the most untold story of all, but one that falls on the moral side of the spectrum, were those few black persons who managed to practice law, either in the Cape or in the Transvaal as these areas were then known. Many of these black practitioners were instrumental in setting up the political movements that would be instrumental in the fight for freedom against apartheid later in the century – these lawyers include Pixley ka Isaka Seme, Richard Msimang, George Montsioa and Ngcubu Poswayo.[207]

The picture of lawyering in this era is a difficult one to paint. Certainly, it appears that the professional societies were keen to maintain legal practitioners' status and prestige and may have improved the standard of lawyering to a certain extent. However, there is also evidence to suggest that these societies acted more like legal practitioners' unions than institutions formed for the public good. But this version of the legal profession again replicates general issues with legal professions across the commonwealth and the US. For example, in 1927, a practising lawyer commented that legal practitioners were the 'butt of uninformed and prejudicial criticism' and saw the problem as one of an 'overcrowded profession' where legal practitioners were seen to be 'on par' with general shopkeepers.[208] So the answer for this particular lawyer was to limit entrants to the profession by, inter alia, increasing the standards of the profession.[209] Together with the prejudices of race and class, the South African legal profession could be characterised as being very similar to the legal profession in other countries in this period in its emphasis on gatekeeping in the interests of those who were already part of the profession – until apartheid cemented these prejudices into institutional form.

[207] Some of these lawyers were founding members of the South African Native National Congress as well the African National Congress that followed. See Ngcukaitobi *The Land is Ours* 205-208.
[208] SB Kitchin 'The lawyer's place in the Commonwealth' (1927) 44 *SALJ* 10.
[209] A Boon, J Flood & J Webb 'Postmodern Professions? The fragmentation of legal education and the legal profession' (2005) 32 *Journal of Law and Society* 473 at 474.

### *2.5.2 The first centralisation of regulation post-Union*

Attorneys began to be centrally regulated in 1934 in terms of the Attorneys, Notaries and Conveyancers Admission Act[210] although separate provincial law societies continued to operate with their own councils and professional rules.[211] To introduce a greater measure of uniformity to the profession, a central, co-ordinating body, the Association of Law Societies, was established in 1938.[212] The admission requirements in that Act were largely followed in the 1964 amendment[213] and then by a new Act in 1979.[214] This Act provided that, in order to be admitted to the profession as an attorney, one had to be 'fit and proper', be at least 21 years old, have completed an LLB degree, and have completed a two-year articles period.[215] The new Act provided that each provincial law society had the power to govern the standards of professional conduct in their province,[216] subject to the High Court retaining ultimate jurisdiction over the conduct of attorneys as officers of the court.

Legislation governing the admission of advocates was introduced in 1921,[217] which was later repealed by the Admission of Advocates Act.[218] This Act required an applicant to be 'fit and proper', be at least 21 years old, have the necessary qualifications, and be a South African citizen or a permanent resident.[219] While attorneys were regulated by statutory regulatory bodies, advocates were left to form their own voluntary association, the General Council of the Bar.[220] As was the case with the law societies, the General Council of the Bar was seen as the *custos morum* of the advocacy profession. Thus, despite its voluntary nature, it could bring applications before the court for the disbarment of any advocate.

---

[210] Act 23 of 1934.
[211] Ellis, Lamey & Kilbourn *The SA Legal Practitioner* 2-2.
[212] Van Dijkhorst & Church (2007) para 150; Ellis, Lamey & Kilbourn *The SA Legal Practitioner* 2-2.
[213] Act 62 of 1964. The Law Societies' Act 41 of 1975 followed in an attempt to co-ordinate regulation better .
[214] Attorney's Act 53 of 1979.
[215] This two-year article period could be shortened by practical legal training options. There were also certain residency requirements and the need to complete a practical examination.
[216] Section 58(f)-(g) of the Attorneys Act. This section repeated s 21 of the Law Societies' Act, which allowed each law society to make its rules as to conduct constituting unprofessional or dishonourable or conduct on the part of any practitioner. For a discussion of the different law societies' rules, see *Proxi Smart Services (Pty) Ltd v Law Society of South Africa* 2018 (5) SA 644 (GP) para 6.41ff.
[217] Act 19 of 1921.
[218] Act 74 of 1964.
[219] Section 3 of the Act.
[220] The GCB was formed in 1946 and is a confederation of the provincial and local bars. See https://www.sabar.co.za/.

## 2.6 1948-1994 APARTHEID

In 1948, rallying together under the shared ideological slogan of 'apartheid', an alliance of Afrikaner nationalist groupings came into power in South Africa.[221] Their election signalled the formalisation of discrimination that had been pervasive throughout the previous era. Apartheid, now legislated and put into policy, was articulated and defended in the language of 'separate development', but effectively entailed legislated white supremacy.[222]

Dyzenhaus roughly divides apartheid law into four 10-year periods: the 1950s, when the apartheid divide was legislated; the 1960s, when the apartheid security apparatus was legislated and consolidated; the 1970s, when ruthless use of force was licensed by security legislation, but when cracks in the apartheid ideology started to show;[223] and the 1980s, when attempts at maintaining the fractured system by force failed, and eventually where the system was ultimately destroyed.[224]

Direct references to neutral partisanship are hard to find in this time, but the formalism and legalism that dominated this period point to a role for legal practitioners who, for the main part, remained neutral and passive in the legal system, operating in the best interests of their clients. In a seminal work on the South African legal order in this time, Dugard's insights point to a particular brand of 'legal positivism' as the 'creed' of the South African legal profession.[225] Neutral partisanship fits well with positivist claims, which in turn fits in well with formalism. This formalism creates a space for the neutral partisan role to flourish in two ways.[226] First, it allows legal practitioners to escape responsibility for any injustice under the legal system, because of the lawyer's tendency to concentrate on the legal validity of a rule, rather than focus on her service to justice. Secondly, positivism tends to leave moral matters aside, much in the

[221] D Posel 'The meaning of apartheid before 1948: Conflicting interests and forces within the Afrikaner Nationalist Alliance' (1987) 14 *Journal of Southern African Studies* 123 at 123.
[222] Ibid 125.
[223] Frankel characterises the 1970s similarly in his book PH Frankel *Pretoria's Praetorians: Civil-Military Relations in South Africa* (1984) 31 where he states that the country moved into a 'garrison situation' where 'the use of physical force as a means of problem-solving ha[d] been popularised to the detriment of more persuasive and non-coercive techniques for managing social conflict'.
[224] D Dyzenhaus *Truth, Reconciliation and the Apartheid Legal Order* (1998) 129. It is also later in this period that the South African government formed 'Bantustans' or 'homelands' ostensibly as independent states for Africans, but in truth, an administrative mechanism to forcibly remove Africans from their land and their citizenship.
[225] J Dugard *Human Rights and the South African Legal Order* (1978) 44 & 373. It should be noted that recent research has averred that legal realists in the US distorted positivism and formalism to strengthen their case for change. See BZ Tamanaha *Beyond the Formalist-Realist Divide: The Politics of Judging* (2010).
[226] For the link between positivism and neutral partisanship, see C Arjona 'Amorality explained. Analysing the reasons that explain the standard conception of legal ethics' (2013) *Ramon Llull Journal of Applied Ethics* 51.

same way neutral partisanship asks legal practitioners to leave their morality outside of their professional engagement with the client.[227] Gordon summarises the effects of this view of law as follows:

> 'This constricted view of what law is allows lawyers to disclaim any responsibility for third parties and the public interest: The law as-it-is may be presumed to take those interests into account to the extent they need to be; and if it does not, that is a problem to be solved by changing the rules, not by lawyers.'[228]

Dugard made several important connections in this regard. He noted that legal practitioners 'acquiesced' to a legal system, and their neutral and passive attitude to it no doubt contributed to apartheid's continued existence.[229] Despite his focus on judges, Dugard's message applies to all legal practitioners: ostensible neutrality and passivity divorced legal practitioners from legal values (in this case, Dugard emphasised the Roman-Dutch principles of freedom and equality before the law),[230] and moral standards. Dugard's insights are extended by Corder[231] and Dyzenhaus's subsequent works. Through an analysis of judicial decisions, Dyzenhaus found that the majority of judges who adhered to this version of positivism inevitably promoted apartheid's designs, whether willingly or not.[232] This was found to be the case because of positivism's creed that moral considerations, questions of what the law ought to be, do not enter the inquiry into what the law is.[233]

---

[227] Simon makes this point in relation to US lawyers who, he suggests, generally adopt a positivistic view of the law in relation to ethics. See RW Gordon 'The radical conservatism of *The Practice of Justice*' (1999) 51 *Stanford Law Review* 919 at 923.

[228] Ibid.

[229] Dugard *Human Rights* 391-92. Dugard compares South African lawyers to the German lawyers in the 1930s who, he claims, raised no obstacles to the debasement of their legal system. For a more recent and nuanced account of the consequences of an 'ethos of quietism' among lawyers, see K Mcevoy 'What did the lawyers do during the 'war'? Neutrality, conflict and the culture of quietism' (2011) 74 *Modern Law Review* 350.

[230] Dugard *Human Rights* 71 & 393 finds support for his stance in the writings of the Dutch jurists Grotius and Voet, and quotes the latter (at 71) in this regard: 'A law has various requirements. In the first place indeed it ought to be just and reasonable – both in its matter, for it prescribes what is honourable and forbids what is base; and in its form, *for it preserves equality and binds citizens equally.'* My emphasis. For the original, see *Commentarius ad Pandectas* 1.3.5. Mureinik followed Dugard's ideas by utilising Dworkin's theory of adjudication in contending that the core of the South African legal system was still founded on certain fundamental values that promoted individual liberty and freedom. See E Mureinik 'Dworkin and apartheid' in H Corder (ed) *Law and Social Practice* (1988) 181 and E Mureinik 'Security and integrity' 1987 *Acta Juridica* 197.

[231] H Corder *Judges at Work* (1984). Corder's work focused on the judiciary from 1910 to 1950 and provides a more nuanced argument about the judiciary's so-called moral activism during this time. He argues that the judiciary at this time were firm supporters of the status quo and the political ideology of the ruling group. Dugard observes at 215 that this support meant that judges in this time did not show 'much concern for, or understanding of, the human consequences of the [oppressive] statutes'.

[232] D Dyzenhaus *Wicked Legal Systems: South African Law in the Perspective of Legal Philosophy* (1991).

[233]Cf S Ellman *In a Time of Trouble. Law and Liberty in South Africa's State of Emergency* (1992) who suggested that one cannot lay the blame for the apartheid system on positivism however construed. His argument is that

Apart from a few important texts, the pervasive method of lawyering in the apartheid period is gauged more from what was *not* written about, than what was written about. As discussed earlier, writers tended to focus on black-letter doctrinal law, legal issues prevalent to white people, and the 'formal' system of law. There are notable exceptions, and it is particularly from the texts on cause lawyering that we can infer the then prevailing approach of lawyering. Haysom's calls for legal practitioners to 'practice law democratically'[234] implied that this was not the prevalent mode of lawyering. Further, Haysom's call for legal practitioners to get involved in the 'unglamorous' and difficult work of serving the needs of the poor[235] implied that legal practitioners in his time, in the main, did not get involved in such activities. Indeed, he explicitly says so:

> 'Generally, lawyers are unwilling to devote the time, resources and specialisation required to deal with legal problems in the rural areas. … Professionals are removed from the needs of the poor… '[236]

As a result, the texts on public rights litigation and cause lawyering at the time can be seen as a foil to the prevailing method of lawyering: particularly by those who saw no cause to look into the morality of their clients ends.[237] Those legal practitioners operating within the civil service also pursued apartheid objectives dispassionately, displaying excessive zeal in ensuring the client's ends, no matter what the consequences.[238] The SA legal practitioner, in general,

---

positivism and its impact in SA was not uniform and, that positivism was sufficiently flexible to protect human rights. In a review of both books, Hersch suggests that the answer lies somewhere in between. She notes that '[i]f Dyzenhaus's account of judicial decision making is incomplete because it is too narrow, Ellman's is unsatisfactory because it is too wide-ranging'. See J Hersch 'Reviewed Work(s): *Hard Cases in Wicked Legal Systems South African Law in the Perspective of Legal Philosophy* by David Dyzenhaus; *In a Time of Trouble. Law and Liberty in South Africa's State of Emergency* by Stephen Ellman' (1993) 19 *Journal of Southern African Studies* 536 at 539.

[234] N Haysom 'Practising Law Democratically' In C Murray & C O'Regan (eds) *No Place to Rest: Forced Removals and the Law in South Africa* (1990) 106.

[235] Ibid 113 & 115. Haysom provides a good example of the 'difficulty' associated with representation of African clients: he points out the morass of legislation pertaining to the Bantustans and comments that this would mean that on any occasion, a lawyer would need to know the date which each homeland achieved the three stages of constitutional development and what legislation was applicable where, and whether the homeland was self-governing or independent.

[236] Ibid.

[237] Haysom in Murray & O'Regan (eds) *No Place to Rest* – his version of 'democratic lawyering' has many similarities to Golub's 'legal empowerment' alternative to prevailing legal practice orthodoxies. See S Golub 'The legal empowerment alternative' in Thomas Carothers (ed) *Promoting the Rule of Law Abroad: In Search of Knowledge* (2006) 161 at 163. Golub mentions that some of the salient features distinguishing this concept from the dominant discourse include the idea that, amongst others, attorneys support the poor as partner, instead of dominating them as proprietors of expertise.'

[238] See J Mugler *Measuring Justice: Quantitative Accountability and the National Prosecuting Authority in South Africa* (2019) 21ff. An example of this attitude described by Joel Joffe's (attorney for the defence in the Rivonia trial) is useful. Joffe describes Yutar's (the lead prosecutor) cross-examination of Alan Paton in the Rivonia Trial

found no reason to be concerned with access to justice. In fact, early on in this period, a commission considered whether 'natives' should have legal representation in court at all.[239] But even if the South African lawyer wanted to practise for the poor – as Haysom has already pointed out – considerable barriers would stand in her way.[240]

A curious, but not unusual, perspective in this time, is the general lack of debate on the role and approach of the attorney or advocate, in favour of a focus on the debate about the proper role of the judge. The legal profession and academia's preoccupation with judges gives some indication of the 'conscientiousness' of legal practitioners. One of the reasons why the focus was not on legal practitioners and rather on judges, is explained by Mureinik in an astute statement on the pervasive nature of lawyering:

> 'The judicial function of stating the law is important not only in itself, but also because a very significant part of legal practice apes it. If, say, we discover that in our country law affords no scope to justice, that tells us almost as much about the role of attorneys and advocates as it does about the role of judges. If we find that conscientious judges are so tightly constrained by the fetters of unjust laws as to destroy their capacity to do justice, and that they should therefore resign … We have discovered most of what we need to know to determine the moral duty of a conscientious legal practitioner. *If there is no point in being a conscientious judge, there is no point in being a conscientious advocate, because the arguments of a conscientious advocate are calculated to persuade only conscientious judges. Nor can there be any point in being a conscientious attorney, because an attorney is fettered as much as his brethren in the bar and on the bench.* And if there is no point in being a conscientious advocate or a conscientious academic lawyer, because the most important kind of legal research is addressed top conscientious judges and practitioners, and teaching is a worthless activity unless it is addressed to conscientious students; there can be no point in being a conscientious law student, because you would be preparing yourself for nothing.'[241]

---

as 'a degrading exhibition … But the police at least enjoyed it, they tittered gleefully as this honest man, of undeniable courage, was smeared and demeaned by Yutar.' (J Joffe *The Rivonia Story* (1999) 211).

[239]Mr Justice GG Hoexter *Commission of Inquiry into the Structure and Functioning of the Courts* (1983).

[240] Haysom in Murray & O'Regan (eds) *No Place to Rest* 115.

[241] E Mureinik 'Dworkin and Apartheid' in H Corder (ed) *Essays on Law and Social Practice in South Africa* (1988) 181 at 183. My emphasis. Dyzenhaus (influenced by the work of Cover) gives this focus on the judges' work a more theoretical element, arguing that a focus on judges was warranted since '[i]t is adjudication [by judges] that best manifests the tensions which arise out of [the] intrinsic relationship [between law and justice] when law is put in the service of injustice. For judges everywhere claim that their duty is not simply to administer the law, but to administer justice.' See Dyzenhaus *Truth, Reconciliation and the Apartheid Legal Order* 34 relying on insights by R Cover *Justice Accused: Antislavery and the Judicial Process* (1975).

### *2.6.1 Three contexts that were indicative of the state of justice in South Africa*

While there was this focus on the judiciary, there were a few important incidents and/or reports during this time involving lawyers. These incidents stand out as an indication of how lawyers saw their role in the legal system. I focus on a brief description of a few of these incidents to provide a sense of how the profession viewed their role:

- 1950s and 1960s: A comparison of the unsuccessful attempt of the Transvaal Law Society to strike Nelson Mandela from the roll of attorneys with the successful attempt of the Johannesburg Bar to strike Bram Fischer from the roll of advocates.

- 1970s: The conviction of a law professor, Barend van Nierkerk, for criticising the courts and legal practitioners for failing to consider justice.

- 1980s: Some of the findings of the Hoexter Commission into the structure and functioning of the court;[242] the emergence of the first 'official' textbook on legal ethics for attorneys;[243] and the increase in conferences and literature critical of apartheid by certain groups of legal practitioners following the two states of emergency declared by the apartheid government.[244]

#### *2.6.1.1 The attempts to strike Mandela & Fischer from the roll*

In the 1950s and 1960s, Nelson Mandela and Bram Fischer were practising as an attorney and advocate respectively.[245] The Transvaal Law Society and the Johannesburg Bar sought to remove these men from the roll. The Transvaal Law Society sought to remove Mandela essentially due to his part in the defiance campaign,[246] while the Johannesburg Bar sought to

---

[242] Mr Justice GG Hoexter *Commission of Inquiry into the Structure and Functioning of the Courts* Vols 1 & 2 (1983).

[243] EAL Lewis *Legal Ethics: A guide to Professional Conduct for South African Attorneys* (1982). For a description of texts related to ethics before and after Lewis, see M Robertson and H Kruuse 'Legal ethics education in South Africa: Possibilities, challenges and opportunities' (2016) 32 *SAJHR* 344.

[244] For example, N Haysom & C Plasket *Developments in Emergency Law* (1989); H Corder (ed) *Essays on Law and Social Practice in South Africa* (1988); A Rycroft *Race and the Law in South Africa* (1987). There were also interdisciplinary gatherings which contributed to the debates around the use and abuse of law. For example, see B Bozzoli (ed) *Class, Community and Conflict: South African Perspectives* (1987) and C Murray & C O'Regan (eds) *No Place to Rest: Forced Removals and the Law in South Africa* (1990), among others.

[245] Dyzenhaus *Truth, Reconciliation and the Apartheid Legal Order* 129 comments that Fischer's story 'is central to any account of the choices South African lawyers faced in apartheid'. For an overview of the striking off applications, see W le Roux 'Conscience against the law: Mahatma Gandhi, Nelson Mandela and Bram Fischer as practising lawyers during the struggle' (2001) 42 *Codicillus* 20.

[246] *Incorporated Law Society, Transvaal v Mandela* 1954 (3) SA 102 (T). He had been convicted previously in terms of s 11 (b) of the Suppression of Communism Act 44 of 1950 inter alia for his involvement in defiance campaign. Amongst other resolutions, in July 1951, the joint conference of the African National Congress and the

remove Fischer due his escaping the country when under bail conditions in the run up to a 'political' trial.[247]. As mentioned earlier, these professional associations were not as benign as they would have the public believe.[248] It is interesting to note (1) each court's reception of the two separate applications; and (2) the attitude of the professional body at the time.

In the application to remove Mandela from the roll, the court refused to strike him off, finding that his character was compatible with the fit and proper test set out in the then Attorney's Act, notwithstanding his 'breaking the law'. In other words, the court found that being 'fit and proper' was more than just a case of 'following the law'. This decision can be contrasted with the court's finding in the *Fischer* case. About 12 years had passed and, being in the second phase of the apartheid law period, the outcome of Fischer's case was different. It appeared that apartheid and the amoral stance it engendered appeared to cement itself in the courts. In the *Fischer* case, the court found that being 'fit and proper' was just that: it was about complete obedience to the law. Since Fischer had disobeyed the law, he was not fit and proper, and was struck from the roll. In terms of the attitudes of the professional bodies, it bears mentioning that both the law society and the Johannesburg Bar characterised their decision to bring a striking off application as one of 'simply following the law'. Both societies saw the oath of allegiance to the law of the land as being paramount, and any account of virtue or justice which countered that system was to be dispensed with.[249] A comparison of these cases is important as it shows up, as will be argued in the next chapter,[250] how neutral partisanship fosters moral disengagement which may indeed increase over time.

#### *2.6.1.2 The conviction of Professor Barend van Niekerk*

In the 1970s, Prof Barend van Niekerk, a law academic at Natal University, was convicted for contempt of court and with attempting to defeat or obstruct the ends of justice.[251] The source

South Indian African Congress resolved that: '[d]efiance of unjust laws should take the form of committing breaches of certain selected laws and regulations which are undemocratic, unjust, racially discriminatory and repugnant to the natural rights of men. Rather than submit to the unjust laws we should defy them deliberately and in an organised manner and be prepared to bear the penalties thereof.'

[247] *Society of Advocates of SA (Witwatersrand Division) v Fischer* 1966 (1) SA 133 (T). Mandela had been convicted in terms of the Suppression of Communism Act, and Fischer broke the conditions of his bail by fleeing the country.

[248] See fn 68 above, dealing with the politics of professionalism.

[249] Significantly, Fischer saw himself as betrayed by his own professional body when he wrote in a letter from exile: 'If … I have to be removed from the roll of practising advocates, the Minister himself and not the Bar Council should do the dirty work'. See S Clingman *Bram Fischer: Afrikaner-Revolutionary* (1998) 371.

[250] At 3.3.2.

[251] See *S v Van Niekerk* 1972 (3) SA 711 (A). He specifically commented that judges should refuse to accept any evidence procured in confinement since it was widely accepted that solitary confinement for a long period in and of itself constituted torture. These comments were made during a much publicised 'terrorism' case where the

of such conviction was a comment he had made at a public meeting to protest the death of a detainee held by the apartheid government under s 6 of the Terrorism Act.[252] The incident, and his subsequent conviction, attracted national and international attention.[253] At the time, Van Niekerk criticised SA legal practitioners by saying that they had 'done so very little' to mitigate the 'crudities' of apartheid law which they must have known to be 'an abdication of decency and justice'.[254] He went on to say:

> 'Surely we have reached the stage that we are no longer merely dealing with a nicety of jurisprudence but with the essential quality and survival of justice itself. *Surely also lawyers should realise that by remaining silent at the helm of their clinging cash registers they are not only perpetuating these palpable injustices but that they are also indeed also lending them the aura of respectability.*' [255]

In these comments, Van Niekerk criticised the legal profession, implying that South African legal practitioners were, by and large, impervious to the consequences of their actions. At the extreme, Van Niekerk called out these legal practitioners for taking advantage of the self-interest that could be obtained by seeing their role as separate from any moral considerations.

#### *2.6.1.3 The Hoexter Commission findings, the first legal ethics textbook, and an increase in critical conduct and literature*

In the early 1980s, the President of SA set up a Commission to consider the structure and functioning of the courts.[256] While the Commission focused on the number and jurisdiction of the courts, certain findings point to evidence of neutral partisanship in this time. The Commission mad these findings in the context of considering practices in the courts that impeded the administration of justice.[257] The Commission found that

---

detainees had been held in solitary confinement. As a result, both the court of first instance, and on appeal, found that such comments were designed to influence the court, and therefore an obstruction of justice. For a detailed discussion of this case, see Dugard *Human Rights* 293-302. See also Dyzenhaus *Truth, Reconciliation and the Apartheid Legal Order* 64-73.

[252] Act 86 of 1967.

[253] For an overview of this case, J Dugard 'Judges, academics and unjust laws: The Van Niekerk contempt case' (1972) 89 *South African Law Journal* 271.

[254] Dugard *Human Rights* 293-302. See also Dyzenhaus *Truth, Reconciliation and the Apartheid Legal Order* 64-73.

[255] *S v Van Niekerk* 716-17. For a discussion of the issues raised in this case, see Kentridge's Owen J Roberts Memorial Lecture, delivered 18 October 1979 at the University of Pennsylvania Law School. This lecture is published in Sydney Kentridge QC *Free Country: Selected Lectures and Talks* (2012) 1. See also Ellman's consideration of these issues in the final chapter of his book 'Lawyers against the Emergency' in S Ellman *In a Time of Trouble: Law and Liberty in South Africa's State of Emergency* (1992) 248.

[256] In terms of Proclamation R47 of 1981. See *Hoexter Commission* paras 1.1.2-1.1.3.

[257] The Commission's findings are reported under chapter 6 of the its final report, under the heading: 'Delays in the Administration of Justice'. See *Hoexter Commission* vii.

1) Practitioners resorted to interlocutory applications quite unnecessarily. They found that often this practice merely served to 'gain time improperly, to harass the opponent, or to force him under threat of rapidly mounting costs to an undesired settlement'.[258]

2) Practititioners who represented defendants lacking a valid defence exploited the long delays before trial at the expense of the plaintiff.[259]

3) Practitioners abused cross-examination in trial cases. In particular, the Commission found that there was an increasing tendency towards 'inordinate and improper' cross-examination in furtherance of the client's ends.[260]

This report indeed shows tactics indicative of a neutral partisanship approach at the time, given the focus on the client's ends while ostensibly complying with the technical requirements of the law. At the height of apartheid, and with the emergency laws having taken its stranglehold, Haysom argued in 1989 that the lessons of the past had given attorneys the opportunity to broaden their conception of their role 'ironically by revealing [its] limitations'.[261] This was then done in a series of workshop and conferences in the 1970s and 1980s, where lawyers and scholars from different disciplines began to investigate the roles of various players of the apartheid system. It was also at this time that various activist lawyer organisations were formed, notably Lawyers for Human Rights (LHR),[262] the Black Lawyers Association (BLA),[263] and the National Democratic Association of Democratic Lawyers (NADEL).[264] These movements all recognised that more needed to be done by legal professionals to promote justice in the country. Notwithstanding these movements, writing in 1988, Budlender wrote: 'For a lawyer concerned with the search for justice, South Africa does not present a promising picture'.[265] However, he ends the chapter with a more inspiring 'apparent paradox' that:

> '[t]here are today more "human rights" lawyers than ever before, there is a growing public interest movement; and organisations and individuals facing discrimination and repression turn frequently to lawyers for assistance.'[266]

[258] Hoexter Commission 170 at para 6.3.4.3(c).
[259] Ibid 171 para 6.3.4.6.
[260] Ibid 173-4 para 6.3.5.5
[261] Haysom & Plasket *Developments in Emergency Law* 7.
[262] Formed in 1979, see https://www.lhr.org.za/about-us/.
[263] Formed in 1977, see http://www.blaonline.org.za/.
[264] Initially formed in 1986 under the acronym SAADEL (South African Association of Democratic Lawyers), then becoming NADEL in 1987. See https://www.nadel.co.za/about-us/.
[265] G Budlender 'On practising law' in H Corder (ed) *Essays on Law and Social Practice* (1988) 319.
[266] Ibid 332.

It was also at this time that the Association of Law Societies commissioned a practising attorney to draft the first ever 'official' text on legal ethics in 1982.[267] Until this point very little had been written on the subject, and ethical conduct was seen as governed by the rules of each law society, and the common law, fortifying the view that legal practitioners in SA were dominated by legalism and formalism. However, this view was cemented by the textbook that followed – namely that the ethical lawyer need look no further for guidance than the rules themselves. This is apparent when the author, introducing the first topic, suggests that: '[e]thical philosophy [is] not part of this book'.[268]

Nothing in the rules of the law societies and the General Council of the Bar until this point suggests anything else but the adoption of the neutral partisanship role for lawyers.[269] The rules, similar to Anglo-American jurisdictions, prohibited blatant forms of lawyer dishonesty, fabricating defences, preventing perjury, and the disclosure of adverse authority. While the rules qualified lawyers' 'paramount duty to client', this qualification did not really translate in practice, if one considers the evidence of legal practice at the time. This qualification provided that lawyers' duty to client was subject to their duty to court, the 'interests of justice' and 'the observation of the law'. How this worked out in practice appears similar to how the rule was treated in the US and UK – as a shield rather than as a cuirass.[270]

[267] Lewis *Legal Ethics*. The then Association of Law Societies commissioned the book in the early 1980s. For more background to the book, see D McQuoid-Mason 'Ethics and the attorney's profession: Fact or fiction? Some perspectives from the consumer's viewpoint' (1983) *Acta Juridica* 213.
[268] Lewis *Legal Ethics* 1.
[269] See, for example, the Uniform Rules of Professional Ethics drafted by the GCB in terms of its constitution, available at http://www.sabar.co.za/rules-of-ethics.html. For a similar version of this rule in one of the law society's rules, see the Cape Law Society rules, drafted in terms of powers granted to it in the Attorney's Act, available at https://chellemblog.files.wordpress.com/2013/09/cls-rules-amended-oct-2011-final.pdf.
[270] See RL Abel *English Lawyers Between Market and State: The Politics of Professionalism* (2004) in relation to lawyers in the United Kingdom. Abel challenged the motives of the legal profession in this vein: he notes that the contemporary profession's (in UK) new ideal of independence is inherently contradictory, by noting that (at 497): ' … a duty cannot be both paramount and subordinate; and lawyers offer no principled basis for accommodating these inconsistent loyalties. … How can barristers argue both that solo independent practice makes them (appropriately) *more* loyal to their clients and that the cab-rank rule and solicitor intermediation makes them (just as appropriately) *less* loyal? … At best, independence generates empirical hypotheses that the profession shows no interest in testing; at worst, independence is riddled with moral ambiguities that can only serve to mystify normative judgments.' Abel (at 498) concludes his criticism as follows '[The legal profession's] claims are inherently contradictory and factitious. Just as lawyers broke their promise to elevate client interests about their own; so very few champion the oppressed against injustice.'

## 2.7 The 1990 TO PRESENT DAY CONSTITUTIONAL DEMOCRACY

### *2.7.1 A negotiated political settlement & the drafting of the interim and final Constitutions*

In early 1990, and against a backdrop of political violence, negotiations to end apartheid took place between the African National Congress (ANC) and its allies, and the white National Party government and its allies.[271] This resulted in the unbanning of the ANC, a negotiated political settlement for the transfer of power, and the adoption of the first democratic (interim) Constitution.[272] This interim Constitution, which was the framework under which SA's first democratic elections took place, was ultimately replaced by South Africa's final Constitution in 1996.[273]

The whole constitutional process[274] during this time was dedicated to establishing what has become known as a 'transformative constitutional regime'.[275] Unlike other (older) Constitutions, its purpose was not to entrench the status quo, but to utilise the law to *change* society in the direction of greater justice and equality.[276] In this light then, it appeared inevitable that the Constitution would affect the way in which legal practitioners practice and the role that they adopt. But before that could happen, the Truth and Reconciliation Commission's (TRC's) hearings during 1996-98[277] called on the judges, advocates and attorneys to give testimony as to their complicity in upholding the apartheid machinery. The focus during the Commission's hearings was on the judges once again (and their subsequent controversial non-appearance before the commissioners). However, the hearing, and the submissions made to the TRC, provide us with a rare opportunity to understand how legal practitioners saw their role, and whether neutral partisanship was an aspect of this role. It took a US scholar, Karl Klare,[278] to recognise how formalism had dominated the legal culture not only during apartheid, but even

[271] Negotiations took place in what was called CODESA: The Convention for a Democratic South Africa.
[272] Act 200 of 1993.
[273] Formally known as the Constitution of the Republic of South Africa, 1996.
[274] As discussed in 3.4.3.1.
[275] Lessig 1996 *Emory Law Journal* 869. D Bilchitz, T Metz & A Oyowe *Jurisprudence in an African Context* (2017) 68.
[276] Bilchitz et al *Jurisprudence* 68.
[277] The TRC was set up by the Promotion of National Unity and Reconciliation Act 34 of 1995. Its stated aim (set out in the preamble) was inter alia to: 'provide for the investigation and the establishment of as complete a picture as possible of the nature, causes and extent of gross violations of human rights committed during the period from 1 March 1960 to the cut-off date contemplated in the Constitution … and for the said purposes to provide for the establishment of a Truth and Reconciliation Commission, …'.
[278] Following on from the work of Dugard, Corder and Dyzenhaus prior to the Constitution. See K Klare 'Legal culture and transformative constitutionalism' (1998) 14 *SAJHR* 146.

after the interim Constitution came into force. Nowhere did this come more to the fore than in the hearings of the TRC in the late 1990s.

### *2.7.2 The TRCs findings in relation to the legal profession*

Archbishop Desmond Tutu (the chair of the commission) began the TRC hearing into the legal profession by suggesting that it was the most important hearing within the Commission's mandate.[279] Submissions were made by the Association of Law Societies, the GCB, the BLA and NADEL, among others. There were also individual submissions by, among others, the then Dean of the University of Witwatersrand's Law Faculty (Carole Lewis), Arthur Chaskalson, Pius Langa and David Dyzenhaus. There are several statements made in these submissions that point to the idea that strong neutrality characterised lawyers' actions in these years, both in private practice on behalf of the state. The GCB made a submission reminiscent of Lord Broughham's statement in Queen Caroline's case set out in 2.4.1 above:

> 'The independence of the Bar as an institution and that of its members facilitates fearless advocacy. It ensures that everything that can possible be said for a client will be said without fear of adverse consequences. The "cab-rank" rule ensures that advocates accept briefs, no matter how unpleasant and the advocate's duty to his or her client ensures that the case will be presented without fear or favour.'[280]

However, as Haysom had said in the 1980s, this independence was only useful for those that could afford the services of these advocates. Further, independence deflected some realities as to how the cab-rank rule was used to protect and deflect. For example, it was generally known among those in the legal profession that certain bars of advocates were completely executive-minded. As a result, the actions of advocates acting for the apartheid government hardly counted as 'fearless advocacy' in a way that the GCB alleged at the TRC. In a particular heinous example, a group of advocates in Pretoria (the South African capital city at the time) were openly called 'officials of the Department of Justice' (given their physical and ideological proximity to that government department).[281] In these circumstances, it was unlikely that

[279] Quoted in Dyzenhaus *Truth, Reconciliation and the Apartheid Legal Order* viii.
[280] GCB Submission vol 2 80 quoted in *Dyzenhaus Truth, Reconciliation and the Apartheid Legal Order* 104.
[281] This is a reference to the Pretoria Bar, where they were a couple of blocks away from the South African Department of Justice. See Forsyth (2014) 59 fn 152. Despite the actions of the Johannesburg Bar in applying for Bram Fischer's removal from the Bar, the Pretoria Bar was singled out at the TRC (and separately apologised) for its conservative stance and its support of the colour bar in the profession (it was the last to open its doors to membership by all races, for instance). For more on the Pretoria Bar, see Justice L W H Ackermann 'Submission to the Truth and Reconciliation Commission re: the role of the judiciary' (1998) 115 *SALJ* 52. See also the Pretoria

certain advocates would assist a poor or unpopular client. It was also almost as unlikely that an advocate of this ilk would be approached to appear for what was then seen as a poor or unpopular client or cause.[282] A concrete example of the failure in practice of 'justice for all' rhetoric behind the independence argument is Joel Joffe's recollection at how he came to be instructed as one of the attorneys in the Rivonia Trial. He tells the story of how he was approached by one of the detainee's wives. The wife advised that she could not find any lawyer prepared to take the case.[283] And so, the idea of the practitioner as champion of a client's cause, no matter at how unpopular, becomes less credible in a politically fraught system.[284] It causes us to question whether the cab-rank rule was honoured in those times more in the breach than in its observance.[285]

While the GCB came in for censure during the TRC, its submission (made up of two volumes) also sought to point a finger at legal practitioners acting on behalf of the government. They noted 'two areas of concern' about the role of the Attorneys-General.[286] The first concerned the '*very substantial vigour* with which the Attorneys-General and their departments prosecuted cases with political overtones'.[287] The GCB went on to note that '[i]n general, there was an overwhelming sense that the prosecutors in these types of cases identified with the police and security apparatus in pursuing convictions *at all costs*'.[288] The GCB's second concern was that 'the independence of the Attorneys-General during the critical apartheid years was more apparent than real'. The GCB's complaint was that the Attorney-Generals' conduct in political cases went beyond any stated 'independence' in that prosecutors 'were intent *at all*

Bar's separate apology contained in the GCB submission vol 2 209-2011 quoted in Dyzenhaus *Truth, Reconciliation and the Apartheid Legal Order* 94-95.

[282] In interviewing barristers in Northern Ireland, Mcevoy 2011 *Modern Law Review* 354 records the following insightful barrister comment on representation: 'I have represented both Republican and Loyalist defendants and I never made any distinction between them. … It is true, however, that a preponderance of the conflict related defendants I represented were actually Loyalists who I would say knew my [Catholic] background. In part it may have been the particular firms who instructed me. Also if you do a decent job for someone one time he is up he may ask for you or tell his friends. There may also be a sense in which sometimes Loyalists appeared to believe that Catholic lawyers were more willing to go the extra mile for them, less deferential to authority or willing to exercise our supposed Jesuitical skills [laughs] in their defence.'

[283] In this example, I recognise that an attorney is not similarly held to the cab-rank rule. However, the point is that: if an attorney is unwilling to take on the case, by virtue of the referral rule, no advocate would have to take on the case either.

[284] Joffe *The Rivonia Story* 36. See also Dyzenhaus *Truth, Reconciliation and the Apartheid Legal Order* 108-109.

[285] Of course, it is important to note that the cab rank rule only applies to advocates, not attorneys. But the point is still a good one.

[286] The Attorneys-General were the head of the prosecution authorities in each of their various provinces.

[287] GCB Submission vol 1 71-73 quoted in *Dyzenhaus Truth, Reconciliation and the Apartheid Legal Order* 122.

[288] Ibid. My emphasis. The GCB follows this with the qualifier: 'As with everything there were exceptions to this but we believe [this view] is a fair reflection of the advocates defending clients in cases with political overtones'.

*costs* on procuring convictions'. This included condoning irregular means of obtaining evidence, the detention of witnesses and accused persons without the right of access to legal practitioners, doctors or family, and their apparent keen use of the breadth of the definition of statutory offences and statutory presumptions in favour of the prosecution.[289] While the GCB recognised that it was the police who used the former methods, their view was that prosecutors could have refused to pursue prosecutions on the distorted bases set out above, or even resisted these methods, or at least simply not using these methods 'would have improved the situation to some degree'.[290]

In terms of the submissions made by the attorney's profession,[291] Dyzenhaus claims that the Association of Law Societies (ALS) failed miserably to defend their position, attempting to combine an apology for having failed South Africans during apartheid with the following claims:

> 'It in fact did a lot to oppose apartheid, though not enough; doing a lot risked a reaction by government which would have destroyed the independence of the profession; in any case, opposition to the apartheid moonlight was futile.'[292]

Dyzenhaus continues:

> 'It did not occur to the ALS that it could not excuse itself by claiming that the apartheid legal order seemed an impregnable monolith if its own supineness in the 1950s and 1960s, indeed, at times its own active support for apartheid during that time, had contributed to the appearance of impregnability.'

In following the court's approach in the *Fischer* case discussed above, the ALS said that attorneys swore an oath of allegiance upon their admission to practice and in the face of this oath to the State, legal practitioners had little, if any, option than to accept the status quo.[293] It is disappointing that the TRC did not specifically deal with the independence *ideal* versus *practice* of legal practitioners, but it is clear that the Commission found the use of neutrality and passivity to be a mask for injustice rather than justice.[294]

---

[289] Ibid.
[290] Ibid. My emphasis.
[291] Represented by the Association of Law Societies.
[292] Dyzenhaus *Truth, Reconciliation and the Apartheid Legal Order* 112.
[293] ALS submission at D 2-4, D 17-18 as quoted in Dyzenhaus *Truth, Reconciliation and the Apartheid Legal Order* 113-14.
[294] See chapter 1.

### *2.7.3 Kentridge QC's lectures*

Following the TRC, the most insights to be gained on the current use of the neutral partisan role comes from Kentridge, a leading anti-apartheid lawyer,[295] who delivered a series of talks and lectures over the course of 1979-2011.[296] In a talk that he gave to the Inner Temple in 2003 on 'The Ethics of Advocacy', he considered how a South African practising advocate might consider the representation of those with immoral ends post-apartheid – then and now.[297] Kentridge starts with this particular aspect of his discussion by quoting one of the best-known passages in Boswell's *Life of Johnson*. Boswell (as a practising Scottish advocate) asks:

> '"But what do you think of supporting a cause which you know to be bad?" Dr Johnson's robust reply was: "Sir, you do not know it to be good or bad until the judge determines it".'[298]

Kentridge's response was to say: '[h]is a good enough answer if the cause is a matter of pure law, or if its goodness or badness can only be determined after all the witnesses have been heard.'[299] He then rephrases the question: 'How should an advocate, as a member of an honourable profession, conduct himself or herself in a cause which, on rational grounds, he or she firmly believes to be unmeritorious or morally objectionable?'[300]

Kentridge then went on to say that currently 'it is not an option to refuse to act' even in cases which the modern Boswell would classify as bad causes, because of the cab-rank rule. In looking back on the apartheid years, Kentridge made the point that

> 'one of the things which kept the flame of liberty flickering was that opponents of the apartheid regime … were able to get members of the bar to defend them … with vigour. This was not because they necessarily sympathised with the aims or methods of the accused, but rather because they recognised their professional duty to take on those cases.'[301]

---

[295] Kentridge practised law in South Africa and the United Kingdom from the 1940s until he retired in 2013. He was involved in the most significant apartheid-era political trials, including the Nelson Mandela's treason trial and the 1978 inquest into Steve Biko's death, an anti-apartheid activist.
[296] These talks and lectures have been complied in the book: S Kentridge QC *Free Country: Selected Lectures and Talks* (2012).
[297] Ibid chap 5.
[298] For a full account of the passage, see W Lowry 'James Boswell, Scots Advocate and English Barrister, 1740-1795' (1950) 2 *Stanford Law Review* 471 at 479 fn 28.
[299] Ibid 64.
[300] Ibid 65-6.
[301] Ibid.

However, and whether deliberately put or not, Kentridge himself puts this point into doubt later when he had this to say:

> 'There were cases … in South Africa where counsel were briefed by the former government in cases designed to enforce apartheid laws. I was, of course, not on the government's list of counsel, and was never asked to act for the government in such a case. There were fortunately, or unfortunately, any number of pro-apartheid members of the Bar who would take on those cases without, apparently, a qualm of conscience. The rules of conduct of the South African Bar included the cab-rank rule. *The issue never arose for me. If it had arisen, I believe that I and many other advocates would have been unable to comply with the cab rank rule.* Perhaps no rule of conduct can be an absolute rule. There may be times, fortunately rare, when one's own conscience rather that the general rule must govern one's conduct.'[302]

I believe it is in this particular talk by Kentridge that he encapsulates some of the contradictions and paradoxes of neutral partisanship under apartheid, and which continue to plague the South African legal profession. First, he avers that neutrality and passivity (in the form of the cab-rank rule) are necessary to ensure legal representation of all, yet admits that he would refuse to act for a cause (such as apartheid) which he found morally questionable. For the cynic then, the value of the cab-rank rule during apartheid was that it allowed pro-apartheid advocates to mask their immoral choices, and for anti-apartheid advocates to deny them. If the publicity is bad regarding a particular case, the cab-rank rule can be a positive thing. Recent[303] and ancient examples bear this out. For an ancient example, one of the first to claim the protection of the rule was John Cook, who was hung, drawn and quartered for accepting instructions to prosecute Charles I for war crimes in the 1600s in England.[304] However, if protection from bad publicity is the point of the cab-rank rule, then there are other ways to ensure that every person has legal representation. For example, there could be a collective duty on the part of the profession to ensure access to justice. The issue remains that, despite the lessons learnt during apartheid, neutrality and passivity are central tenets for the lawyer's role in SA currently, and discourse around the inevitable shortcomings of this approach has been dominated by different, albeit linked, concerns.

---

[302] Ibid 72. My emphasis.
[303] For a relatively recent example in the criminal context, see the drama surrounding students demands that a law professor resign his academic position over his representation of Harvey Weinstein in 2019. Weinstein (now convicted) is a popular film producer in the US who was charged with several sexual offences. See https://edition.cnn.com/2019/05/11/us/harvard-law-professor-ronald-sullivan-loses-deanship-harvey-weinstein/index.html
[304] G Robertson 'England's Bravest Barrister?' 2005 *Counsel* 25.

In addition to adherence to neutrality, the SA legal profession has also been affected by its hegemony. It has long been recognised that the profession has needed to transform in terms of race, gender, and class.[305] The need for diversity in the legal profession is invaluable for a variety of reasons,[306] but is particularly relevant in SA. This is because research indicates that a professional who represents a minority, or has been exposed to multicultural experiences and discourse, is more likely to have a developed (or developing) moral judgement and growth mind-set.[307] Unfortunately, there has not been very much literature on linking neutrality with hegemony in South Africa, and how this affects the conduct of legal practitioners. As a result, the dominant approach to lawyering has to be inferred by statements made about the legal culture, court cases dealing with alleged unethical conduct and, from the strongly political voice of legal practitioners in the civil service. It is in this last area that the neutral partisan role has been most evidenced post 1994,[308] in an ironic replication of the past. This is discussed further in chapter 6.

### *2.7.4 The establishment of a new regulatory regime for the legal profession*

At the time Kentridge was giving his talk in 2003, the SA government had already embarked on an attempt to transform the legal profession.[309] Commentators recognised the irony that lawyers had been advising other sectors in society since 1996 as to the need to transform their practices in line with the Constitution, but had not thought to do so themselves in terms of their own regulation, codes and practices.[310] The rationale for the change was clear, at least to some:

---

[305] See in general, KS Broun *Black Lawyers, White Courts: The Soul of South African Law* (2000), Centre for Applied Legal Studies *Transformation of the Legal Profession* (August 2014) available at https://www.wits.ac.za/cals/our-programmes/gender/transformation-of-the-legal-profession/ and T Ngcukaitobi *The Land is Ours: Black Lawyers and the Birth of Constitutionalism in South Africa* (2018). For particular issues, see L Pruitt 'No black names on the letterhead? Effective discrimination and the South African legal profession' (2002) 23 *Michigan Journal of International Law* 545, S Godfrey 'The legal profession: Transformation and skills' (2009) 126 *SALJ* 91, J Klaaren 'Current demographics in large corporate law firms in South Africa' (2014) 7 *AJLS* 584 and J Klaaren 'South Africa: A profession in transformation' in RL Abel, O Hammersley, H Sommerlad, U Schultz (eds) *Lawyers in 21st-Century Societies Vol. 1: National Reports* (2020). For government policy papers, see *Justice Vision 2000* available at https://www.gov.za/documents/justice-vision-2000. and *Transformation of the Legal Profession of South Africa* (2000) available at https://www.gov.za/documents/transformation-legal-profession-discussion-paper.

[306] The research goes some way to answering Chanock's general concerns regarding elitism and exclusion. See Chanock *The Making of South African Legal Culture* in general.

[307] D Narvaez and PL Hill 'The relation of multicultural experiences to moral judgment and mindsets' (2010) 3 *Journal of Diversity in Higher Education* 43.

[308] See chap 1.

[309] J Klaaren 'South Africa: A profession in transformation' in RL Abel, O Hammersley, H Sommerlad, U Schultz (eds) *Lawyers in 21st-Century Societies Vol. 1: National Reports* (2020) 535-36.

[310] See H Kruuse 'A South African response to ethics in legal education' in Corbin (ed) *The Ethics Project in Legal Education* (2011) 102. For example, the pre-Constitution Attorney Act and Admission of Advocates Act continued to regulate the professions until the LPA came into force. At the time, attorneys and advocates admitted during the existence of the so-called independent states of Transkei, Bophuthatswana, Venda and Ciskei

despite a change in the fundamental foundation of the legal system (viz the Constitution), the legal profession continued to operate in much the same way they had before the Constitution.[311] The debates about these changes among lawyers and government were long and fierce. While other jurisdictions have recently made the type of changes envisaged by the state,[312] there were those in the South African government and the legal profession that alleged ulterior motives for the changes and the opposition to those changes. One the one hand, some lawyers opposed any change on the basis that they saw the state as attempting to take control and subvert the legal system for their own ends.[313] On the other hand, those who were pro-change complained that the SA legal profession had not done anything to increase access to the profession by those previously disadvantaged by a racially classified political system. These sceptics also suspected that some in the legal profession wanted to suppress competition in its own economic interests (viz a form of protectionism).[314]

After what Klaaren calls a 'nearly two-decade gestation',[315] the Legal Practice Act[316] came slowly into effect from 2015 onwards.[317] The Act established a single regulatory body (the South African Legal Practice Council (the LPC)) as well a new body – a Legal Services Ombudsman.[318] Apart from the change to the regulatory structures, one major change was to allow advocates to hold trust accounts, and in this way, to accept instructions directly from clients. Up until this point, the advocates' profession was strictly a referral profession, where attorneys would act as intermediaries between client and advocate. The introduction of this

(effectively the Bantustans created by the apartheid government for the black population's so-called independence) were still subject to statutes those "countries" inherited when they became "independent" – an obvious anomaly. See *Law Society of the Northern Provinces v Maseka and Another* ZANWHC 19. See also Kruuse & Genty 2018 *Fordham Journal of International Law* 395 fn 7.

[311] Certain attempts to bring about transformation in this time met varying success. The newly established competition authorities challenged some GCB rules as being anti-competitive and managed to get the courts to invalidate certain provisions promoting restrictive practices within the advocate's profession. However, the SCA kept the referral rule intact. See *Commissioner of the Competition Commission v General Council of the Bar South Africa & others* 2002 [4] All SA 145 (SCA). In another attempt to effect change, the Department of Justice sought to introduce a Black Economic Empowerment charter for lawyers, namely the Legal Services Sector Charter in 2007. However, support for the charter dwindled and the proposal failed. See Klaaren in Abel et al (eds) *Lawyers in 21st-Century Societies* 542 and Kruuse & Genty 2018 *Fordham International Law Journal* 395 fn 110.

[312] For example, the reforms in England & Wales and Australia, that is, a co-regulatory framework, with the state playing much more of a prominent role. See D Webb 'Are lawyers regulatable?' (2008) 5 *Alberta Law Review* 233 at 243.

[313] For a discussion of these debates, see Kruuse and Genty 2018 *Fordham International Law Journal* 396-99.

[314] Ibid.

[315] Klaaren in Abel et al (ed) *Lawyering in the 21st Century* 541.

[316] Act 38 of 2014.

[317] Section 120 of the LPA set out that different chapters of the Act would come into effect on different dates as promulgated in the Government Gazette. A transitional body, the 'National Forum on the Legal Profession' operated for 18 months while the law societies transferred assets, the (first) code was finalised, and details of the Act were finalised.

[318] The chapter dealing with the Ombudsman is not yet in force as at date of writing.

type of advocate was pushed as an attempt to improve access to justice for many South Africans.[319] In *Ex Parte Goosen*,[320] the court noted that the 'objective and the effect of the LPA are deliberately to revolutionise the regulation of the South African legal profession'. It is worth repeating its main objective as set out in the Act's preamble:

> 'To provide a legislative framework for the transformation and restructuring of the legal profession in line with constitutional imperatives so as to facilitate and enhance an independent legal profession that broadly reflects the diversity and demographics of the Republic.'

Significantly for this thesis, the transitional forum set up in the Act[321] was tasked with drafting and finalising a new code of conduct that would apply to *all* legal practitioners, instead of the separate codes that had been drafted by the various provincial law societies and the voluntary associations in the advocates' profession. While the forum indeed finalised a new code,[322] this code was later replaced by the LPC.[323] It is this code to which I will turn to and consider in chapters 4 and 6. As with the previous codes, it is said to serve the 'prevailing standard of conduct' for all legal practitioners, candidate legal practitioners and juristic entities, and a failure to adhere to any provision would constitute misconduct.[324]

In considering the present code, one may be forgiven for thinking that there may have been a marked change in the orientation of lawyers' norms. The code now sets out that legal practitioners need to uphold the Constitution, and the principles and values in the Constitution,[325] and extends its net to cover in-house counsel.[326] However, the code retains most of the original rules, so much so that Sutherland[327] advised (in respect of the National Forum's code) that 'not much is new', it is a 'reaffirmation of the familiar' and there is 'not a great deal that is new'.[328]

---

[319] Legal Fees Report SALRC (2019) 35.
[320] 2019 (3) SA 489 (GJ) para 9.
[321] In terms of chapter 10 of the LPA titled: 'National forum and transitional provisions'.
[322] In terms of *GG No*. 40610 on 10 February 2017 titled: 'Code of Conduct for Legal Practitioners, Candidate Legal Practitioners and Juristic Entities'.
[323] The LPC suspended the operation of the National Forum's code, and introduced their own code in terms of s 36(1) of the LPA. See Legal Practice Council Notice 198 of 2019 in *GG No.* 42364 on 29 March 2019 with the same title as the National Forum Code.
[324] Section 36(2) of the LPA.
[325] Paras 3.2 and 3.3.
[326] Part VII.
[327] R Sutherland *A Brief Guide to Navigating the Important Innovations in the New Code of Conduct* available at https://www.johannesburgbar.co.za/wp-content/uploads/A-BRIEF-GUIDE-TO-THE-NEW-CODE-OF-CONDUCT-SUTHERLAND-J-.pdf. The guide is an edited version of the series of talks given to the members of the Johannesburg Bar in May 2017 at the request of the Johannesburg Bar Council.
[328] Ibid 1-2.

As I shall argue later, it is in what is *not* covered in the code that indicates that neutral partisanship is still condoned as the prevailing approach to lawyering in SA. First, there is no coverage or regulation of dishonesty outside of litigation.[329] There are norms that seek to prevent courts being deceived or misled, but there is a large array of tactics not covered in the code. This means that legal practitioners have continued to adopt the so-called 'tricks of the trade'.[330] The most blatant example of this continued adoption of the neutral partisanship role emerges from the much publicised strategies of the legal representatives of the former President of SA, Jacob Zuma. Its initial form was set out explicitly: In 2007 the media reported an exchange between a presiding judge and Zuma's legal representative during a hearing dealing with the state's attempt to obtain evidence showing potential corruption.[331] In court, the judge asked the advocate: 'If a person professes his innocence, then why go to all these lengths to prevent this evidence from being obtained?' Kemp is reported to have replied: 'We think it important. This is not like a fight between two champ fighters. This is more like Stalingrad. It's burning house to burning house.'[332]

Subsequent to this exchange, these strategies have become known as 'scorched earth' tactics and 'the Stalingrad approach'.[333] While the courts express their disproval of the tactics, there are usually no consequences for the lawyers who adopt these strategies. This is probably on account of the argument that they are within the limits of the law because the tricks are themselves provided by the law. This follows a neutral partisanship approach that would hold that the various procedural devices that lawyers use to prolong litigation are a creature of the rules of procedure that structure the system of adjudication. Horwitz writes that the 'Stalingrad strategy' phrase has acquired particular notoriety in South African legal circles, in that it describes an approach in which every attempt – through delays, objections, changes of legal team, funding hitches – is made to avoid the merits of the case. Horwitz goes on to state: 'Its

[329] See discussion of this issue at 6.2.
[330] See discussion at 6.3.3.
[331] See E Horwitz '"Let's kill all the lawyers": Zuma's R30m Stalingrad strategy evokes Shakespeare's Henry VI' *BizNews* 19 October 2017 available at https://www.biznews.com/undictated/2017/10/19/zuma-r30m-stalingrad-strategy. See also H Corder & C Hoexter '"Lawfare" in South Africa and its effects on the judiciary' (2017) 10 *African Journal of Legal Studies* 105 at 114-16
[332] Ibid. The incident is also recorded by Meyer J in *Democratic Alliance v President of the Republic of South Africa; Economic Freedom Fighters v State Attorney* [2019] 1 All SA 681 (GP) at para 11. See also Wallis JA in *Moyo v Minister of Justice and Constitutional Development; Sonti v Minister of Justice and Correctional Services* 2018 (2) SACR 313 (SCA) para 169. This remark is also referred to in the state's heads of argument at paras 47, 248 & 457 in *S v Zuma and Another, Thales South Africa (Pty) Ltd v KwaZulu-Natal Director of Public Prosecutions & others* 2020 (2) BCLR 153 (KZD) (on file with author).
[333] See for example, paras 1 and 16 in the court a quo: *W v H* 2017 (1) SA 196 (WCC) where the court refers to defendant's representation of a divorce action as a 'scorched earth' policy.

effect, through a combination of deep pockets and the exhausting passage of time, is to grind the other bastards down.'[334]

The existence and continued use of these tactics[335] evidences the existence of neutral partisanship tactics and concludes my investigation of neutral partisanship in the constitutional era, I believe that there is a clear indication that the legal profession continue to see a lawyer's role as a neutral partisan for their client, despite some criticism[336] to this role.

---

[334] Horwitz 'Let's kill all the lawyers": Zuma's R30m Stalingrad strategy evokes Shakespeare's Henry VI'. Recently, South Africa's SCA has described a Stalingrad Defence as 'a term of art in the armoury of criminal defence lawyers. By allowing criminal trials to be postponed pending approaches to the civil courts, justice is delayed and the speedy trials for which the Constitution provides do not take place. I need hardly add that this is of particular benefit to those who are well-resourced and able to secure the services of the best lawyers.' *Moyo v Minister of Justice and Constitutional Development & others; Sonti v Minister of Justice and Correctional Services & others* [2018] 3 All SA 342 (SCA) para 169. A full bench of the Pretoria High Court in *Democratic Alliance v President of the RSA & others; Economic Freedom Fighters v State Attorney & others* [2019] 1 All SA 681 (GP) at paras 1–23 recently described the way in which Mr Zuma has deployed his Stalingrad Defence to avoid prosecution. It has cost the State between R16,7 million and R32 million and it has so far been successful in that it has allowed Mr Zuma to escape prosecution for almost 15 years. See State's heads of argument para 2 in *S v Zuma & another, Thales South Africa (Pty) Ltd* (on file with author).

[335] For contemporary examples, see *C & M Fastners CC v Buffalo City Metropolitan Municipality* [2019] ZAECGHC 22 at para 49 where the Court commented, in a tender issue, that one of the parties seemed 'intent on the subterfuge of a mixture of deep silence and then when forced out of hiding, a Stalingrad Strategy, taking all possible technical points and staying coy at best on the details of the merits and purported cancellation [of the tender]'. In *Geldenhuys & others v Orthotouch Limited; In re: Highveld Syndication Investors v Orthotouch Ltd* [2016] ZAGPJHC 233 the Court found it appropriate to use more than one metaphor to describe one party's delay tactics. At para 15, it noted that the tactics used by one of the party's was 'a classic case of a party *performing cart wheels* with no purpose other than to frustrate the merits of the case being dealt with expeditiously'. My emphasis. Later on in the judgment, the Court suggested at para 16 that the issues raised by that party was 'symptomatic of a Stalingrad defence; where side issues taken on appeal simply delay the matter and build up costs for lay litigants against those who have deep pockets. The risk of being financially out-litigated cannot be in the interests of justice particularly where the interests of justice are served ultimately by ensuring that the most effective and practical means is adopted to bring the rescission application to the notice of the thousands of affected investors'. The equivalent phrase 'scorched earth policy' has also been used by the courts, see for example, *ST v CT* 2018 (5) SA 479 (SCA) para 15. While the court in *Woodlands Dairy (Pty) Ltd and another v Competition Commission* [2009] ZACT 69 never used the term 'Stalingrad tactics', it chastised one of the parties for generating 'a veritable forest of interlocutory paper … in order to prevent cartel disputes from being determined on their merits' (no paragraph numbers in the case).

[336] An interesting example of criticism can be found in the comments of the Judicial Service Commission (the JSC), the body responsible for recommending the appointment of judges (in terms of the Judicial Service Commission Act 9 of 1994). The JSC castigated specific advocates for taking on a neutral partisan role. For example, in 2009 the Commissioners interviewed Hennie de Vos, a senior Pretoria advocate. The media reported as follows: 'Ntsebeza [a newly appointed JSC Commissioner] put it to De Vos that he successfully defended former justice minister Magnus Malan when he was charged with murder over the 1987 KwaMakutha massacre. His failure to call Inkatha Freedom Party chief Mangosuthu Buthelezi and others meant that it never emerged that the state was involved in covertly training IFP members as part of Operation Marion to "liquidate" United Democratic Freedom party activists. "Those people who were not called could have sent Malan to jail," Ntsebeza said. *De Vos said he did his job and did it well, and that this did not include calling witnesses that would enable state prosecutors to prove their case. He added that, in addition, he only had information that his client chose to disclose*.' My emphasis. The JSC also criticised Donen about his approach and role in the 1978 prosecution of the African National Congress's (ANC's) Tokyo Sexwale. Donen at the time was a junior prosecutor in the State prosecutor's office. 'JSC grills advocate over apartheid' *News24.com* 20 July 2009 available at https://www.news24.com/news24/jsc-grills-advocate-over-apartheid-20090720. My emphasis.

## 2.8 CONCLUDING REMARKS

The focus of this chapter was to ascertain whether it could be said that neutral partisanship is the predominant conception of lawyering in South Africa. This required an understanding of some of the political, social and legal history in which this role played out. Having traversed the lawyer's role throughout selected junctures in South African history, it is clear that the neutral partisan role was and remains the dominant role of lawyering in South Africa, bar the pre-formal pre-1652 stage. Whilst at times it has been necessary to infer the role from what was *not* said than from what *was* said, there has been no real challenge to the neutral partisan role bar a few activist legal practitioners who propounded a particular type of role for the lawyer which envisaged lawyering which would be 'democratic', take 'social considerations into account', take account of 'social justice' and who have said that they would actively exercise their moral preferences in representation. While the Legal Practice Act has sought to reform the legal profession in major ways, neutrality and partisanship are principles that continue to remain firmly embedded in the legal profession's psyche, as the advocates' and attorneys' practices remain largely unchanged from early on in the history of South Africa, at least from the time of British rule.

This is disconcerting, least of all because the TRC hearings made it clear that, while a few legal practitioners contributed to the demise of apartheid, many in the legal profession – by their neutrality and amoral stance – furthered oppression and injustice, or simply did not care. As indicated earlier, the choice of a constitutional democracy in the early 1990s, meant that South Africa's new social order is again dependent on the country's 'adjudicative practices', and those operating as role-players in that setting.[337] Despite this explicit change, it seems evident that the role of the lawyer remains largely unchanged. There are those who will argue that the Legal Practice Act envisages a radical change in lawyering that will further access to justice and access to the profession (answering Chanock's concerns regarding elitism and exclusion).[338] However, even with a diverse and non-elitist 'new breed' of legal practitioners, there is some merit in arguing that, by continuing the same ethic, and schooling this new breed

[336] In *Van der Berg* para 16, the court tempered its statement (regarding neutral partisanship) by the observance that an advocate (and attorney's) duty is fettered by the injunction (found in the rules of conduct) which require that the duty to client is paramount 'subject to' the lawyers duty to the court and to justice. In this regard, the court quotes from the English case of *Rondel v Worsley* that '[i]t is a mistake to suppose that he is the mouthpiece of his client to say what he wants: or his tool to do what he directs. He is none of these things. He owes allegiance to a higher cause. It is the cause of truth and justice.'
[337] Klare 1998 *SAJHR* 146. See discussion above.
[338] Chanock *The Making of SA Legal Culture* xii and 31.

of legal practitioners in the old habits and practices of those pre-democracy, justice will not be served. One might even say the project is insane, if insanity is defined by doing things the same way and expecting different results.[339]

[339] A saying commonly attributed to Albert Einstein.

# CHAPTER 3: NEUTRAL PARTISANSHIP AND ITS SHORTCOMINGS: GENERAL AND PARTICULAR

'… theirs is not to make reply,
Theirs not to reason why,
Theirs but to do and die'[340]

## 3.1 INTRODUCTION

Legal representation in SA (and in most western democratic states) has been characterised by the privileging of (1) client partisanship; (2) substantive neutrality; and (3) professional non-accountability.[341] Chapter 2 outlined how the South African legal profession has endorsed this fundamental conception of the lawyer's role with regard to its history, and evidenced in its practice.

However, internationally, while critics have found this neutral partisanship role defensible to a certain point,[342] the justifications for the continued use of the role has come under fire for a number of reasons. This chapter thus considers the harms caused by neutral partisanship. It appears imperative to spell out these evils or 'harms', since the cost-benefit analysis of 'more harm than good' implies that the justifications outweigh the harms. Thus, in the next section I consider the harms brought about by neutral partisanship, followed by an analysis of the content and viability of the three main justifications for the role. It is said that neutral partisanship: (1) is essential to the adversarial system; (2) upholds the institutions of the liberal state; and (3) promotes liberal values.[343]

---

[340] Lord Alfred Tennyson *The Charge of the Light Brigade* (1854). The implication that neutral partisanship lawyers act in such a dramatic fashion mimics the often hyperbolic language that characterises literature on lawyers generally. One only has to read Luban's comment on one of the justifications for neutral partisanship to appreciate this point: 'The [adversarial] excuse rests on an elephant that stands on a tortoise that floats in the sky. But the sky is falling' (D Luban *Lawyers & Human Dignity* (2007) 59).

[341] See chapter 1. See also AC Hutchinson *Fighting Fair: Legal Ethics for an Adversarial Age* (2015) 39 & T Dare *The Counsel of Rogues? A Defence of the Standard Conception of the Lawyers Role* (2009) 5ff.

[342] For example, most commentators acknowledge that the particular context of criminal defence work justifies elements of the neutral partisanship role given the balance of power between prosecutor/state and accused/defence lawyer. However, neutral partisanship is not justified in other contexts, especially civil litigation, counselling clients and alternative dispute resolution. See for example, R Wasserstrom 'Lawyers as professionals: Some moral issues' (1975) 5 *Human Rights* 1 at 6-10; D Rhode 'Ethical perspectives on legal practice' (1985) 37 *Stanford Law Review* 589 at 605-6 and D Rhode 'An adversarial exchange on adversarial ethics' (1991) 41 *Journal of Legal Education* 29 at 32; D Luban *Lawyers and Justice: An Ethical Study* (1988) 58; D Luban 'Are criminal defenders different?' (1993) 91 *Michigan Law Review* 1729 and R Cranston 'Legal ethics and professional responsibility' in R Cranston (ed) *Legal Ethics and Professional Responsibility* (1995) 22-23.

[343] Nicolson & Webb *Professional Legal Ethics* 182.

## 3.2 WHY DOES NEUTRAL PARTISANSHIP NEED TO BE JUSTIFIED?

Postema and Nicolson & Webb suggest the adoption of neutral partisanship results in three types of unjustified harm: to clients, to lawyers themselves, and to the community.[344] In what follows, I use Nicolson & Webb's framework of harms updated and considered in the context of South African legal practice.

### *3.2.1 Harm to clients*

Ironically, commentators note that the moral detachment necessary for taking on the amoral role in legal practice may in fact lead lawyers to deliver inferior legal services to their clients.[345] This argument proceeds on the basis that lawyers need their fully integrated personality to give sound advice to their clients. By detaching themselves from their personalities, it is argued that lawyers cannot draw on their own experiences and views in giving advice.[346] In other words, unless lawyers integrates their professional and nonprofessional lives, they cannot fully satisfy their professional roles. Basically, the argument is that you cannot be a good lawyer without using your full range of personal and professional experiences and beliefs.[347] In his book *The Lost Lawyer*,[348] Kronman repeats this claim, but in Aristotelian terms. One of the major themes in the book is that practical wisdom (ie *phronesis*) is required of lawyers to act properly for clients. This practical wisdom is not a kind of expertise or intellectual skill, but a character trait that depends fundamentally upon acts of imagination and habits of feeling[349] that inevitably needs to be drawn from a lawyer's integrated personality. Similarly, Nicolson & Webb believe that moral detachment is likely to prevent the development of *phronesis* which must be rooted in the 'ordinary moral beliefs, attitudes, feelings and relationship' of the lawyer.[350] *Phronesis,* Kronman notes further, is likely to be extremely useful in contexts where novel situations arise.[351]

Linked to the idea of *phronesis* is the idea that moral detachment may adversely affect how the lawyer deals with the facts of her client's case. Perlman identifies the possibility that where

---

[344] Ibid.
[345] Nicolson & Webb *Professional Legal Ethics* 178.
[346] Postema 1980 *New York University Law Review* 63.
[347] E Wolgast *Ethics of an Artificial Person: Lost Responsibility in Professions and Organizations* (1992) 24.
[348] A Kronman *The Lost Lawyer* (1993). The use of practical wisdom in the practice of law was presaged in A Kronman 'Living in the Law' (1987) 54 *University of Chicago Law Review* 835.
[349] Kronman *The Lost Lawyer* 74-75. See also J Altman 'Book review: Modern litigators and lawyer-statesmen: *The Lost Lawyer. By* Anthony T Kronman' (1994) 103 *Yale Law Journal* 1031 at 1032.
[350] See in general Postema 1980 *New York University Law Review* 78.
[351] Kronman as referred to in Nicolson & Webb *Professional Legal Ethics* 179.

lawyers zealously seek favourable outcomes for their clients above all other considerations, they may find it more difficult to assess facts that tend to undermine their clients' positions, resulting in either bad legal advice, and/or increasing the risk of crossing the line between permissible and impermissible behaviour.[352] Perlman explains this distortion in perception as follows:

> '[P]artisanship itself is a situational force capable of distorting a professional's perceptions, including judgments relating to legal compliance. ... So when we are placed in partisan roles, we tend to filter information in ways that support that conclusion (i.e., the conclusion favoring our clients). This effect complicates our ability to make objective decisions, such as determining whether our clients are complying with existing legal requirements. ... This effect is even stronger when people's sense of identity and self-worth is tied to their partisan stances.'[353]

In sum, Perlman's argument is that partisanship has a tendency to distort judgment,[354] and that we are prone to partisan bias in favour of our clients, leading to legally and/or morally bad advice, and/or even unlawful action.[355] While much of the evidence here is anecdotal (given the nature of confidential advice), there are a few South African cases which appear to support Perlman's argument. For bad advice, the cases of *MB v NB*[356] and *Corruption Watch NPC v President of the Republic of South Africa*[357] bear reference.

*MB v NB* was a divorce and custody matter. The court identified that the lawyers in the matter had exacerbated an already acrimonious situation and that their conduct directly harmed the clients instead of resolving the dispute:

> 'Acrimony between legal representatives, which can carry over from one case to the next, easily produces an overidentification with the client's cause and an attitude of win-at-all-costs. These emotions can act as a complete barrier to settlement.'[358]

[352] AM Perlman 'A behavioral theory of legal ethics' (2015) 90 *Indiana Law Journal* 1639.
[353] Ibid 1655-56.
[354] Ibid 1641.
[355] See also TCW Farrow 'Sustainable Professionalism' (2008) 46 *Osgoode Hall Law Journal* 51 at 74 and A Hutchinson 'Legal ethics for a fragmented society: Between professional and personal' (1997) 5 *International Journal of the Legal Profession* 175 at 187-8.
[356] 2010 (3) SA 220 (GSJ).
[357] 2018 2 SACR 442 (CC).
[358] *MB v NB* para 54.

It is worth repeating how the court suggested that a lawyer's conduct can act to the detriment of the client, notwithstanding their protestations that they are 'following client's instructions':

> 'Lawyers create the illusion that clients are solely responsible for the stances that are adopted in litigation, but of course their advice is profoundly influential and shapes the demands being made and strategies used to achieve them. With this in mind, the lawyers have much to answer for when a party requires the other "to vacate the matrimonial home forthwith"; when requests for particulars are deflected on the grounds of petty mistakes in the formulation of the questions; when there are interminable skirmishes over documents that result, eventually, in the production of bundles totalling almost 1000 pages, few of which have any direct bearing on the matter at hand; and when the parties threaten each other with criminal proceedings and respond by saying that the threat is being dismissed "with the contempt it deserves".'[359]

While the Constitutional Court (CC) was not as explicit about the actions of the legal practitioner in the *Corruption Watch* case, it was clear that the legal practitioner's actions, acting on behalf of his client (the then President of SA, President Zuma), were problematic for want of independence *from* client – specifically given the identity of the client in this case.[360] Green notes, for example, that

> 'when clients act badly, it is sometimes because of their lawyers' failure to give independent advice that directs the client to broad considerations weighing against the client's preferred course of conduct – for example, advice that is not just legally or technically accurate but that takes into account the spirit or purpose of the law or broader societal concerns beyond obeying the law.'[361]

The attorney in this matter – following his client's instruction – offered a settlement agreement to the then acting National Director of Public Prosecutions (NDPP), Mr Nxasana, to resign. Ironically, it appears that the President had wanted Mr Nxasana to resign *because* of Mr Nxasana's independence, and refusal to let the President interfere with the work of the National Prosecution Authority (NPA).[362] Given that the NPA was considering prosecuting the President

---

[359] Ibid.

[360] For a discussion of the different types of lawyer independence see B Green 'Professional independence: Overrated or undervalued?' (2013) 46 *Akron Law Review* 599.

[361] Ibid 609.

[362] The clash between loyalty to the office of the President versus the President as an individual is beyond the scope of this thesis, suffice to mention that there has been an increase in literature on the issue of government lawyers and their role in advising political appointees. In particular Mortazavi has investigated institutional pressures which compromise proper legal advice. She notes that '[s]enior government lawyers may often find themselves on the receiving end of harsh and unwanted pressure, and even employment action, for failure to respond to political pressure'. See M Mortazavi 'Institutional independence: Lawyers and the administrative state'

for alleged corruption, this was particularly problematic. While the court held that the offer of retirement was not untoward, the attorney's actions in leaving the amount blank on the settlement agreement for the NDPP to complete was a distinctive issue.[363] The court found the inescapable inference that the President as client (facilitated by his lawyer) was 'effectively buying Mr Nxasana out of office'[364] and, as such, the agreement was constitutionally invalid 'for having come about in a manner inconsistent with the constitutionally required independence of the office of the NDPP'.[365] The finalisation of an agreement that was so obviously unconstitutional (and therefore unlawful) calls to mind advice that Louis Brandeis wrote (apparently) to himself: 'Advise client what he should have – not what he wants.'[366]

The examples above show how lawyers act to achieve their clients' ends *in spite of* clear ethical (even legal) issues in doing so. At least in some of these instances, these actions could have been averted had the lawyers actively engaged their moral faculties. Commentators note that moral arguments may play important roles in legal argumentation,[367] and where lawyers have 'shut off' their moral faculties, they are less able to call on these arguments and give advice that takes cognisance of a variety of factors. In the case examples given above, there is certainly evidence of a failure to account for their actions outside of their client's instructions.

Commentators have also recognised that there is an unintended consequence in adopting a morally detached stance towards legal work.[368] Ironically, it may also lead to lawyers' failing to see clients in their full humanity. As a result, lawyers view clients as products of a lawyer's own speciality. Instead of individuals, the lawyer thus deals with 'the divorce', 'the property dispute', and so forth.[369] Together with the professional socialisation dynamic of 'win at all

(2019) 87 *Fordham Law Review* 1937 at 1951 (and footnotes cited therein). See also M Tarkington 'Introduction: The ethics of lawyers in government' (2019) 52 *Indiana Law Review* 265. For scholarship from Canada on this, see A Hutchinson 'In the public interest: The responsibilities and rights of government lawyers' (2008) 46 *Osgoode Law Journal* 105 at 106. See also AM Dodek 'Lawyering at the intersection of public law and legal ethics: Government lawyers as custodians of the rule of law' (2010) 33 *Dalhousie Law Journal* 1 at 4.

[363] Paras 10ff and 25. The court records that nothing came of this, but that a settlement agreement of R17.3 million was eventually agreed on.

[364] Para 28.

[365] Ibid.

[366] Quoted in D Luban 'Partisanship, betrayal and autonomy in the lawyer-client relationship: A reply to Stephen Ellman' (1990) 90 *Columbia Law Review* 1004 at 1004.

[367] Cf Postema 1980 *New York Law Review* 78.

[368] For example, Nicolson & Webb *Professional Legal Ethics* 178ff and K Kruse 'Beyond cardboard clients in legal ethics' (2010) 23 *Georgetown Journal of Legal Ethics* 103.

[369] Nicolson & Webb *Professional Legal Ethics* 180. Nicolson & Webb quote Paul Hill to show how this may happen. Paul Hill was one of the Guildford Four who spent years in jail for a wrongful conviction of murder. He is quoted as saying that he 'got the impression that any of our barristers could easily have … taken over the running of the prosecution'.

costs', this can produce what Kruse has called 'cardboard clients'.[370] Her argument is that practitioners presume clients to be one-dimensional figures[371] who are only concerned with maximising their legal and financial interests.[372] She tells us that this presumption comes from the tendency of lawyers to view their clients as walking bundles of legal rights and interests, rather than as whole persons whose legal issues often come 'deeply intertwined with other concerns – relationships, loyalties, hopes, uncertainties, fears, doubts, and values – that shape the objectives they bring to legal representation.'[373] By 'legally objectifying'[374] their clients, practitioners presume that the client wants to maximise their interests no matter what the costs or harm to third parties.[375] The idea that practitioners presume (and act on) 'extreme selfishness' on behalf of their clients is not new.[376] In the late 1970s, Simon complained that lawyers tended to end up representing a 'hypothetical person with only a few crude discrete

[370] Kruse 2010 *Georgetown Journal of Legal Ethics* 103. See also RC Cramton 'Lawyer disclosure to prevent death or bodily injury: a new look at Spaulding v Zimmerman' (1999) 2 *Journal for the Institute for the Study of Legal Ethics* 163 at 169 where he suggests that '[l]awyers have a terrible habit of fitting client objectives into a simplified framework-assuming that clients are governed only by selfish concerns-and then deciding matters for them as if the clients were moral ciphers'. Cramton, in turn, refers to an interesting study by Mindes that provides empirical support for the view that this assumption is often not true. Mindes's research suggested that clients want a caring and helping lawyer. See M Mindes 'Trickster, hero, helper: A report on the lawyer image' (1982) 7 *American Bar Foundation Research Journal* 177.

[371] Vischer also uses this terminology in noting that attorneys should not advise on the basis of 'one-dimensional professional constructs of client interests' but should enter into a dialogue with their clients that is broad enough to encompass basic insights about human nature. See RK Vischer 'How do lawyers serve human dignity' (2011) 9 *University of St Thomas Law Journal* 222 at 247.

[372] Kruse 2010 *Georgetown Journal of Legal Ethics* 124 sets out this phenomenon as follows: 'Lawyers, with the analytical precision of their professional training, slough off clients' non-legal concerns and focus only on the legally relevant aspects of the case. Consonant with their professional training, lawyers "issue-spot" their clients as they would the facts in a law school exam, reducing client objectives to bundles of legal rights and interests. Lawyers then pursue those legal interests in disregard of *both* their clients' actual wishes *and* the harm caused to others. In the process, lawyers disregard their client's inclinations to be cooperative, moral, and socially responsible and encourage the self-seeking behavior that accompanies legal interest maximization'.

[373] Kruse 2010 *Georgetown Journal of Legal Ethics* 104. See also K Kruse 'Client-centred answers to legal ethics questions' (2010) 13 *Legal Ethics* 186 at 188: 'The professionalised construction of clients as walking bundles of legal interests emphasises what clients are entitled to get from the law and de-emphasises concerns that carry normative content, such as the client's values, the client's reputation and standing in the community, and the preservation of the client's relationships with others'.

[374] Kruse uses this term in relation to how the lawyer in the US case of *Spaulding v Zimmerman* 116 N.W.2d 704 (Minn. 1962) might have justified his decision not to reveal information that could have saved the life of the plaintiff without even consulting his client on the matter. Kruse opines that it is likely that the lawyer in Spaulding saw his job as 'simply to maximize his client's legal and financial interests and did not consider the effect of the settlement on the client's other values or relationships. In other words, the lawyer in *Spaulding* possibly succumbed to *legally objectifying* his client, viewing John Zimmerman narrowly as nothing more than a collection of legal and financial interests disconnected from the rest of his life'. Kruse 2010 *Georgetown Journal of Legal Ethics* 106.

[375] Hegland attributes this assumption to the way in which law students are taught that litigation is a 'game' where victory is more important than truth. Within this game theory of law, he posits that it is natural for law students to impute immoral ends to clients on this basis. See K Hegland 'Moral dilemmas in teaching trial advocacy' (1982) 32 *Journal of Legal Education* 69 at 73-5.

[376] WH Simon 'The ideology of advocacy: procedural justice and professional ethics' (1978) 36-7 *Wisconsin Law Review* 29 at 53. See also Wasserstrom 1975 *Human Rights* 1 (with more of an emphasis on lawyer paternalism) & W Lehman 'The pursuit of a client's interests' (1979) 77 *Michigan Law Review* 1078 at 1088-89.

ends' who bore little resemblance to the real client, due to the lawyer's egoistic assumptions about the client.[377]

Again, while it is difficult to evidence these claims in SA, there is at least an indication that this may be the case in this country, especially when practitioners represent the state in civil litigation matters. Anecdotally[378] certain counsel for the state will believe that their mandate is simply to resist any relief that is sought, and will adopt a defensive position to that end, without considering the state's interests and values (and even facts at times). This appears to have been the situation in a decision involving several organs of state as respondents.[379] The matter was the consolidation of three applications where the applicants asked the court to declare the state's inaction to recognise and regulate Muslim marriages unconstitutional.[380] In the course of the judgment, the court commented that one of the state respondents (the Commission for the Promotion and Protection of the Rights of Cultural, Religious, and Linguistic Communities (CRL))[381] changed its lawyers and its stance during the case of the judgment due to 'a misunderstanding of its constitutional mandate by its previous legal representatives'.[382] In justifying its change of position in respect of the litigation (essentially from opposing the applications to supporting recognition for *all* religious marriages), the CRL alleged (through its new legal team) that its previous representatives misunderstood its instructions in that they submitted to the court that the CRL 'opposed the recognition and regulation of Muslim marriages *per* se'.[383] It is worth setting out how the CRL as the client became aware of this misunderstanding, especially in the light of Kruse's claim that lawyer's assume 'cardboard clients' who want to 'win at all costs' or at least fight any claim:

---

[377] Simon 1978 *Wisconsin Law Review* 54. Luban offering a series of hypothetical examples that evidence the divergence between a client's strictly legal interests and client's other values, cares, and commitments that can materially change the nature of the legal advice. See D Luban 'Paternalism and the legal profession' 1981 *Wisconsin Law Review* 454.

[378] Correspondence with legal practitioner, 25 October 2018, on file with author. See for eg *Shannon v Masilonyana Local Municipality* [2017] ZAFSHC 149 where the court found that counsel for the state opposed an application for condonation with no factual basis and making averments that 'could surely not be made with any conviction' (para 20). See also *Minister of Safety & Security v G4S International UK Ltd: In re G4S International UK Ltd v SA Airways (Pty) Ltd* [2012] JOL 28815 (GSJ) at paras 15-16 where the court noted the state attorney's tactics of opposing matters at the last moment.

[379] *Women's Legal Centre Trust v President of the Republic of South Africa, Faro v Bignham NO, Esau v Esau* [2018] 4 All SA 551 (WCC) (*WLCT*).

[380] The specific remedies sought by each applicant is set out in the *WLCT* paras 33-39, 41 & 48 respectively.

[381] A body set up in terms of the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities Act 19 of 2002.

[382] *WLTC* para 96. At para 5.10 of the CRL's initial Explanatory Affidavit, counsel for CRC drafted a statement that the CRL 'cannot support the promulgation of the Muslim marriages Act only' since this would result in inequality between Muslim religious marriages and other religious marriages.

[383] Para 16 of CRL's Supplementary Affidavit in *WLCT.*

> 'It was while attending the court proceedings at the last sitting of this court … that Ms Bernadette Muthien, a part-time Commissioner of the CRL Rights Commission, became aware that the CRL Rights Commission's written and oral submissions may not have been in accordance with its Constitutional mandate. Upon deliberation and proper understanding of the meaning of its position, it dawned upon the CRL Rights Commission that the allegations and submissions made in the Explanatory Affidavit and Submissions, did not accord with its Constitutional mandate. Furthermore, it became evident that its former legal representatives did not understand their client's instructions.'[384]

Perhaps the most vivid harm to the state (as a client) was in the matter of *Njongi v MEC, Department of Welfare, Eastern Cape*.[385] In this matter, the provincial government terminated all social security payments unilaterally. The provincial government did this out of an apparent concern that many fictitious beneficiaries existed. As a result, tens of thousands of bona fide beneficiaries were forced to reapply for their grants. Not surprisingly, many disabled beneficiaries in the rural areas did not have the means or know-how of how to re-apply. Some beneficiaries went for months without payment of their grants. By the time Njongi – one such beneficiary – was able to seek legal help with the aid of pro bono representation,[386] and while administrative processes were undertaken, the matter had gone on for years. When Njongi's grant was eventually reinstated, the provincial government failed to pay backpay. When she finally applied to court for her backpay, having exhausted administrative processes, the legal advisors to the provincial government advised its political head, the Member of the Executive Council for the Eastern Cape Department of Welfare (the MEC) to plead prescription[387] of the debt to avoid payment, which advice he followed.

While the CC expressed doubt as to whether prescription could run at all if the debt claimed is a social grant, the court was scathing in its criticism of the provincial government and its legal advisors. While the court found that the initial decision to terminate grants in the manner it did

[384] Para 17 of CRL's Supplementary Affidavit in *WLTC*. Of course, it begs the question of whether the client (a representative of CRL) who deposed to the initial explanatory affidavit actually read it before signing it – but it is possible to explain this as part of the reliance that clients put on representatives where they lack the legal knowledge and jargon. Kruse 2010 *Georgetown Journal of Legal Ethics* 133 implies this when she comments that a client who might otherwise act in the public interest may be dissuaded by their deference to a lawyer's professional expertise.

[385] 2008 (4) SA 237 (CC).

[386] With the assistance of the Legal Resources Centre, a public interest law firm established in 1979 with the primary aim of using the law as an instrument of justice for South Africa's marginalised and under-resourced populations. See http://resources.lrc.org.za/introduction-3/.

[387] Prescription in South Africa is governed by the Prescription Act 68 of 1969. The Act provides inter alia that 'debts' are effectively extinguished after a period of 3 years. It is the equivalent then to a Statute of Limitations found in other types of legal systems.

was 'bewildering', 'unthinkably cruel' and utterly at odds with the constitutional vision to the achievement of which that government ought to have been committed,'[388] the court reserved most of its ire for the way in which the legal advisors had advised its client (provincial government) to plead prescription. Essentially, the advice was for the state to take advantage of its own unlawful administrative action in refusing payment to a vulnerable person. Unusually, the court required that the MEC explain why the matter was handled in the way it was. As a result, the MEC deposed to an affidavit setting out his legal advisor's memorandum on the issue, which he had followed. The court found the legal advice to be inaccurate in a number of respects, namely that Njongi 'ought' to have known that she was entitled to the payment of arrears,[389] and the amount of the claim was set out as more than was actually due.[390] The court went on to state that the legal adviser ought to have set out the moral and policy context. In particular the court noted that the legal advisor should have drawn the MEC's attention to the fact that:

> 'Mrs Njongi is poor, that she suffers from 100% permanent disability, that she has no other source of income and that the aim of opposing the application would be to avoid paying disability grants that had accrued to her and had not been paid to her as a result of unlawful administrative decision.'[391]

In summarising, the court noted that:

> '[l]awyers, in particular senior lawyers, employed by the State must be careful to place accurate and full information in briefing documents to senior office bearers who are required to make policy decisions of great sensitivity.'[392]

Interestingly, the court characterised the moral and policy context as 'legal' considerations in that they derived their relevance from the values of the Constitution.[393] In particular, the court found that failure to take into account Njongi's circumstances resulted in a violation of her

[388] *Njongi* para 17.
[389] Para 65.
[390] Para 67. The court noted that the legal advice had stated that the claim was for R16 300 but failed to mention that R10 500 had already been paid out, and the only amount outstanding was a relatively small sum of R5 800. The court noted: 'The memorandum ought to have brought this factor into the reckoning, and told the MEC how much the litigation had already cost and how much it would cost in the future. The MEC would then have been able to make an informed decision taking into account the costs, the amount due to Mrs Njongi, her circumstances and the importance of the issue of prescription to the Provincial Government'.
[391] *Njongi* para 66.
[392] Para 68.
[393] Paras 17 and 79.

dignity – a value and right enshrined in the Constitution.[394] While the harm to the client was less and more indirect (being reputation and possible political fall out), nevertheless, it remains important in this context. In considering the legal advisor's conduct in this setting then, it is hard not to conclude that the legal advisor saw his role as resisting all claims against the client by whatever means possible, no matter what the costs or harm to third parties, and no matter what the context of the client's position – in this case as an organ of state. This meant ignoring the obvious moral and policy implications of the issue, in favour of a 'technical' approach based on prescription. Levinson notes that the action of ignoring obvious moral considerations involves "'bleaching' out of [the] merely contingent aspects of the self, including the residue of particularistic socialization that we refer to as our "conscience"'.[395] What was the harm to client? The court found (and it was much publicised) that the provincial government's conduct in defending the matter represented 'unconscionable conduct',[396] a reference back to Levinson's insight noted above. This resulted in public condemnation of the MEC and the provincial government.[397]

One may argue that this case was over ten years ago, and lessons should have been learnt. However, in a recent judgment against the very same department,[398] it appears that the Department as 'client' learnt nothing from the judgment, and that the legal practitioners it employed were prepared to employ similar technical tactics to resist a claim that had extensive moral and policy implications. In *Imbumba Association for the Aged v MEC for Social Development Eastern Cape & another,*[399] the Department unilaterally announced without any prior warning, negotiation or consultation that it would not pay pre-agreed subsidies to charity organisations that were providing services to older persons, because these older persons could not leave their homes due to COVID.[400] The strategy of the legal representatives was to argue (1) that the application to court to recover the money was not urgent; (2) that COVID was a force majeure that interrupted the state's obligations to pay; and (3) a host of technical points regarding the service level agreement provisions in the case of a breach. It is worth repeating

[394] Paras 4, 16, 17 and 81.
[395] S Levinson 'Identifying the Jewish lawyer: Reflections on the construction of professional identity' (1993) 14 *Cardozo Law Review* 1577 at 1578.
[396] *Njongi* para 85.
[397] For example, see Staff Reporter 'E Cape Govt 'at war with the poor' *Mail & Guardian* 16 November 2007, available at https://mg.co.za/article/2007-11-16-e-cape-govt-at-war-with-the-poor; P de Vos 'Batophele se ma se …' 7 November 2017, available at https://constitutionallyspeaking.co.za/batophele-se-ma-se/.
[398] In July 2000, all Departments of Welfare were 'rebranded' to Departments of Social Development. However, their mandate remains the same.
[399] [2020] ZAECGHC 112.
[400] *Imbumba* para 16.

the court's response to two of the three of the tactics. In respect of the claim that the matter was not urgent, the court said as follows:

> 'In my view this [lack of urgency] is a vexatious and futile point when one is dealing with the welfare of people in need, during a life threatening pandemic. One would not expect it to be raised by an organ of state mandated to provide social services, and especially when no SLA's [Service Level Agreements] have been concluded for home based care because there is no budget for such services.'[401]

In respect of the claim of force majeure, the court found the claim to be

> 'an extraordinary stance in circumstances where older persons are in need of social services, and even more so in the midst of a pandemic. … [The charity organisations] provided essential services and were obliged to perform. Covid-19 did not prevent them from performing. Similarly it was not impossible for the Department to perform. It had the budget. If the services were provided, it had to pay.'[402]

Finally, the court found that none of the technical points raised regarding the contractual provisions had any merit. Before giving its order, the court found it necessary to comment on the way in which the Department conducted the matter both prior to and during litigation.[403] Quoting *Permanent Secretary Department of Welfare, Eastern Cape Provincial Government & another v Ngxuza and Others,*[404] the court found that the Department's resistance to the application was 'regrettable'[405] given that the litigation involved the needs of older persons and their constitutional rights to social services and dignity, and even the right to life. The court further bemoaned the Department's unilateral conduct and its failure to consult, *knowing* that such conduct would be harmful to older persons in need. It suggested that its conduct not only

[401] Ibid para 27.
[402] Ibid para 39.
[403] Ibid para 41.
[404] 2001 (4) SA 1184 (SCA) para 15 (footnotes omitted): 'But when an organ of government invokes legal processes to impede the rightful claims of its citizens, it not only defies the Constitution, which commands all organs of state to be loyal to the Constitution, and requires that public administration be conducted on the basis that "people's needs must be responded to". It also misuses the mechanisms of the law, which it is the responsibility of the courts to safeguard. The province's approach to these proceedings was contradictory, cynical, expedient and obstructionist. It conducted the case as though it was at war with its own citizens, the more shamefully because those it was combatting were in terms of secular hierarchies and affluence and power the least in its sphere'.
[405] *Imbumba* para 42.

'fell below the standard expected of it in litigation' but was in disregard of the people it supposedly served.[406]

The lawyer's moral detachment or lack of 'conscience' has also harmed clients in a way that the lawyer does not foresee. Research in behavioural psychology has shown that where persons are morally disengaged, they are blinded as to how their behaviour violates their moral principles[407] that may, in fact, impact on others*, including* their clients. This research indicates that people rationalise their conduct by directly addressing the nature of their immoral actions, reconstruing their conduct to make potentially immoral behaviour appear positive.[408] Hall and Holmes helpfully pick up on the psychological meaning of 'rationalisation' in the Oxford Dictionary as:

> '([P]sychol) a justification of behaviour to make it appear rational or socially acceptable by (subconsciously) ignoring, concealing or glossing over its real motive'.[409]

Hall and Holmes go on to note that this definition allows lawyer to justify conduct (often subconsciously), concealing their real motive, and in effect 'making it look better than it actually is'.[410]

This effect can be found particularly in the domain of personal injury law, where contingency fee agreements are used. Contingency fee agreements were unlawful in SA until 1997 when the Contingency Fee Agreements Act[411] (CFA) was passed. The rationale for this Act was to provide, in effect, the keys to the court house for those who otherwise could not afford litigation.[412] Importantly, the Act provides that lawyers may not charge more than double their normal fees on contingency, subject to that amount not being more than 25 per cent of the total award.[413] The regulators (in the form of the then law societies), the state, and the judiciary have usually characterised lawyers' actions in charging fees above the maximum prescribed by law

---

[406] Ibid.
[407] J Tsang 'Moral rationalization and the integration of situational factors and psychological processes in immoral behavior' (2002) 6 *Review of General Psychology* 25.
[408] A Bandura 'Social cognitive theory of moral thought and action' in WM Kurtines & JL Gewirtz (eds) in *Handbook of Moral Behavior and Development* vol 1 (1991) 45. See in general, K Hall & V Holmes 'The power of rationalisation to influence lawyers' decisions to act unethically' (2008) 11 *Legal Ethics* 137.
[409] Hall & Holmes 2008 *Legal Ethics* 138.
[410] Ibid.
[411] Act 66 of 1997.
[412] See in general, South African Law Commission Report *Speculative and Contingency Fees: Project 93* (1996).
[413] Section 2(2) of Act 66 of 1997.

(viz overreaching) as simply dishonest and based on pure greed.[414] However, it is arguable that the conduct of these lawyers may be the result of the neutral partisanship role that requires them to be morally disengaged.[415] This moral engagement allows them to rationalise a role that incorporates their self-interest while supposedly acting zealously for their vulnerable clients. It is hard not to make this conclusion in the context of a group of lawyers who – for almost 20 years[416] – justified collecting impermissible ratios of their client's award/settlement as part of their role in serving the public (especially when serving indigent clients who, but for the contingency fee agreement, would not be able to access the legal system).[417]

The process of moral detachment arguably allows practitioners to forget the rationale behind the amount awarded for the harm against the client, and to fail to see the consequences of cutting into that award more than what is due/lawful. This kind of rationalisation came out forcefully when the South African Association of Personal Injury Lawyers (SAAPIL) applied to court for a declaration that the Act did not prohibit so-called 'common law contingency fee agreements' (CLCFAs) (effectively asking the court to allow lawyers to charge over the statutory fees cap). In the alternative, SAAPIL argued that the cap on fees in the Contingency Fees Act was unconstitutional because the Act violated lawyers *and* their *clients'* rights.[418] The court a quo found that SAAPIL's argument was 'manifestly unfounded and completely irreconcilable with the seven judicial decisions …' on the matter. When their application failed, SAAPIL appealed to the CC.[419] In a rare example of a judgment penned by all the justices of

[414] For example, in *Erasmus v William* [2016] ZAECGHC 116 para 13 the court interpreted the practitioner's reading of the Act as a 'licence to plunder'.
[415] See D Ariely *The (Honest) Truth about Dishonesty* (2012) for a general discussion on the powers of people to rationalise their conduct.
[416] In 2002, the Law Society of the Northern Provinces (LSNP) issued a circular to all attorneys in its jurisdiction (the most urban jurisdiction in SA) that common law contingency fee agreements (CLCFAs) were lawful (Ronald Bobroff was the President at the time the circular was issued). The Free State Law Society did the same. Despite two senior counsel advising the LSNP separately that CLCFAs were unlawful, the law society declined to withdraw the circular, having obtained a contrary opinion from a junior advocate during 2004. It was only around 2013 that practitioners were cautioned against following the opinion of the circular (see *South African Association of Personal Injury Lawyers (SAAPIL) v Minister of Justice and Constitutional Development* 2013 (2) SA 583 (GNP) para 3)
[417] The Contingency Fees Act permits a practitioner to charge 25 per cent of the amount awarded in the judgment, or double the normal fees of the practitioner, whichever is the lower (s 2(2)). As pointed out in various matters before the courts, practitioners have – at worst – ignored the Act, charging up to 60 per cent of the award on the supposed basis of a 'common law contingency fee agreement'. At best, lawyers have read the Act to mean that the practitioner is entitled to take 25 per cent of the award, notwithstanding effort or risk. This is a patently wrong reading of the Act. See for example, *Thulo v Road Accident Fund* 2011 (5) SA 446 (GSJ)*, Mofokeng v Road Accident Fund* [2012] ZAGPJHC 150 *and Mfengwana v Road Accident* 2017 (5) SA 445 (ECG).
[418] *SAAPIL* para 4.
[419] *Ronald Bobroff & Partners Inc v De La Guerre; SAAPIL v Minister of Justice and Constitutional Development* 2014 (3) SA 134 (CC).

the court collectively,[420] the CC questioned SAAPIL's *locus standi* in that they appeared to be representing their *own* interests, rather than their stated locus standi as representing the interests of potential and actual clients in need of access to justice.

While SAAPIL claimed that clients' access to justice would be limited should lawyers not be able to charge above the cap, SAAPIL did not lead any evidence of a limitation to clients' access to justice, and the court could find no limitation of that right.[421] This kind of argument by SAAPIL epitomises the power of rationalisation, where the very purpose of the controls in the Contingency Fees Act were subverted by lawyers who attempted to parade their own interests as the interests of clients.[422] The court dismissed SAAPIL's case, but the practice of overreaching in these types of matters continues.[423]

### *3.2.2 Harm to lawyers*

The second type of harm brought about by moral anaesthetisation is direct harm to lawyers themselves. While this is a contested harm,[424] there is some evidence to suggest that lawyers suffer from a pervasive guilty conscience over their 'professional viciousness'.[425] Markowits blames excessive adversarialism for what he calls an epidemic of lawyer self-loathing.[426] Kruse recognises that this critique mainly relies on the Bernard Williams's work on moral philosophy, which focuses on the way moral agents experience moral obligation.[427] As Kruse points out:

> 'Williams's philosophical work builds on the strongly intuitive notion that our moral concerns in these situations cannot be fully expiated by telling us that the moral harm we cause, … , is not really our fault. A theory that delivers the answer that causing such harm "is not morally

[420] The judgment was penned by 'The Court' rather than the usual way in which judgments are written: ie the name of the judge who wrote the judgment precedes the decision, and the names of the concurring judges follow.
[421] *Bobroff* para 12.
[422] Given that the controls protect clients *from* lawyers' conflicts of interest in the first place. The court a quo judgment (*SAAPIL*) relies on several sources to make this point, specifically the SALRC *Report on Speculative and Contingency Fees* para 4.95–4.97 & paras 1.19, 2.19, 3.23 and 4.101, and J Sarkin & N Fourie 'The contingency fees bill: Opening the doors of justice or Pandora's Box?' (1997) 12 *SAPL* 214 at 219.
[423] *Legal Practice Council v Tlalang* (unreported judgment) (case number 68910/2018) *North Gauteng High Court.*
[424] See M Freeman & A Smith *Understanding Legal Ethics* 5 ed (2016) 18 where they contest this idea by commenting that in their 80 years of practising law between them, they have 'never experienced this terrible guilt' and nor do they think that most lawyers suffer from it.
[425] Markowits *A Modern Legal Ethics* 36. This is the subject of some popular movies that focus on lawyer conduct, for example, the opening scene in *The Devil's Advocate* (1997) shows a lawyer dealing with his conscience in representing an alleged child abuser.
[426] Markowits *A Modern Legal Ethics* 36.
[427] Kruse 2010 *Georgetown Journal of Legal Ethics* 115 and the references to Williams cited therein.

> wrong" is incomplete because it fails to capture the moral experience of acting, or being forced to act, contrary to one's own values.'[428]

Those such as Freedman and Smith, who claim that this guilty conscience does not (and should not) occur, usually adopt a 'strategy of detachment' exemplified by Montaigne's claim that he was able to do exactly this:

> 'The mayor and Montaigne have always been two people clearly separated. There's no reason why a lawyer or a banker should not recognise knavery that is part of his vocation. An honest man is not responsible for the vices or stupidity of his calling, and need not refuse to practise them. They are customs in his counter and there is profit in them. A man must live in the world and avail himself of what he finds there.'[429]

The issue with Montaigne's assertion is the question whether individuals can truly ever separate their professional and nonprofessional life. It is inevitable that 'an individual will bear the traces of their work'.[430] If one takes this to its natural conclusion, lawyers may well become morally cynical or amoral in their non-professional dealings and, at worst, they may begin to prize attributes in their private life that have given them success in their professional lives – attributes such as cunning, manipulation and humiliation.[431] Detachment then may lead to self-absorption and a lack of empathy. Schmitt argues that this strategy leads people to become incapable of obtaining the moral insight that flows from being in relation to another[432] and which, he argues, is the essence of caring and dialogic ethics.[433] Dialogical ethics implies that the best advice can be obtained when the lawyer treats her client as a 'thou' – being a person – rather than an 'it' – a mere object.[434]

In South Africa, the harm to lawyers takes a particular turn where prejudices regarding race and sex, used in the defence of a client, can lead to a legal profession starting to believe its own strategies – a dangerous road to travel given South Africa's history. As De Vos notes, '[i]t has long been a strategy of defence counsel in rape trials to exploit deeply entrenched sexism in society by putting the victim on trial, turning the prosecution of the rapist into the prosecution

---

[428] Ibid. Footnotes omitted.
[429] *IV Essays de Montaigne* (1876) quoted in Nicolson & Webb *Professional Legal Ethics* 176.
[430] Nicolson & Webb *Professional Legal Ethics* 177.
[431] Ibid. See also Rhode 1985 *Stanford Law Review* 589.
[432] R Schmitt *Beyond Separateness* (1995) 50 and 58-71.
[433] Nicolson & Webb *Professional Legal Ethics* chap 2, ss 6 and 7.4.
[434] For a general discussion of dialogical ethics, see HW Simons, J Morreale, BE Gronbeck *Persuasion in Society* (2001) 362.

of the survivor'.[435] De Vos asks further: can it 'ever be professionally and personally acceptable for lawyers to aid and abet the reprehensible conduct of their clients. How, for example, would we judge a senior advocate who exploits deeply entrenched racial prejudice in defence of his or her client?'[436] If we are to believe the assertion above that lawyers' will 'bear traces of their work in their personal life', this conduct is concerning in the extreme and affects not only lawyers themselves, but also the community.

### *3.2.3 Harm to the community*

In relation to the final harm, Rhode notes the potential harm that lawyers pose to the community poignantly when she states that

> '[o]verzealous representation of powerful clients has exposed innocent third parties to substantial health, safety, and financial risks. And inadequate representation of poor and unsophisticated clients has left them similarly vulnerable.'[437]

In considering this harm, most commentators use a utilitarian argument about the consequences of unbridled zeal for the community. For example, Atkinson – in militaristic terms – comments that it leads 'to atrocities against other combatants and mounting casualties among the civilian population',[438] and Gordon notes that it provides 'a recipe for total sabotage of the legal framework'.[439] Cramton suggests that the process of 'constantly going to the edge of the law and taking a very permissive view of what the law permits' results in lawyers gradually adopting a mind-set that ignores, and may eventually assist in, illegality that harms third persons.[440]

Theorists in the US put this into context by complaining that the root cause of many high-profile scandals. For example, the participation of lawyers in the US saving-and-loan crisis of the 1980s, the spectacular rise and fall of Enron in the early 2000s, and legal opinions approving

---

[435] P de Vos 'Jacob Zuma and the State Capture Commission: We need to talk about his lawyers' *Daily Maverick* 1 February 2021, available at https://www.dailymaverick.co.za/article/2021-02-01-jacob-zuma-and-the-state-capture-commission-we-need-to-talk-about-his-lawyers/. De Vos reflection turns a lawyer's dubious ethical treatment of Fezekile Kuzwayo, the survivor and complainant in the Zuma rape trial. In quoting Tlhabi, De Vos notes that the lawyer was judged as 'masterful – and I don't mean that as a compliment – in slut-shaming Fezekile Kuzwayo'.

[436] Ibid.

[437] Rhode *In the Interests of Justice* 50.

[438] R Atkinson 'Beyond the new role morality for lawyers' (1992) 51 *Maryland Law Review* 853 at 857-58.

[439] RW Gordon 'The independence of lawyers' (1988) 68 *Boston University Law Review* 1 at 20-21.

[440] RC Cramton 'Enron and the Corporate Lawyer: A Primer on Legal and Ethical Issues' (2002) 58 *Business Lawyer* 143 at 173. See also Hall & Holmes (2008) *Legal Ethics* 137 at 143.

CIA torture,[441] have all been caused by lawyers whose zeal blinded them to the greater moral, legal and financial implications of their work.[442] Even in the absence of evidence implicating lawyers in some (but not all) of these scandals, it is trite to say that none of these cases of fraud could have been successfully executed without lawyers' assistance.[443]

Similarly, it could be said that South African lawyers involving in the unfolding so-called 'state capture' scandal are subject to the same criticism. In order to give some context, a definition and the context of 'state capture' is necessary to understand how lawyers have, arguably, harmed the community. State capture has been defined in South Africa's popular media as a form of political and economic corruption with a general reference to corrupt relations between bureaucratic/political actors and private sector interests within the economy.[444] It is alleged that the facilitation of state capture has deprived the South African state of approximately R1.2 trillion that would otherwise have been spent 'on essential public services and on helping to repair the colossal damage caused by the apartheid, still a huge deadweight on [South Africa]'.[445] Croucamp & Malan provide a nuanced explanation of how this corruption occurs:

> 'The political elite provides the economic elite with preferential access to the resources of the state, which could otherwise not be accessed other than through direct theft, who in turn return a portion of the revenue accessed through a consolidated monopoly in the formal economy to the political elite … .'

In the context of strong procurement regulations in South Africa,[446] it is difficult to imagine how this preferential access to state resources can take place without the direct assistance of

---

[441] D Cole *The Torture Memos: Rationalizing the Unthinkable* (2009).

[442] See for eg W Simon 'The Kay Scholer affair: The lawyer's duty of candor and the bar's temptations of evasion and apology' (1998) 23 *Law and Social Inquiry* 243; S Koniak 'When the hurlyburly's done: The Bar's struggle with the SEC' (2003) 103 *Columbia Law Review* 1236; and E Wald 'Lawyers and corporate scandals' (2004) 7 *Legal Ethics* 54. Fischer lists what he calls 'a succession of frauds' over 35 years which he notes inevitably involves probable and explicit misconduct by lawyers': '[T]he National Student Marketing in the late 1960s to early 1970s, OPM. in the 1970s, abusive tax shelters of the 1970s and early 1980s, several of the more spectacular S&L failures during the S&L crisis of the 1980s and early 1990s, the global BCCI bank fraud of that same period, and now Enron, Tyco, [and] WorldCom.' See KR Fisher 'The higher calling: regulation of lawyers post-Enron' (2004) 37 *University of Michigan Journal for Law Reform* 1144 at 1045.

[443] Fischer 2004 *University of Michigan Journal for Law Reform* 1045.

[444] A Grzymala-Busse 'Beyond clientelism: incumbent state capture and state formations' (2008) 41 *Comparative Political Studies* 638 at 638. Cf PA Croucamp & L Malan 'The theory of systemic patronage and state capture: the liberal democratic project and its regime contenders' (2018) 10 *African Journal of Public Affairs* 86 at 89 where the authors focus on the social relations underlying the phenomenon and argue that it is a defined means of social order and control – essentially a regime preference.

[445] P Hain *Submission to the Judicial Commission of Enquiry into State Capture* (November 2019) available at https://www.biznews.com/global-citizen/2019/11/18/guptas-kpmg-hsbc-state-capture-peter-hain.

[446] Section 217 of the Constitution requires that procurement by the state must be done in accordance with a system which is 'fair, equitable, transparent, competitive and cost-effective'. Legislation enacted to promote s 217

lawyers.[447] Thus, Boqwana has alleged that the various financial crises at state-owned enterprises (such as Prasa,[448] Transnet[449] and Denel[450]) have been facilitated by lawyers 'who convinced all and sundry that the shuffling of paper facilitating unethical transactions between business elite and political elite must be understood as the practice of commercial law'.[451] While direct evidence is difficult to obtain given the nature of confidentiality and privilege rules, there have been some disturbing revelations of lawyer conduct at the Zondo Commission of Inquiry into State Capture, a judicial commission set up by the President to 'inquire into allegations of state capture, corruption and fraud in the public sector including organs of state'.[452] One such revelation was that a senior partner at the firm Hogan Lovells was alleged to have facilitated corrupt payments to government officials on behalf of his client.[453] A British politician, Lord Hain, alleged in a House of Lords debate in the British Parliament that the same law firm had facilitated state capture at the South African Revenue Service. He alleged that the law firm had done so by whitewashing an investigation and incorrectly exonerating the service's deputy Jonas Makwakwa [454] In his testimony to the Zondo Commission, Hain included lawyers in what he termed the 'professional enablers' of state capture. These are:

> 'persons or entities that become involved (whether intentionally or unintentionally) in facilitating the "cleaning" of laundered money in return for a fee. Their role is to disguise the source, location and ownership of funds. Examples of professional enablers include lawyers, auditors/accountants and estate agents. Lawyers might assist by setting up complex corporate

includes the Public Finance Management Act 1 of 1999, the Local Government Municipal Finance Act 56 of 2003, and the Preferential Procurement Policy Framework Act 5 of 2000.

[447] The same could be said of the accounting profession. See for example, C Ryan 'State capture chickens come home to roost for accountants' *MoneyWeb* 11 September 2018 available at https://www.moneyweb.co.za/news/south-africa/the-state-capture-chickens-have-come-home-to-roost-for-accountants/. See also C Smith 'Delighting' clients undermine accounting industry's moral courage - KPMG SA chair' *Fin24* 14 August 2019, available at https://www.fin24.com/Companies/Financial-Services/delighting-clients-undermine-accounting-industrys-moral-courage-kpmg-sa-chair-20190814.

[448] The Passenger Rail Association of South Africa.

[449] Transnet deals with the state railways, ports and pipelines.

[450] Denel deals in state defence, security and related technology.

[451] A Carlisle 'Ethics in legal profession at all-time low' *Daily Dispatch* 24 July 2019 quoting Boqwana during his public lecture: M Boqwana 'Ethics in the legal profession' *Rhodes University Faculty of Law* 23 July 2019.

[452] Proclamation number 3 of 2018, GG 41403, 25 January 2018. For an overview of its genesis, see *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma* [2021] ZACC 2 at paras 19-23.

[453] 'Law firm "appalled" that former partner implicated in state capture testimony' *News24* 18 January 2019, available at https://www.news24.com/SouthAfrica/News/law-firm-appalled-that-former-partner-implicated-in-state-capture-testimony-20190118.

[454] In response to Hain's allegations, the chairperson of Hogan Lovells (South Africa) Inc. published a response entitled: 'Sunlight over shadow: An examination of Lord Hain's remarks to the House of Lords on 15 January 2018' January 2018, available at https://www.biznews.com/global-citizen/2018/01/23/peter-hain-hogan-lovells-state-capture.

> structures of shell companies enabling money to be moved from one country to another country where there is low transparency.'[455]

Another example of possible lawyer complicity was when the former head of the Independent Police Investigative Unit alleged that a 'flawed' report by another top law firm legitimised a groundless case against him by state capturers.[456]

While the examples set out above are still only allegations, they highlight how lawyers' conduct can have a negative effect on the community. But it is not just high-level scandals: generalised hyperzealous partisanship in everyday legal practice can have devastating effects on the legal framework too, as Gordon eloquently sets out:

> 'The legal-social framework is a common good, and self-interested individual behaviour can destroy its value for everyone. Extreme adversariness in litigation or regulatory compliance settings is problematic not just because it is incredibly unpleasant and full of posturing and bad manners, but because it erodes the conditions of the economy and social order. Repeated lying in negotiations can destroy fragile networks of trust and cooperation that alone make negotiation – especially between relative strangers possible. Strategic contract-breaking reduces the value of all contracts everywhere that are not already backed by strong customary sanctions.'[457]

An example of extreme adversarial conduct can be found in the case of *Omotoso & others v S.*[458] The case dealt with a renewed bail application for a person charged with multiple rapes and human trafficking. In both his heads of argument and in argument, counsel for *Omotoso* submitted to the court that the fact that the applicant was an illegal immigrant in the country was of little relevance in the bail application.[459] In support of this submission, counsel stated in his heads that

---

[455] P Hain *Submission to the Judicial Commission of Enquiry into State Capture* (November 2019) para 17, available at https://www.biznews.com/global-citizen/2019/11/18/guptas-kpmg-hsbc-state-capture-peter-hain.
[456] H Böhmke 'The role of lawyers in state capture' *Financial Mail* 6 June 2019 available at https://www.businesslive.co.za/fm/opinion/on-my-mind/2019-06-06-heinrich-bhmke-the-role-of-lawyers-in-state-capture/. A Umraw 'Werksmans report "got it wrong and jumped to conclusions", Robert McBride tells inquiry' *Financial Mail* 12 April 2019 available at https://www.businesslive.co.za/bd/national/2019-04-12-werksmans-report-got-it-wrong-and-jumped-to-conclusions-robert-mcbride-tells-inquiry/.
[457] RW Gordon 'Why lawyers cannot just be hired guns' in D Rhode (ed) *Ethics in Practice: Lawyers' Roles, Responsibilities and Regulation* (2000) 42 at 46.
[458][2020] ZAECPEHC 43.
[459] Ibid 24.

> '[o]ur Courts have, on a number of occasions indicated that to suggest that a person cannot be admitted to bail because he is illegally in the country is in conflict with the Constitution. Counsel then cited two cases to support this submission.'[460]

When the court pointed out that the cases cited had nothing to do with the status of illegal immigrants and bail, counsel apologised, suggested that he had simply used the wrong authorities, and would provide the correct authorities before the case was finalised. However, counsel was unable to do so and ended up conceding that, in fact, such authorities did not exist, in so far as he was aware.[461] In the light of counsel's submission on this point, the court had the following to say:

> 'In passing I consider it timely to express my disquiet in legal representatives making bold submissions to the Court regarding a particular legal principle and claiming the existence of numerous case law in support thereof when in fact they are aware of none. I accept that this may have been a genuine error on the part of Mr Price but it calls for caution going forward. Courts should be able to accept Counsel's word about the existence of case law in support of a legal submission without question or compunction, especially where specific cases allegedly in support thereof have been cited in argument.'[462]

While there may have been a genuine error on the part of counsel (as the court pointed out), the impression left is of a practitioner who was willing to go, as Cramton says, 'to the edge of the law'.[463] The result is that, gradually, the legal practitioner may make submissions that are favourable to her client that mislead the court, and could harm third parties and justice.[464]

At the heart of this harm then is a critique of formalism and its commitment to conceptual clarity. Schlag notes that formalists believe that the law contains concepts that are

> 'sufficiently rich and determinate to allow a "meaning-based" elaboration of the system of law. In other words, one can reflect upon the concepts of law in such a way as to derive legal conclusions from those concepts (without any extrinsic aid).'[465]

---

[460] *S v Branco* 2002 (1) SACR 531 (W) at 536; *S v Acheson* 1991 (2) SA 805 (Nm).
[461] *Omotoso* para 24.
[462] Ibid.
[463] RC Cramton 'Enron and the Corporate Lawyer: A Primer on Legal and Ethical Issues' (2002) 58 *Business Lawyer* 143 at 173.
[464] See also *Ulde v Minister of Home Affairs and Another* 2008 (6) SA 483 (W) para 36*ff.* See also the order of the SCA in *Jeebhai v Minister of Home Affairs* 2009 (5) SA 54 (SCA) where the court chastised a practitioner for failing to mention an unfavourable precedent that he himself had argued before a full bench of that same court.
[465] P Schlag 'Formalism and realism in ruins (mapping the logics of collapse)' (2009) 95 *Iowa Law Review* 195 at 202. Schlag uses Kennedy's term ('meaning-based') and comments (at fn 22) that it is helpful because it captures

This ignores the obvious point, as Hale indicates, that every grant of a private right is a disablement of the rights of others.[466] Thus, to argue that lawyers serve the legal system by protecting the liberal value of autonomy, misses the obvious point that the pursuit of a client's autonomy does not necessarily increase autonomy generally - it merely increases someone's liberty by coercively impairing someone else's.[467]

## 3.3 JUSTIFICATIONS FOR THE NEUTRAL PARTISANSHIP ROLE

It is thus clear that while many commentators may argue about the significance or weight of the harms considered above, neutral partisanship *does cause harm*. It therefore follows that these harms have to be justified. As mentioned above these justifications come in three main forms, namely that NP is: (1) a necessary corollary of the adversarial system; (2) consistent with the aims of the liberal institution s of state; and (3) the best way to achieve liberal values. These three justifications are considered and then critiqued below.

### *3.3.1 Neutral partisanship is essential to the adversarial system*

One justification for the neutral partisanship role is its alleged necessity for the effective operation of the adversarial system.[468] The adversarial system, a feature of most commonwealth countries (including SA) and the United States, is based on the idea that the litigation process is party-driven. In contrast, most European systems adopt an 'inquisitorial' method that is – for the most part – judge-driven.[469] The adversarial system thus operates under the premise that the courts are almost completely reliant on legal representatives in litigation

formalism's ethos so well, that is, the attempt to derive meaning from basic concepts alone, in isolation from history, psychology, politics, and culture.

[466] R Hale 'Coercion and distribution in a supposedly noncoercive state' (1923) 38 *Political Science Quarterly* 70 as unpacked by Schlag ibid 206. Schlag gives an obvious example of the general impact of this approach: the grant of a property right to a private party effectively disables other parties from using the protected resource.

[467] Schlag ibid.

[468] L Fuller & JD Randall 'Professional responsibility: Report of the joint conference' (1958) 44 *ABA Journal* 1159; M Freedman *Lawyer's Ethics in an Adversary System* (1975) and Nicolson & Webb *Professional Legal Ethics* 183. West calls neutral partisanship 'the unpleasant by-product of an adversarial system', see R West 'The zealous advocacy of justice in a less than ideal legal world' (1999) 51 *Stanford Law Review* 973 at 973. Huemer claims that this is the 'main' justification for the neutral partisanship role played by lawyers. See M Huemer 'Devil's advocates: On the ethics of unjust legal advocacy' in E Crookston, D Killoren, & J Trerise (eds) *Ethics in Politics: The Rights and Obligations of Individual Political Agents* (2017) 285 at 289.

[469] Hurter argues that the characterisation of European systems as 'inquisitorial' is incorrect and notes that the characterisation probably stemmed from the summary and rather despotic procedure 'by inquisition' introduced by Pope Innocent III in terms of which a judge collected testimony against a suspect in secret. She notes that terms like the 'investigatory system' or the 'activist system' would be more fitting. See E Hurter 'Seeking truth or seeking justice: Reflections on the changing face of the adversarial process in civil litigation' 2007 *TSAR* 240 at 241.

to decide what material to present in support of the litigants' rival propositions.[470] On this basis then, the argument for zealous partisanship proceeds on the basis that, without zealous and neutral advocates, clients cannot be sure that everything that could be said for their cases will be brought before the courts. If the lawyer is concerned with the immorality of client ends or the means to those ends, the lawyer could affect the litigants' interests and the quality of the decision made by the court.[471] There are usually three main arguments made in favour of the adversarial system, supported by neutral-partisan lawyers.[472] These are that the system is the best suited to ascertaining truth;[473] is the best procedural context for the protection of legal rights;[474] and accords with our sense of fairness.[475]

Ipp points out that it is now generally accepted that – while fairness and rights protection are reasons – the ultimate purpose of the adversarial system is to resolve disputes by pursuing the truth.[476] The idea is that the parties are supposed to 'engage in fierce combat, pulling apart each other's case and, once the dust has settled, the truth will emerge. It should be the only thing left standing after the battle.'[477] Bundy and Elhauge similarly comment that '[t]he lawyer's zeal ensures that motivation is high, and competition from the opposing counsel checks potential excesses and ensures that each party's increased effort enhances rather than impairs the

[470] See *Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development & others* 2009 (4) SA 222 (CC) at para 39 where the CC noted that a feature of the adversarial system is that 'courts are required to be impartial and ordinarily only decide issues that the parties have properly raised and are properly before the court in terms of its factual underpinnings.' The court does say, however, that this is subject to certain exceptions.
[471] Hurt 2007 *TSAR* 241.
[472] Nicolson & Webb *Professional Legal Ethics* 188.
[473] L Fuller 'The adversary system' in H Berman (ed) *Talks on American Law* (1971). SD Thurman 'Limits to the adversary system: Interests that outweigh confidentiality' (1980) 5 *Journal of the Legal Profession* 5 at 7. Freedman & Smith *Understanding Legal Ethics* 30.
[474] MH Freedman 'Our constitutionalized adversary system' (1998) 1 *Chapman Law Review* 57 at 61.
[475] LL Fuller & JD Randall 'Professional responsibility: Report of the joint conference' (1958) 44 *American Bar Association Journal* 1159 at 1216; Nicolson & Webb *Professional Legal Ethics* 189; M Freedman 'Our constitutionalised adversary system' (1998) 1 *Chapman Law Review* 57 at 87-88 and RA Macdonald 'Study paper: Prospects for civil justice' in *Ontario Law Reform Commission Study Paper on Prospects for Civil Justice* (1995) 15 at 16: 'Indeed, to feel that one has been listened to impartially and conscientiously is a central litigant value'.
[476] D Ipp 'Reform to the adversarial process in civil litigation (part I)' (1995) *ALJ* 705 at 714. But cf Hurter 2007 *TSAR* 241 who notes that '[t]raditionally it is said that the adversarial system of dispute resolution seeks the attainment of justice, while in the system used in civil law countries … seeks truth'.
[477] R Finkelstein 'The adversarial system and the search for truth' (2011) 37 *Monash University Law Review* 135 at 136. Harms, an erstwhile Deputy President in the SCA, has likened the adversarial trial to a game of American football or even rugby. He notes that the main object of the game is to 'block the other side from progressing' and in the case of American football at least, '[e]very minute or so the game comes to a stop'. He continues the analogy with the game of rugby: '[I]f something goes wrong, you may have a scrum, a lineout, a free kick, or a penalty kick. The players cannot know all the rules. They are even sometimes too complicated for the referee. And you keep your impact players, like your defence, until the last minute or so in reserve.' See L Harms 'Demystification of the inquisitorial system' (2011) 14 *PELJ* 240 at 240-41. Likening the adversarial system to a battle or a sports contest is common amongst commentators. For example, see R Cramton 'Furthering justice by improving the adversary system and making lawyers more accountable' (2002) 70 *Fordham Law Review* 1599 at 1609.

accuracy of adjudication'.[478] Given South Africa's adoption of the adversarial system from its English colonisers,[479] it is apt to refer to the English case of *Ridehalgh v Horsefield*,[480] which summarises the characteristics of the system:

> 'Our legal system, developed over many centuries, rests on the principle that the interests of justice are on the whole best served if parties in dispute, each represented by solicitors and counsel, take cases incapable of compromise to court for decisions by an independent and neutral judge, before whom their relationship is essentially antagonistic: each is determined to win, and prepares and presents his case so as to defeat his opponent and achieve a favourable result. By the clash of competing evidence and argument, it is believed, the judge is best enabled to decide what happened, to formulate the relevant principles of law and to apply those principles to the facts of the case before him as he has found them.'

Thus, the underlying premise of the argument for neutral partisanship in an adversarial system, as accepted in the South African legal system, can be stated as follows: accurate results will emerge from competitive partisan presentations before disinterested tribunals.

Many commentators believe that this is an assumption that does not hold true in daily practice, for a variety of reasons.

First, commentators point out that the vast majority of legal representation never receives oversight from an impartial decision-maker.[481] Most of these consultations and/or disputes never come before a court. Most lawyers are not trial lawyers but are counsellors or advisers, operating, as Gillers notes, 'where there is no judge and no adversary. No one is watching. And

[478] S Bundy & E Elhauge 'Do lawyers improve the adversary system? A general theory of litigation advice and its regulation' (1991) 79 *California Law Review* 315 at 317-18.
[479] The adoption of the adversarial system is largely a result of SA adopting the English rules of civil and criminal procedure. However, it is noted that the South African criminal justice system does include some aspects of a more inquisitorial nature, see CR Snyman 'The accusatorial and inquisitorial approaches to criminal procedure: Some points of comparison between the South African and continental systems' (1975) 8 *CILSA* 100. For an example of an inquisitorial aspect in SA criminal procedure, see s 186 of the Criminal Procedure Act 51 of 1977 which provides that a judge may call witnesses in addition to those called by the prosecution and the defence 'in the interests of justice'.
[480] 1994 3 WLR 462 (CA) 470 471.
[481] As Carle notes, the idea that law is to be found in what ordinary lawyers do, rather than in what judges announce, is by no means new: she gives the examples of realists such as Llewellyn who organized their whole academic career around this insight in the 1920s and 1930s. See further, S Carle 'Structure and Integrity' (2008) 93 *Cornell Law Review* 1311 at 1315.

there may never be.'[482] As a result, the temptation for lawyers is to push the limits, sift the language of the law and find hidden meanings.[483] Gillers notes:

> 'Now, our social understanding is that law is not endlessly pliable in this way. But the problem is this: It can be made to be because law, after all, is only a language and language is pretty pliable. In the hands of a creative, motivated lawyer, with a demanding client, the language of the law can have astonishing elasticity. Through interpretation, the rule of law can be turned into what it is not. A fine exercise perhaps if you are interpreting Shakespeare or Kafka. But not for law.'[484]

The problem is that there is no oversight in situations where lawyers manipulate legal rights in the first place. Secondly, even if one accepts the importance of litigation in the legal system and the lawyer's role, commentators argue that the cases that end up in court rarely resemble the bar's idealised model of adversarial process given vast disparities in wealth, high litigation costs, and grossly inadequate access to legal assistance.[485]

As a result, the apparent required antagonism (as set out in *Ridehalgh v Horsefield*[486] above) may not – in fact – assist in the truth-finding mission, and the clash of competing evidence may not be on an equal playing field. This is because the recognition and application of clients' legal rights often reflect wider power imbalances in society. In particular, this objection is based on evidence that legal services are distributed among people according to how much money they can pay.[487] Kennedy notes that

---

[482] S Gillers 'Is law (still) an honourable profession?' Central Synagogue's Jethro Shabbat Lecture, New York City, Feb (2009) available at https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=e79a4a0f-bca8-4046-bf9f-42660d39e7af. See also P Schaefer 'Harming business clients with zealous advocacy: Rethinking the attorney advisor's touchstone' (2011) 38 *Florida University State Review* 253 at 262. Atkinson uses hyperbole to mock the use of role morality in both the courtroom and the conference room: 'Like the magic lead of the mythic Norsemen, the old role morality induces something akin to a state of berserk. Partakers are steeled against cries for quarter that might otherwise detract them from wholly zealous pursuit of client ends in the chaos of court room combat and in the staging areas of office conferences.' See Atkinson 1992 Maryland *Law Review* 857.

[483] Similarly, Gordon asserts that for corporate lawyers, there are none of the 'bothersome conditions of the courtroom', leaving these lawyers to stretch the rules and facts very extravagantly in their clients' favour without risking contradiction by adversaries, or the annoyed reactions of judges or regulators. See R Gordon 'A new role for lawyers? The corporate counselor after Enron' (2003) 35 *Connecticut Law Review* 1185 at 1204-205.

[484] Gillers 'Is law (still) an honourable profession?'

[485] Nicolson & Webb *Professional Legal Ethics* 188.

[486] 1994 3 WLR 462 (CA) 470 471.

[487] Pearce notes that current measures of the extent of unequal justice under law are quite gross and anecdotal. Thus, he notes that 'access to justice' is often used as a surrogate in an attempt to gauge inequality. See Pearce (2004) 73 *Fordham Law Review* 973. Rhode refers to a famous *New Yorker* cartoon (published 24 December 1973) to describe this situation: 'There, a well-heeled lawyer peers out over his desk and inquires of a slightly shabby client: "You have a pretty good case, Mr. Pitkin. How much justice *can* you afford?"' See D Rhode 'Keynote: Law, lawyers, and the pursuit of justice' (2002) 70 *Fordham Law Review* 1543 at 1549.

> '[l]awyers want to feel that because society has left the decision about who gets a lawyer, and what lawyer (an incompetent or the best money can buy) to the market, then it's all right for them to forget about it, while selling their own services for what they will command, regardless of the morality of the legal activity'.[488]

In this context, then, commentators argue that those supporting the neutral partisanship approach fail to acknowledge that the legal system's promise of equal justice under law is undermined by the ability of those in the system to afford payment of legal services.[489] This requires an 'unjustifiedly extreme faith in the justice system'.[490] Pearce notes:

> 'The reality is that our legal system largely distributes legal services through the market and justice through an adversary system where the quality of legal services has a major influence. As a result, to a significant degree, justice is bought and sold and the inevitable result is unequal justice under the law.'[491]

A comparison between paras 22.3.1 and 26.10.3 of the LPC's Code of Conduct[492] illustrates how the idealised version (para 22.3.1) of the advocate's role in this context is contradicted by a conduct rule (para 26) that allows advocates' to refuse a mandate where parties cannot agree on a fee or where costs are unlikely to be covered. In para 22.3.1, the idealised version is set out as follows:

> 'counsel are independent practitioners of advocacy and agents of the rule of law, who resist any undue influence from anyone, *whose specialised services are available to all persons*, *in particular indigent people*, regardless of any disregard in which persons requiring the services of counsel may be held by anyone …'[493]

This section is then contrasted with para 26.5, which states:

---

[488] D Kennedy 'The responsibility of lawyers for the justice of their causes' (1987) 18 *Texas Tech Law Review* (1987) 1157 at 1162.
[489] Weinreb, for example, notes that even if some wealth-based disparity is an inevitable result of a private bar, '[i]t is quite another thing to let the decisions of lawyers privately retained and compensated so overwhelm the criminal process that the influence of wealth is palpable and pervasive.' See LL Weinreb 'The adversary process is not an end in itself' (1999) 2 *Journal of the Institute for the Study of Legal Ethics* 59 at 62.
[490] Huemer in Crookston et al *Ethics in Politics* 290.
[491] RG Pearce 'Redressing inequality in the market for justice: Why access to lawyers will never solve the problem and why rethinking the role of judges will help' (2004) 73 *Fordham Law Review* 969 at 970. See in general: W Simon *The Practice of Justice: A Theory of Lawyers' Ethics* and Rhode 1985 *Stanford Law Review* 589.
[492] The code of conduct for all Legal Practitioners, Candidate Legal Practitioners and Juristic Entities came into effect on 29 March 2019 (GG 42337 GN 168 of 2019, as corrected in GG 42364 GN 198 of 2019.
[493] My emphasis.

> 'Counsel may decline the offer of a brief if agreement … cannot be reached on the fee to be charged by counsel; …'

And para 26.10.3:

> 'Counsel may refuse to accept a brief if … the instructing attorney is reasonably suspected by counsel of being unlikely to pay the fees due to counsel timeously or at all'.

Not surprisingly, much of the criticism of the adversarial system (combined with neutral partisanship) has come from theorists who contrast the ideal and abstracted form of the system with the social and financial power differentials in actual everyday practice.[494]

These theorists also question why it is assumed that polarised debate (as opposed to other methods of negotiation / discussion) encourages truth. For example, Frankel has argued that many of the rules and devices of adversarial litigation are not geared for the development of truth and fairness, but are often aptly suited to defeat those very values. As a result, truth becomes only 'an accidental approximation' of the adversarial system.[495] Rhode comments that it seems naïve to expect that the truth will emerge if two adversaries do their utmost to obstruct it.[496] Menkel-Meadow equally doubts the truth-seeking outcome of adversarial litigation in stating that '[b]inary, oppositional presentations of facts in dispute are not the best way for us to learn the truth; polarized debate distorts the truth, leaves out important information, simplifies complexity, and obfuscates rather than clarifies.'[497]

If one combines the two concepts under discussion in this section (neutral partisanship and adversarialism), commentators believe that it could lead to a situation where 'winning' becomes more important than 'truth', even if the idea is that winning *should* lead to truth. Menkel-Meadow, for instance, complains that lawyers in this system can limit and control both the presentation of facts and evidence (and even 'conspire' to keep some truth and information away from the court) in order to pursue this end.[498] Nicolson & Webb attribute the practice of wanting to win (above all) to 'professional socialisation and pedagogical discourses' that encourage such an attitude.[499] However, anecdotal evidence in SA suggests that client

[494] Hutchinson points out that not only is access to legal services obviously disparate, but also that the needs of the poor require a very different kind of lawyering. See Hutchinson 1995 *Alberta Law Review* 772.
[495] Frankel 1975 *University of Pennsylvania Law Review* 1040.
[496] Rhode 1985 *Stanford Law Review* 595ff.
[497] Menkel-Meadow 1996 *William & Mary Law Review* 5.
[498] Menkel-Meadow in J Holder, C O'Cinneide & M Freeman (eds) *Current Legal Problems* (2004) 84.
[499] Nicolson & Webb *Professional Legal Ethics* 187.

expectations also contribute to this approach. For example, one attorney writes in the attorney profession's national publication, *De Rebus*, that:

> '[t]here is hardly a litigation attorney who has not had experience of a client who is more concerned with the fight than its result. Even if advised that prospects of success are poor, the client insists on proceeding "to the bitter end", with every means at the attorney's disposal. Sometimes it is "a matter of principle". Sometimes the client is adamant that the other side should be resisted or pursued "no matter what it costs". Sensible, sweet reason does not deflect such a client one iota. "Over my dead body will be there talk of settlement!" barks the client.'[500]

In this way, lawyers may be ethically strained to give candid and independent advice to clients who do not want to hear that 'they cannot do what they want to do'[501] even though it is the lawyer's job to do just that.[502]

It is hard to illustrate these criticisms in SA since so many of the tactics and strategies of the adversarial advocate are hidden from view. However, there are some examples from South African case law where the judiciary has been exposed to such strategies and have recognised the strength of some of these criticisms. As mentioned earlier, the basic idea behind the adversarial system is that it '"holds the case … in suspension between two opposing interpretations" while all the "peculiarities and nuances" are explored'.[503] However, this assumes (to continue the metaphor) that the suspension is held taut by equally 'intelligent and vigorous advocacy on both sides'.[504] Thus when one side, or both sides, allow(s) such suspension to loosen, problems arise in both criminal and civil matters. This is obvious in cases where there is no legal representation, but it operates on a continuum. In *Prince v Minister of Justice and Constitutional Development; Rubin v National Director of Public Prosecutions (NDPP); Acton v NDPP*[505] the court dealt with the question whether the laws in SA that prohibit the use, purchase, and cultivation of cannabis for personal consumption were valid.[506] The court found that the matter (which it characterised as one of 'considerable social importance') could not be properly decided as 'the individual applicants appeared against an experienced

---

[500] L Rood 'Fight my case' (1991) Dec *De Rebus* 897 at 897.
[501] Luban & Wendel 2017 *Georgetown Journal of Legal Ethics* 356.
[502] For example, in *Fine v Society of Advocates of SA* (*Witwatersrand Division*) 1983 (4) SA 488 (A), an advocate felt pressed to draft a letter for a client to hand over to an investor in which the advocate confirmed the receipt of rental on behalf of the investor, when in fact no rental monies had been received.
[503] Simon 1978 *Wisconsin Law Review* 76 quoting Fuller & Randall 1958 *ABA Law Journal* 1161.
[504] D Rhode 'Ethical perspectives on legal practice' (1985) 37 *Stanford Law Review* 589 at 595 (quoting a report by the Joint Conference of the American Bar Association and the Association of American Law Schools).
[505] 2017 (4) SA 299 (WCC).
[506] Para 2.

legal team representing [the] respondents'[507] and much of the voluminous documentation the applicants tendered was of 'little value'.[508] It noted that the claim was 'couched in imprecise terms' and the papers were inadequate. The court found that in order for a 'comprehensive legal debate' to occur, it would need to hear submissions from experienced *amici curiae.*[509] Notably, the court eventually found in favour of the applicants relying on the *amici* submissions.[510] While the court did not comment on the socio-economic circumstances of the applicants in this particular case, the South African CC has said the following in relation to the failure of the state to provide legal representation in a commission of inquiry for mineworkers:[511]

> 'The fact that they [the miners] are poor should never be a basis to summarily dismiss their potential substantial prejudice. It is unthinkable and deeply offensive to basic fairness and the rule of law in a democratic state that the poor and vulnerable be left to their own devices, in a manner that will deny them exercise of their constitutional right in terms of section 34 of the Constitution [the right to legal representation]'[512]

Extending these concerns, the courts have also held that where *both* sides in a matter loosen the tension (viz that is, *neither* offer intelligent or vigorous advocacy), the decision maker will be seriously compromised. For example, in *S v Sebofi*,[513] the court set aside a conviction of rape and remitted the matter for further evidence. It did so because it felt that '[t]he calibre of the case presentations, both prosecution and defence, was unacceptable for a case of this seriousness'.[514] The court explained:

---

[507] Para 6.
[508] Para 5.
[509] *Amici curiae* is a Latin term that means 'friend of the court'. The South African courts have a discretion to call on *amici* (they can also be admitted on application in a particular matter) to provide information on areas of law that the court regards as complex or where the court needs specific expertise or information.
[510] The court contacted the Cape Bar Council to appoint members to act as *amici curiae.* In addition, an expert from the Centre of Criminology, Faculty of Law, University of Cape Town was contacted to provide an expert report, 'given that a considerable amount of the documentation filed by applicants proved to be of very little assistance in the determination of this case' (para 5).
[511] The Marikana massacre has been described as 'the biggest incident of police brutality since the advent of democracy' and as a watershed moment in politics (see South African History Online *The Marikana Massacre 16 August 2012* available at www.sahistory.org.za/article/marikana-massacre-16-august-2012). It occurred in August 2012 when the South African Police Services (SAPS) opened fire on a crowd of striking mineworkers at the Marikana platinum mine in South Africa's North West Province. The police officers' actions left 34 mineworkers dead, 78 wounded and more than 250 people were arrested. The SA president set up a commission to investigate the incident in terms of Proclamation no 50 of 2012, in GG 35680 of 12 September 2012. The regulations adopted pursuant to the terms of reference of the Commission provided that 'any person appearing before the Commission may be assisted by an advocate or an attorney'. However, in establishing the Commission, the President did not make any funding available for the various participants' legal representation.
[512] *Magidiwana v President of the Republic of South Africa* [2014] 1 All SA 76 (GNP) para 43.
[513] 2015 (2) SACR 179 (GJ).
[514] Para 65.

> 'A prosecutor cannot present a case by just pouring out a jumble of random facts as if one were pouring treacle from a jar. It is unfair to a court and it retards the aim of a fair trial which, apart from other factors, needs to be coherent and orderly. The defence fares little better: the cross-examination hardly plumbed the body of evidence and appeared to have no plan or objective and was either blind or inattentive to several material or potentially material details. The narrative of the testimony refers to relevant aspects which were ignored or overlooked. *An adversarial process is founded on proper preparation and commitment to testing the testimony available. It is not served by treating the process as a clerical chore.*'[515]

In these examples, the court was able to recognise the limits of the adversarial system and put in place mechanisms to counter such limits. However, the adversarial system does not require courts to be proactive – indeed the opposite it true – and therefore one can say that the court's actions in the examples above are the exception rather than the rule.[516] Further, where imbalances are not as clear (for example, both parties have legal representation, but one side has better resources), the prejudice is hard to ascertain.[517] Two cases deserve mention where courts have been able to pick up (and criticise) practitioner tactics aimed at interfering with, rather than ascertaining, the truth. In *Webb v Botha*[518] the court chastised one of the legal representatives as having:

> (a) obstructed the interests of justice … by the exploitation of the Rules;
>
> (b) …
>
> (c) delayed the final determination of the action to such an extent that prejudice may well result to the parties to it.'

[515] My emphasis.
[516] Another exception to this rule is an extraordinary recusal of the judge in *S v Mothlanyi* [2019] ZAGPJHC 246. In this matter, the judge recused himself from hearing a criminal matter since he found that counsel's behaviour made it impossible for him to preside over the matter: 'The trust I am required … to have in everything said by counsel is irreparably damaged' (para 59). Noting that 'far too many legal representatives who appear before our courts are ethically bankrupt' (para 60), the court found the actions of both prosecution and defence as problematic.
[517] Galanter suggests that the power and protection afforded to individuals (or classes) who act against corporate entities in the adversarial system can be deemed to be diminished, simply on account of corporate entities being generally far better resourced than individuals, with the ability of those corporate entities' lawyers' to use (abuse?) any avenue available to them in law. Access to justice has been a theme of Galanter's work: for examples of his earlier work, see M Galanter 'Why the haves come out ahead: Speculations on the limits of legal change' (1974) 9 *Law & Society Review* 95 and M Galanter 'Dining at the Ritz: Visions of justice for the individual in our changing adversarial system' in H Stacey and M Lavarch (eds) *Beyond the Adversarial System* (1999) 118. For examples of his later work, see M Galanter 'Access to justice in a world of expanding social capability' (2010) 37 *Fordham Urban Law Journal* 115 at 123.
[518] 1980 (3) SA 666 (N) at 673D-F.

Just under 40 years later, it appears that the same tactics continue. In both the court a quo and the Supreme Court of Appeal (SCA) decision in *ST v CT*[519] (a case dealing with a bitterly contested divorce) the court characterised the approach of the defendant (a Senior Counsel) as a 'scorched earth' policy in regard to the litigation.[520] Both courts found that the defendant (facilitated by his lawyers) unnecessarily drummed up the costs of his divorce so as to put the wife in a position where she could not afford to fund litigation and, as he hoped, would surrender to his counterclaims. He raised spurious defences and demanded interim orders, all designed to increase the costs of this action.[521]

### *3.3.2 The liberal institutions of state & respect for institutional resolution of pluralist views*

The justification noted here follows on from the earlier definitions of neutral partisanship given above. The essential argument here, relying on liberal formalism, is that law is a 'formal creation of society', and that lawyers are required to provide access to it.[522] According to this justification, people in society are entitled to rely on lawyers to assist them in realising their full range of legal rights and entitlements as provided in that formally created legal system.[523] By refusing to pursue a client's legal rights, a lawyer effectively undermines the institutions of liberal government, and particularly the principles of democracy and the rule of law.[524] Lawyers undermine these principles in that they 'surreptitiously substitute their own views for those of the institutions of liberal government'.[525] This justification relies on an account of legal ethics that is underpinned by a liberal account of the state – what Wendel calls 'political liberalism and democratic legitimacy'.[526] The argument is that it is only within the power of duly elected representatives (viz the legislature) to decide entitlements. Thus, if the government of the day has not amended the law to reflect this, the lawyer has no right to question the rights and entitlements created by that government. In other words, the lawyer must accept the legal

[519] 2018 (5) SA 479 (SCA). The court a quo judgment is reported as *W v H* 2017 (1) SA 196 (WCC).
[520] The SCA noted that the matter in the high court took up 53 court days, with two Senior Counsel on either side (see para 1).
[521] Paragraphs 1 and 16 in the court a quo: *W v H* 2017 (1) SA 196 (WCC). The court's reference to a 'scorched earth' policy has gained some notoriety in South Africa given its explicit endorsement and use by a legal representative (Adv Kemp J Kemp) of the former President of South Africa, Jacob Zuma. See the discussion at 2.7.4.
[522] Nicolson & Webb *Professional Legal Ethics* 205.
[523] Hutchinson *Fighting Fair* 43.
[524] Nicolson & Webb *Professional Legal Ethics* 205, Hutchinson *Fighting Fair* 43, Pannick *Advocates* 167-8; AH Goldman *The Moral Foundations of Professional Ethics* (1980) 96-7 and 111-2.
[525] Nicolson & Webb *Professional Legal Ethics* 205.
[526] WB Wendel 'The limits of positivist ethics: A brief history, a critique and a return to foundations' (2017) 30 *Canadian Journal of Law and Jurisprudence* 443 at 443.

system as a given, and not attempt to put her own social or moral agenda ahead of it.[527] Arguably, to do so would be to usurp the legislature's right to determine the rights in the legal system, and the resolution of such rights through the choice of certain courts and procedures.[528] Freedman puts this prospect in stark terms when he raises the spectre of lawyers becoming 'an oligarchy whose duty is to nullify decisions made by the people's duly elected representatives'.[529]

Proponents of this justification reason that it follows that lawyers should obtain any benefit for clients that the law allows.[530] If there are damaging outcomes for these parties in this process, the lawyer is not directly responsible since 'the wrong is wholly institutional'.[531] The argument (as summed up by Hutchinson) is that '[t]he legal profession is at its most institutionally moral when it adopts an amoral stance towards legal practice.'[532]

Following classic liberal theory then, all clients are regarded as the *homo economicus* with her lawyer as agent.[533] In this context, law is nothing more than the efficient ordering of a person's affairs, and the legal system (and its agents) should operate within these confines. This view emerges from liberal democratic theorists who take the view that the role of law is essentially 'to frame a landscape in which fair contests of rights and interests can take place'. Raz puts this view in succinct terms:

> 'The law provides the general framework within which social life takes place. It is a system for guiding behavior and for settling disputes which claims supreme authority to interfere in any kind of activity. It also regularly either supports or restricts the creation and practice of other norms in the society. By making these claims the law claims to provide the general framework for the conduct of all aspects of social life and sets itself up as the supreme guardian of society'.

---

[527] Hutchinson *Fighting Fair* 43.
[528] D Mellinkoff *The Conscience of a Lawyer* (1973) 158. In the context of litigation, neutral partisan proponents argue that the lawyer who attempts to impose his or her own morality will also usurp the courts' important role of legal clarification and development. On this latter point, see S Gillers 'Can a good lawyer be a bad person?' (1986) 84 *Michigan Law Review* 1011 at 1025-26.
[529] MH Freedman 'Personal responsibility in a professional system' (1978) 27 *Catholic University Law Review* 191 at 195.
[530] Nicolson & Webb *Professional Legal Ethics* 205. This is certainly the basic argument used by lawyers and accountants in justifying the creation of mechanisms and structures ('allowed in law') for their clients to avoid paying tax.
[531] C Fried 'The lawyer as friend: the moral foundations of the lawyer- client relation' (1976) 85 *Yale Law Journal* 1060 at 1085. Luban & Wendel 2017 *Georgetown Journal of Legal Ethics* 346 characterise Fried's statement as akin to the saying that goes 'don't hate the player – hate the game'.
[532] Hutchinson *Fighting Fair* 45.
[533] The possessive adjective in this sentence is deliberate.

Applying this to the lawyer's role is to understand that lawyers must give their clients the opportunity to pursue all that they want and are entitled to, provided that by so doing, they stay within the confines of the law.

In further support of this argument, theorists argue that if lawyers impose their own moral views on their clients, they dishonour the resolution to pluralism sought by state institutions through its scheme of political institutions and practices that has the governance of the community as its end.[534] Lawyers are thus duty-bound to accept the 'institutional settlement' of the state which includes the law of lawyering, such as rules of ethics and procedures, amongst its elements.[535] In this way, a lawyer's refusal to represent a client because of her own moral objections to the client's ends, or to do anything for the client that is arguably legal, violates the terms of the institutional settlement.[536] As Kruse notes:

> '[m]oral pluralism recognizes the existence of a diversity of reasonable yet irreconcilable moral viewpoints, none of which can be objectively declared to be "right" or "wrong" from a standpoint outside of its own theoretical framework.'[537]

Given this diversity of views, proponents suggest that lawyers should not second-guess the legal system's provision for clients' rights and entitlements, by imposing their own views on what the legal system ought to make provision for.[538] For example, Pepper asks:

> 'Do we want our lawyers primarily following rules as their guides for ethical professional behavior? Or would it be preferable for lawyers to make ethics choices in reliance on their character, virtues and skills of moral discernment and deliberation, aside from the following of a rule?'[539]

Thus, Farrow notes that a feature of this justification is that – while lawyers can legitimately engage their clients regarding moral issues – the resolution of these moral issues must take place either at the level of the legal system itself, or through the decisions of the client, *not the*

---

[534] Luban & Wendel 2017 *Georgetown Journal of Legal Ethics* 352-53.
[535] Ibid 353.
[536] See for example, A Woolley 'The lawyer as advisor and the practice of the rule of law' (2014) 47 *UBCL Review* 743 and K Kruse 'Fortress in the sand: The plural values of client-centred representation' (2003) 12 *Clinical Law Review* 369. General adherents to this view include Dare and Wendel: Wendel *Fidelity to Law* and Dare *Counsel of Rogues.*
[537] Kruse 2011 *Arizona Law Review* 496.
[538] Seen in this light, Luban notes that this could be viewed more like 'moral imperialism' than 'moral activism', see Luban 2012 *Texas Law Review* 676.
[539] SL Pepper 'Three dichotomies in lawyers' ethics (with particular attention to the corporation as client)' (2016) 28 *Georgetown Journal of Legal Ethics* 1069.

*lawyer.*[540] In this way, the lawyer's ethical obligations are derivative of the function of the law, not of some personal preference or virtue.[541] Thus, the lawyer 'uploads' and 'downloads' moral decision-making: uploading to those that make the law: 'judges, politicians and other public officials', and downloading to clients who must decide the scope of their representation.[542] If a lawyer believes that the law is wrong or morally questionable, it is entirely possible for the lawyer to lobby the state for legislative intervention, but the lawyer cannot use her beliefs against a client who seeks the protection of the law that the lawyer believes is questionable.

As Nicolson & Webb note, this justification boils down to the idea that individual lawyers can subvert democracy, the rule of law, and the liberal organs of government by declining to enforce citizens' legal rights. As a result, it is not the function of lawyers to question such rights, but rather the function of 'democratically elected legislatures and, in interstitial cases, by the courts'.[543]

However, Luban and others point out several problems with this justification.[544] The first is the notion of an 'oligarchy' of lawyers preventing clients from vindicating their rights. Luban tells us that this is simply not true, and an illusion since lawyers who refuse to execute client's projects to which they object on moral grounds do so individually, not in concert.[545] Thus, Luban sarcastically remarks that

> '[t]he worry about a hidden Central Committee of lawyers evaporates when we realize that the committee will never hold a meeting, and that its members don't even know they are on it'[546]

Secondly, he notes that legislatures may well agree that certain conduct is reprehensible, but decline to act where it would be 'too difficult to specify the conduct, or if the laws would of necessity be vague or over- or under-inclusive, or if enforcement would destroy our

[540] T Farrow 'The good, the right, and the lawyer' (2012) 15 *Legal Ethics* 141 at 147.
[541] Wendel 2017 *Canadian Journal of Law & Jurisprudence* 449.
[542] Farrow 2012 *Legal Ethics* 169.
[543] Nicolson & Webb *Professional Legal Ethics* 206.
[544] D Luban 'The Lysistratian prerogative: A response to Stephen Pepper' (1986) *American Bar Foundation Research Journal* 637.
[545] Luban 1986 *American Bar Foundation Research Journal* 641.
[546] Luban provides an analogy to clarify this point at 641. He notes that, historically, people have often been dissuaded from undertaking immoral projects by the anger, threats, and uncooperativeness of their spouses. Luban notes that '[i]t would scarcely make sense, however, to worry that this amounts to subjecting autonomous action "to rule by an oligarchy of spouses." There *is* no oligarchy of spouses'. This analogy has resonance with the title of his article on the issue: 'the Lysistratian prerogative' since it is a reference to Aristophanes's ancient Greek comedy where a Greek woman, Lysistrata, persuades the other Greek women to withhold sexual privileges from their husbands as a means of forcing them to end the Peloponnesian War.

liberties'.[547] Finally, Rhode remarks that legislative bodies may also be 'too "anaesthetized or simply overworked"' to remedy obvious deficiencies in legal standards.[548]

All of the above arguments are relevant to SA, but there are two additional reasons that make this justification fundamentally flawed in the context of SA. The first reason is that there are still a number of statutes that are in force but are 'relics' of the apartheid legal regime.[549] While many of them may be uncontroversial, some statutes may not be directly reflective of a constitutional democracy. These statutes are 'pre-constitutional and place […] the state above the law'.[550] Despite an effective new 'grundnorm' being in place since 1993 (viz the acceptance of the Interim Constitution and then the Final Constitution by South African society), some of these statutes remain in force until the legislature amends them, or courts declare their unconstitutionality.[551] While the South African Law Reform Commission (SALRC) has admirably tried to identify these laws and suggest amendments, until the legislature actually acts, these laws remain in force.[552] It is thus problematic to assume that all law (and the entitlements therein) is condoned by the democratic state. One simply cannot take for granted that the legislature has somehow endorsed all legislation in this context. First, there may not have literally 'got to it' (linking to Rhode's remark that legislatures are often anaesthetised or overworked), or – more concerning – the legislature has been careless or negligent in its failure to amend or pass legislation that is in line with the new grundnorm.[553] The South African

[547] Ibid 640. See also Atkinson 1992 *Maryland Law Review* 861-2 where he notes, for example that '[m]agazines like *Hustler* stay on the newsstands not because their merits outweigh their offenses, but because, rightly or wrongly, the cost of banning them is deemed greater than the harm of their circulation. In other cases, the law permits unwanted conduct simply because its eradication is not worth the cost. … The law is far too porous to filter out all socially harmful client desires.'

[548] D Rhode 'Ethical perspectives on legal practice' (1985) 37 *Stanford Law Review* 589 at 603, quoting Kennedy.

[549] Schedule 6 ('Transitional Arrangements') of the final Constitution is applicable here. Section 2 provides for the continuation of existing law until repealed, amended or challenged by means of an application to court as to its lack of consistency with the Constitution.

[550] *Nyathi v Member of the Executive Council for the Department of Health Gauteng and Another* (2008 (5) SA 94 (CC) para 17. In this matter, the CC found that s 3 of the State Liability Act 20 of 1957 was one such 'relic' and declared it unconstitutional.

[551] In terms of s 2 read with s 172 of the Constitution.

[552] The SALRC was established by the South African Law Reform Commission Act 19 of 1973. Section 4 of the Act requires the SALRC to act as an advisory body in the renewal and improvement of law in South Africa. In 2004, the SALRC initiated *Project 25: Statutory Law Revision*. It did so since it recognised that 'no comprehensive review of the statute book for constitutionality, redundancy or obsoleteness' has been undertaken. See, for example, SALRC *Report on Legislation Administered by Departments of Cooperative Governance and Traditional Affairs, Project 25: Statutory Law Revision* (September 2015) chapter 1, available at http://www.justice.gov.za/salrc/reports/r_pr025-CoGTA.pdf.

[553] For a discussion of the failure of Parliament to get a variety of Bills through Parliament (and other issues relating to Parliament's inaction) see T Gqirana & Q Huner 'Parliament: The good, the bad and the fair to middling' *Mail & Guardian* 28 May 2015, available at https://mg.co.za/article/2015-05-28-parliament-the-good-the-bad-andthe-fair-to-middling.

legislature appears to be both. In respect of being 'overworked', the CC has remarked as follows:

> 'We are mindful that Parliament's legislative plate is overflowing. These matters, have, however now become pressing and should be treated with the urgency that they deserve.'[554]

However, both the courts and the media have also complained about the lethargy and neglect of Parliament in amending or introducing laws in an effort to move away from its apartheid/pre-constitutional past. In *Minister of Justice v Ntuli*,[555] for example, the CC lamented the failure of Parliament to amend a fundamental breach of the right to a fair trial contained in a provision of the Criminal Procedure Act.[556] Not only had Parliament failed to amend the law prior to any contestation of its constitutionality (which may have fallen under the 'haven't-got-to-it' category), but the affected party had to go back to the Court since Parliament had failed to comply with the Court's time-based order that it amend the law. The state's inaction has been highlighted recently in cases where litigants have approached the courts (successfully in some instances) to force the executive and/or the legislature to comply with their constitutional obligations to remove, amend or introduce legislation which is in accordance with the Constitution.[557]

If one then considers the justification provided for neutral partisanship, viz that it supports the institutions of government, the justification simply cannot stand in SA for the reasons set out above. This is not to say that problematic legislation or common law is *not law* but simply to state this argument in the context of a fledgling democracy such as SA is a weak one for the reasons cited above. As Roederer has noted:

> 'The bulk of the rules of the private common law, no less than those in public law, are part of [the apartheid] past. The question of their survivability cannot rely *solely* on having secured some firm place in the matrix of precedent over the last two hundred years or more under the

[554] *Tongoane & others v National Minister for Agriculture and Land Affairs & others* 2010 (6) SA 214 (CC) para 125. This matter dealt with the failure of Parliament to make progress on legislation (as recorded in para 1 of the judgment) to: 'provide legally secure tenure or comparable redress to people or communities whose tenure of land is legally insecure as a result of the racist policies of apartheid that were imposed under the colour of the law'.
[555] *Minister of Justice v Ntuli* 1997 (3) SA 772. At para 37, the CC spoke of Parliament's inaction as a 'sorry tale'.
[556] As it was then: s 309(4)(a) read with s 305 of the Criminal Procedure Act 51 of 1977.
[557] For example, see *President of the RSA & another v Womens Legal Centre Trust & others; Minister of Justice and Constitutional Development v Faro & others; and Minister of Justice and Constitutional Development v Esau & others* [2020] ZASCA 177 where the Court found that the President and the Executive had failed to table legislation to protect women in Muslim marriages.

notion of stare decisis and the rule of law. The matrix of legal rules is no longer the seat of the law in South Africa.'[558]

### *3.3.3 Respect for liberal values*

The final justification used for the standard conception, as set out above, grounds role-differentiated morality as necessary for the protection of liberal values, with a particular emphasis on autonomy.[559] Proponents of this approach often name autonomy explicitly as the 'root justification' and 'foundation' for the lawyer's role as neutral partisan.[560] Similarly, it is the value most often referred to as the 'cornerstone'[561] and the 'central organizing value'[562] of the attorney-client role.[563]

It is necessary to consider how autonomy is conceived by proponents who see the lawyer's role in such a light. Autonomy is generally characterised as a value in the liberal tradition, and so the focus on autonomy fits with the second justification set out above, viz supporting the institutions of the liberal state. This is because classical liberal theory underpins both justifications: liberalism sees the individual as 'fundamentally self-interested', and it views government's role as permitting individuals the greatest freedom possible.[564] In this light then, autonomy is about the self-determination and the self-fulfilment of the atomistic individual.[565] This aspect of autonomy focuses on its link with the values of freedom and a certain reading of dignity where the individual is seen as a self-originating source of value. The wrong involved in disrespecting another's autonomy is a violation of the other's personhood, understood as the right to determine for oneself what to do.[566]

---

[558] C Roederer 'Transitional/transformative jurisprudence: Law in a changing society' in C Roederer & D Moellendorf *Jurisprudence* (2004) 622 at 647-48. My emphasis.
[559] S Pepper 'The lawyer's amoral ethical role: A defence, a problem, and some possibilities' (1986) *American Bar Foundation Research Journal* 613 at 616-7. See also Wendel *Fidelity to Law* 31 and Pannick *Advocates* 247.
[560] Pepper 1986 *American Bar Foundation Research Journal* 617; Fried 1976 *Yale Law Journal* 1071; and M Freedman 'Personal responsibility in a professional system' (1978) 27 *Catholic University Law Review* 191 at 197. The right to dignity is often cited alongside autonomy or the same as autonomy. Cf D Luban 'The Lysistratian prerogative: A response to Stephen Pepper' (1986) *American Bar Foundation Research Journal* 637 and CR Mendez 'Deflating autonomy' (2014) 66 *South Carolina Law Review* 401 at 402. Both Luban and Mendez object to Pepper's characterisation of autonomy as the foundation of the attorney-client relationship.
[561] D Luban *Legal Ethics and Human Dignity* (2007) 71.
[562] WB Wendel 'Autonomy isn't everything: Some cautionary notes on *McCoy v Louisiana'* (2018) 9 *St Mary's Journal on Legal Malpractice and Ethics* 92 at 105.
[563] See S Ellmann 'Lawyers and clients' (1987) 34 *UCLA Law Review* 717 at 729.
[564] RG Pearce 'The legal profession as a blue state: Reflections on public philosophy, jurisprudence, and legal ethics' (2006) 75 *Fordham Law Review* 1339 at 1351.
[565] Cornell & Fuller "Introduction" in Cornell *et al* (eds) *Dignity jurisprudence of the Constitutional Court* (2013) 8.
[566] Wendel 2018 *St Mary's Journal on Legal Malpractice & Ethics* 122.

Beyleveld and Brownsword have usefully linked this classically liberal meaning of autonomy with a certain reading of dignity, where it can be described as 'dignity as empowerment'. In this version of dignity, human beings have inherent dignity because they have capacity to act autonomously. Acting autonomously in turn refers to the 'the capacity to control one's actions by reference to the choices one has made,'[567] and to reject any attempt to treat human beings as mere things or instruments.[568]

Translated into role morality, the lawyer is seen thus as a tool for maximising client's autonomy – even if such decision-making is morally 'wrong' or 'bad'.[569] Fried's account of the 'lawyer as friend' sees the lawyer's main role as empowering the client to preserve and express their autonomy in relation to the legal system.[570] In the context of the attorney-client relationship, then, the lawyer 'acts in [the client's] interests, not his own; or rather he adopts [the client's] interests as his own'.[571] As such, the lawyer acts as a facilitator of the client's autonomy.

Pepper, in particular, thus sees autonomy as intrinsically valuable – that is, good for its own sake.[572] According to this view, lawyers owe only the most 'minimal duties' to the legal framework (viz the duties not to violate plain unambiguous commands of law, procedure, or ethics, not to offer such outrageously strained interpretations of facts and law to tribunals to amount to outright misrepresentation). Significantly, lawyers owe 'no duties' to the social framework at all, if performing them would conflict with her client's immediate interests.[573]

In going back to the terminology at the beginning of the section, commentators have identified that a lawyer's role should fit the *basis* or *foundation* of their particular legal system. Freedman – a commentator in the US – has grounded this basis or foundation specifically in the concept of autonomy in US constitutional law. In support of his argument, Freedman quotes Supreme Court Justice Brennan's observation that the US Constitution is 'a charter of human rights, dignity and self-determination'.[574] It follows then that if the main requirement of US law is to

[567] D Beyleveld & R Brownsword *Human Dignity in Bioethics and Biolaw* (2004) 15-16.
[568] D Beyleveld & R Brownsword 'Human dignity, human rights, and human genetics' (1998) 61 *Modern Law Review* 661 at 666.
[569] Ellman notes that, '[a]lthough many of the choices we make may be unwise or immoral, making choices is obviously central to our efforts to create moral value for our lives'. See S Ellman' Client-centeredness multiplied: Individual autonomy and collective mobilization in public interest lawyers' representation of groups' (1992) 78 *Virginia Law Review* 1103 at 1108.
[570] C Fried 'The lawyer as friend: The moral foundations of the lawyer-client relation' (1976) 85 *The Yale Law Journal* 1060.
[571] Ibid 1071.
[572] Ibid.
[573] Ibid.
[574] Quoted in M Freedman & A Smith *Understanding Lawyers* (2016) 7.

protect an individual's dignity *as* autonomy or self-determination, and an ordinary person cannot exercise autonomy without the help of a lawyer,[575] then a lawyer's first and foremost commitment is to enhance the client's autonomy. And it appears then that this requires giving the lawyer autonomy as well as to make representational choices about what clients a lawyer should represent and how to represent them, as long as the actions of the lawyer and client are legal.

In essence, then, commentators see enhancing the autonomy of individuals as the proper goal, end or 'good' in lawyering, as it is an explicit requirement of the US legal system.[576] The emphasis on autonomy is not just a US phenomenon. It is present in all countries where classical liberal theory is accepted as the norm. This norm is that the important, if not the *most* important social value of a system is the freedom of individuals to pursue their own goals.[577]

However, jurists and commentators disagree on this justification. These critics accept that autonomy is an important value to be promoted in the attorney-client relationship, but they differ greatly on the (1) weight that should be attached to the value (viz as 'foundational') and (2) the content of/meaning ascribed to autonomy.

In the first instance, Vischer and others notes that autonomy in this context is no more than a 'simplistic slogan' where it is assumed to be the central feature/foundation of the role of the lawyer, without more.[578] It belies the simple reality that by promoting a client's autonomy (understood as 'unconstrained freedom'[579]), zealous lawyers will often impair the autonomy of others in the pursuit of the client's ends.[580] Why should one person's (viz the client's) rights be

[575] Webb notes that 'lawyers are an essential corollary to any meaningful self-determination'. See D Webb 'Bounded autonomy and bounded zeal' (2009) 28 *University of Queensland Law Journal* 273 at 281.
[576] The US Supreme Court appears to approve of this version of autonomy in legal representation in *McCoy v Louisiana* 138 S. Ct. 1500 (2018). For a critical discussion of this case, see WB Wendel 'Autonomy isn't everything: Some cautionary notes on *McCoy v Louisiana'* (2018) 9 *St Mary's Journal on Legal Malpractice and Ethics* 92. In general, see H Kruuse & P Genty 'The State's role in the regulation and provision of legal services in South Africa and the United States: Supporting, nudging or interfering?' *Fordham International Law Journal* (2018) 42 *Fordham International Law Journal* 373. See also, examples given by Dolovich 2002 *Fordham Law Review* 1637 at fn 27.
[576] Dolovich 2002 *Fordham Law Review* 1638.
[577] Richards, for example, sees autonomy as central in US constitutional law in that it conceives of the people as self-governing agents. See DAJ Richards 'Autonomy in law' in J Christman (ed) *The Inner Citadel: Essays Of Individual Autonomy* (1989) 246. See also Nicolson & Webb *Professional Legal Ethics* 200 regarding the position in the UK.
[578] Vischer 2011 *University of St Thomas Law Journal* 231.
[579] Brownsword 'Freedom of contract, human rights and human dignity' in Friedmann & Barak-Erez (eds) *Human Rights in Private Law* (2001) 194-195.
[580] Nicolson & Webb *Professional Legal Ethics* 201.

privileged in society over those of other legitimate rights holders, particularly where money determines who has a lawyer and who has not?[581]

The privileging of the client's rights over others can take place in a variety of ways. It could occur in court processes through delay, misuse of court rules and/or humiliating a witness during cross-examination.[582] But it could also occur in societal setting, for example, where lawyers enable companies to pursue shareholder wealth to the detriment of the environment.[583] Luban recognises this, even in the US legal system, when he states that

> '[w]hile autonomy is closely connected with important values, it is hardly the *summum bonum*, and restrictions on autonomy for the purpose of securing other values (… [for example] the autonomy of other people) are justified'.[584]

Critics therefore point out that autonomy has been 'overstated' in the context of lawyering.[585] It is 'overstated' in two senses. First, Rhode & Luban have argued that a client's autonomy is not 'the only value' of social importance, and that it may be – depending on context – of lesser importance than other values. Thus, the client's goals may well be legal, and the lawyer's advocacy consistent with her duty to the client, but there may be other important social values that lawyers must take into account. In this vein then, it is argued that proponents of client's autonomy cannot assume *ex ante* that autonomy represents society's only (or most important) priority and thus any actions in accordance with this priority is always justified.[586]

Secondly, autonomy is 'overstated' in that it is paraded as a moral justification when it is a process or instrumental justification, in that it leads to other valuable ends. The challenge is

---

[581] TCW Farrow 'Sustainable Professionalism' (2008) 46 *Osgoode Hall Law Journal* 51. This question has added force when one considers that South Africa is officially the most unequal society in the world: South Africa has a Gini Co-efficient (an international measurement of relative poverty in a country or region) of approximately 0.6. This is consistently the lowest of all countries on this scale. See H Kruuse 'Vuku'zenzele ("Arise and Act"): Lawyers and access to justice in South Africa' in H Whalen-Bridge (ed) *The Role of Lawyers in Access to Justice: Asian and Comparative Perspectives* (2021) (forthcoming).

[582] Ibid.

[583] For other examples see Nicolson & Webb *Professional Legal Ethics* 202.

[584] D Luban 'Partisanship, betrayal and autonomy in the lawyer-client relationship: A reply to Stephen Ellman' (1990) 90 *Columbia Law Review* 1004 at 1035-36.

[585] CR Mendez 'Deflating Autonomy' (2014) 66 *South Carolina Law Review* 401 at 404. Following Luban, Rhode and Gordon's lead, Mendez argues that the extent to which client autonomy exists as a feature of the attorney-client relationship is 'greatly overstated' with the result that 'the value of client autonomy as a moral justification has been equally overstated'.

[586] See DL Rhode & D Luban *Legal Ethics* 3 ed (2001) 152.

that autonomy is often used interchangeably with dignity, whereas autonomy is only one aspect of dignity.[587] I return to this argument below in the context of the South African legal system.[588]

Similar to the complaints above, commentators have argued also that autonomy in and of itself has been 'thinned' and 'deflated' by formalists to the point where it has lost its substance.[589] In particular, these commentators complain that autonomy loses its relational aspect through the emphasis on formalism, but also, on a general misrepresentation of Kant's views.

The problem (linked to formalism), Nedelsky tells us, is that '[t]he liberal individualist tradition has been not so much wrong as seriously and dangerously one-sided in its emphasis'.[590] She notes that this tradition fails to acknowledge that people's '"selves," ... identities, [and] ... capacities are not comprehensible in isolation from their relationships.'[591] Nedelsky proposes the concept of 'relational autonomy' to resolve what she sees as a puzzle: that autonomy seems to be both grounded in and opposed to relationality.[592] Nedelsky suggests changing 'the framework' to resolve the puzzle.

However, there are those that note that it is not really a puzzle,[593] and that it is rather a failure to account for relational aspects of autonomy, or in fact a misrepresentation of early accounts of autonomy, that has led to the focus on the individual. In terms of this misrepresentation, local and international critics[594] have noted that Kant – contrary to many representations of his work as supporting an extreme individualist approach– actually portrays dignity and autonomy as relational. Vischer notes, for example, that Kant's version is often represented as 'some sort of malleable and self-defined freedom of choice'. Instead, Vischer argues that Kant views a person's dignity flowing from our general awareness 'that one is morally obliged and therefore morally accountable'.[595] As Kant puts it, it is the human will that 'has as nature's purpose for it the function of making universal law'.[596] In this way then, those who adhere to neutral partisanship do not recognise that these qualifications to autonomy means that one cannot rely

[587] Vischer 2011 *University of St Thomas Law Journal* 222.
[588] CR Mendez 'Deflating Autonomy' (2014) 66 *South Carolina Law Review* 401 at 404.
[589] Ibid.
[590] J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy, and Law* (2011) 249.
[591] Nedelsky *Law's Relations* 122.
[592] Ibid 52. Her solution then is to challenge the 'dominant picture of autonomy,' which treats autonomy as 'opposition to the collective' – this is discussed in chapter 6 below.
[593] M Friedman 'Relational autonomy and individuality' (2013) 63 *University of Toronto Law Journal* 327 at 332.
[594] Luban, Cornell, Wood and Vischer amongst others.
[595] Shell quoted in Vischer 2011 *University of St Thomas Law Journal* 229.
[596] Kant quoted in Vischer ibid.

on a principle that the individual is entirely self-motivated. Instead, lawyers need to recognise that autonomy – even in this context – may involve relational aspects.

#### *3.3.3.1 A failure of fit: the application of the liberal value justification in South Africa*

What does this mean for the South African setting? Contrary to what has been set out above, some have argued that South Africa's legal system – based on the foundational values of human dignity, equality and freedom – adopts (or should adopt) human dignity as understood as autonomy more along the lines described by Pepper, Fried and Freedman.[597] In interpreting dignity in the South African Constitution, for example, Ackermann argues that the right stems from human beings' 'intellectual and moral capacities' and entitles all human beings to the conditions necessary for 'self-determination' and 'self-fulfilment', among other entitlements.[598] Applying this to the lawyer's role may be interpreted thus as a requirement that lawyers must give their clients the opportunity to pursue all that they want and are entitled to, provided that by so doing, they stay within the confines of the law.

However, there are strong indications from commentators and South Africa's CC itself, that this should not be the approach. First, if the lawyer's role should fit the legal system (Freedman's constitutional law argument set out above), then South Africa's Constitution (and its particular provisions) has been distinctly described as 'different' to other Constitutions, especially the US Constitution.[599] This difference is important not just in form but in content. In terms of form, the CC emphatically noted the incompatibility of the US and SA constitutions in *S v Mamabolo*,[600] given that 'they stem from different common law origins and subsist in materially different constitutional regimes' with different emphases.[601] Lessig usefully distinguishes types of constitutions:

---

[597] R Sutherland *A Defence of the Standard Conception of Adversary Advocacy* (unpublished MA research report, University of the Witwatersrand, 2016). See in general L Ackerman *Human Dignity: Lodestar for Equality in South Africa* (2012). For a review of this text, see C McConnachie 'Human dignity, "unfair discrimination" and guidance' (2014) 34 *Oxford Journal of Legal Studies* 609.

[598] Ackerman *Human Dignity* 23–24 and 86.

[599] Mohamed DP, as he then was, in *S v Makwanyane* 1995 (3) SA 391 (CC) at para 262, quoted in D Davis & K Klare 'Transformative constitutionalism and the common and customary law' (2010) 26 *SAJHR* 403 at 404.

[600] 2001 (3) SA 409 (CC) at para 40.

[601] Lessig notes that '[t]he United States constitution stands as a monument to the vision and the libertarian aspirations of the Founding Fathers; and the First Amendment in particular to the values endorsed by all who cherish freedom. But they paint eighteenth century revolutionary insights in broad, bold strokes. The language is simple, terse and direct, the injunctions unqualified and the style peremptory. Our Constitution is a wholly different kind of instrument. For present purposes it is sufficient to note that it is infinitely more explicit, more detailed, more balanced, more carefully phrased and counterpoised, representing a multi-disciplinary effort on the part of hundreds of expert advisors and political negotiators to produce a blueprint for the future governance of the country'. See L Lessig 'Reading the constitution in cyberspace' (1996) 45 *Emory Law Journal* 869 at 869.

> 'We might distinguish between two types of constitutional regimes, one codifying, the other transformative. A codifying constitutional regime aims at preserving something essential from the then current constitutional or legal culture to protect it against change in the future; a transformative constitutional regime aims at changing something essential in the then current constitutional or legal culture to make it different in the future'.

Lessig then notes that the US constitution is a 'codifying constitutional regime',[602] and as such, it aims to enforce the status quo in classic liberal theory. That status quo was a response to the incursion of freedom by the English. Bilchitz, for example, notes that it is understandable that US theorists place such a strong emphasis on freedom (and interestingly, the right to religion) given the history of US where the very settlement of Europeans in the USA was to escape religious persecution[603] and absolute monarchy.[604] As a result, autonomy has special importance in the US as replacing the church and the monarchy with preserving the 'consent of the governed'.[605]

However, the South African Constitution can be described as a 'transformative constitutional regime'.[606] Its purpose is not to entrench the status quo, but rather is aimed at 'changing something essential' or making it 'different', as Lessig points out above. The drafters of the SA Constitution sought to utilise the law to *change* society in the direction of greater justice and equality.[607] This stems from a history in which the Constitution was passed as a direct response to legalised discrimination and segregation during apartheid. Given this format, it follows that a transformative constitution may (and probably will) have a different approach to values and rights than in a codifying constitutional regime.[608] This appears evident in the CC's pronouncement that South Africa's new Constitution 'is a document that seeks to transform the status quo ante into a new order'.[609] To illustrate this, Lessig notes '[t]he picture of the

[602] Lessig notes (ibid) that '[i]n [the US] constitutional tradition, the Constitution of 1791 was a codifying constitution-the Bill of Rights, that is, was a constitutional regime that sought to entrench certain practices and values against change'.
[603] D Bilchitz 'Should religious associations be allowed to discriminate?' (2011) 27 *SAJHR* 219.
[604] Mendez 2014 *South Carolina Law Review* 415
[605] Ibid.
[606] Lessig 1996 *Emory Law Journal* 869. D Bilchitz, T Metz & A Oyowe *Jurisprudence in an African Context* (2017) 68.
[607] Bilchitz et al *Jurisprudence* 68.
[608] *S v Zuma* 1995 4 BCLR 401 (SA) (CC) 411 para 15; *v Makwanyane* 688 para 39; *Executive Council of the Western Cape Legislature & Others v President of the Republic of South Africa & Others* 1995 10 BCLR 1289 (CC); *Coetzee v Government of the Republic of South Africa* 1995 10 BCLR 1382 (CC).
[609] *Du Plessis v De Klerk* 1996 (3) SA 850 (CC) para 157.

codifying regime is Ulysses tied to the mast; the picture of the transformative is revolutionary France'.[610]

In terms of the actual content of constitutional values, Feldman[611] notes that the content of the same concept found in different constitutions (viz autonomy, dignity, equality etc) is dependent on the particular moral and/or political philosophy at play. In other words:

> '[I]deas about descriptions of dignity are linked to beliefs about what is involved in living a good life, and to ideas of the Good more generally… [and] such ideas are culturally specific ….'

In particular to our discussion of autonomy in the US jurisdiction being translated into 'freedom' or 'dignity as empowerment', Feldman notes:

> '[W]e must not assume that the idea of dignity is inextricably linked to a liberal-individualist view of human beings as people whose life-choices deserve respect. If the state takes a particular view on what is required for people to live dignified lives, it may introduce regulations to restrict the freedom which people have to make choices which, in the state's view, interfere with the dignity of the individual, the group or the human race as a whole. …'[612]

The question then is whether South Africa's legal system accords the same meaning to autonomy as that which other classically liberal legal systems ascribe to it (amidst those who criticise such an account). There are certain statements emanating from the SA CC which may point to such a meaning. For example, in *NM and others v Smith and others,*[613] the court noted that underlying the rights to dignity, privacy and freedom is autonomy in that it encourages 'the constitutional celebration of the possibility of morally autonomous human beings independently able to form opinions and act on them'.[614] The court has also highlighted the importance of autonomy in *Barkhuizen v Napier*[615] where it has noted that '[s]elf-autonomy, or the ability to regulate one's own affairs, even to one's own detriment, is the very essence of

[610] Lessig 1996 *Emory Law Journal* 869.
[611] D Feldman 'Human dignity as a legal value – part 1' 1999 *Public Law* 682 at 686.
[612] Ibid at 685. See also C Albertyn 'Values in the South African Constitution' in D Davis, A Richter, and C Saunders *Inquiry into the Existence of Global Values* (2015) 326.
[613] 2007 (5) SA 250 (CC) paras 145-6.
[614] Ibid at para 145.
[615] 2007 (5) SA 323 (CC).

freedom and a vital part of dignity'.[616] However, Justice Khampepe[617] has argued forcefully that while South Africa's individualist rights-based Constitution can lead one to pigeonholing the Constitution as pejoratively 'liberal', its Constitution is not based on classic liberalism with its focus on autonomy, as in the US Constitution. Instead, the basis of South Africa's Constitution has been described as 'social, redistributive, caring, positive, horizontal, participatory, multicultural, and self-conscious about its historical setting, and transformative role and mission'.[618] As Klare has pointed out,

> '[u]nlike classical liberal bills of rights, whose chief purpose was to secure individual liberty and property from imposition from the government, the South African Constitution embodies the idea that the power of the community can (and must) be deployed to achieve goals consistent with freedom, that collective power can be tapped to create social circumstances that will nurture and encourage people's capacity for self-determination'.[619]

Thus, where 'autonomy as empowerment' is the focus in a legal system (such as the US arguably, where much of the work on role morality has been developed[620]) the neutral partisan role fits much more easily than in SA where, as Klare and others have pointed out,[621] autonomy is not front and central. In the South African system then, the liberal autonomy-focused theory of legal ethics is arguably excessively individualistic, not in keeping with the constitutional ethos, and ignores the importance of a well-lived life of attachment to families,

---

[616] Ibid at para 57. As in other jurisdictions, the court has also used autonomy interchangeably with the concept of dignity. For example, see *Mayelane v Ngwenyama* 2013 (4) SA 415 (CC) at para 73 where the right to dignity is described as including 'the right-bearer's entitlement to make choices and to take decisions that affect his or her life – the more significant the decision, the greater the entitlement. Autonomy and control over one's personal circumstances is a fundamental aspect of human dignity'. See also *Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development* 2014 (2) SA 168 (CC) at para 52 where the court noted that 'dignity recognises the inherent worth of all individuals … as members of our society, as well as the value of the choices that they make'.

[617] Justice S Khampepe *Meaningful Participation as Transformative Process: The Challenges of Institutional Change in South Africa's Constitutional Democracy* Stellenbosch University Annual Human Rights Lecture, 6 October 2016 para 30.

[618] Ibid para 31.

[619] Klare 1998 *SAJHR* 146. This is by no means a settled point: Woolman forcefully points out that the CC's body of jurisprudence waivers between the classical liberal model, a liberal democratic model, and finally a socially democratic model – the latter being a model in keeping with Khampepe, Klare and others. See S Woolman 'South Africa's aspirational Constitution and our problems of collective action' (2016) 32 *SAJHR* 156.

[620] Although this is a contested point made by commentators such as Luban 1990 *Columbia Law Review* 1035-36. Cf H Kruuse & P Genty 'The state's role in the regulation and provision of legal services in South African and the United States: Supporting, nudging or interfering?' (2018) 42 *Fordham International Law Journal* 373 at 399.

[621] See also Davis & Klare 2010 *SAJHR* 403.

neighbourhoods, faith communities and other associations,[622] as implied by Khampepe's description.

Of course, it will be recalled that there are those that argue that even in the US and other jurisdictions, theorists have overstated autonomy and that it is instrumental in any context, in that it leads to other values (rather than being a good in and of itself). Thus, autonomy in and of itself cannot properly ground the attorney-client relationship. While the South African CC has not addressing the attorney-client relationship directly, the court has explicitly endorsed this view of autonomy, viz that it has instrumental rather than substantive moral value. It follows then that any consideration of the exercise of autonomy has to be considered in the context of the end that it serves, at least in the context of a constitutional analysis.[623] For example, in *S v Jordan*,[624] the appellants argued that they could bring a constitutional challenge under the umbrella term of 'autonomy'. However, the CC found that a challenge grounded on a right to autonomy was inappropriate because the right was 'unenumerated' in the SA Constitution.[625] Instead, the court found that a challenge implicating autonomy had to be considered in the light of the end that it served, viz freedom, dignity or equality. The court noted this as follows:[626]

> 'While we accept that there is manifest overlap between the rights to dignity, freedom and privacy, and each reinforces the other, *we do not believe that it is useful for the purposes of constitutional analysis to posit an independent right to autonomy*. There can be no doubt that the ambit of each of the protected rights is to be determined in part by the underlying purport and values of the Bill of Rights as a whole and that the rights intersect and overlap one another. *It does not follow from this however that it is appropriate to base our constitutional analysis*

[622] This is the basic argument raised by communitarians in relation to neutral partisanship, but as noted in chap 5ff, this argument has resonance in the light of the South African Constitution. Wendel in LaFollette *International Encyclopedia* 2989.
[623] S Woolman 'Dignity' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa (CLOSA)* 2 ed (2013) 36-21.
[624] *S v Jordan & others (Sex workers education and advocacy task force & others as amici curiae* 2002 (6) SA 642.
[625] Ibid at para 52-53. My emphases.
[626] The Court summarised this argument as follows in ibid para 51: '[C]ounsel for the appellants argued that the structure of the Constitution makes it necessary to cluster the rights to dignity, privacy, and freedom of the person under the global concept of autonomy. In the first place, he argued, it is a matter of extreme significance for all persons to be able to determine how to live their lives. *It is the experience of autonomy that matters, the right to make decisions rather than the content of these decisions. Secondly, the state should not be empowered to make judgments concerning the good or bad life, provided that the conduct in question does not harm others. Such conduct might be unworthy or risky, but if it is not harmful to others then the state cannot interfere.'* (My emphasis).

*on a right not expressly included within the Constitution.* Accordingly, we will deal in turn with each of the rights said to be infringed.'[627]

The CC has also endorsed a position that the 'thinned out' or 'deflated' version of autonomy (viz one that is used interchangeably dignity in an individualist-directed way) is simply not what the SA Constitution contemplates, or what is needed.[628] This much is clear from *Ferreira v Levin NO & others; Vryenhoek and others v Powell NO & others*[629] where the CC characterised self-determination as only *part* of autonomy. Instead, the court has repeatedly emphasised the relationality of autonomy in a number of cases.[630] For example, in *MEC for Education: Kwazulu-Natal v Pillay*[631] the former Chief Justice noted that 'an individual human person cannot develop and achieve the fullness of his/her potential without the concrete act of relating to other individual persons'.[632] In *Jordan*, the court noted:

> 'To equate freedom simply with autonomy or the right to be left alone does not accord with the reality of life in a modern, industrialized society. … *Freedom and personal security are … achieved both by protecting human autonomy on the one hand, and by acknowledging human interdependence on the other. The interdependence is not a limitation on freedom, but an element of it.* It follows that *the definition of freedom requires not the exclusion of inter-dependence, but its embodiment,* bearing in mind that such incorporation should be accomplished in a manner which reinforces rather than undermines autonomy and upholds rather than reduces the value of maximising effective personal choice.'[633]

---

[627] Ibid at para 52.

[628] Cowen agrees that a reading of dignity as 'individualistic' makes the right particularly ill-equipped to meet the goals of the SA Constitution, particularly in relation to its equality jurisprudence. However, Cowen concludes that dignity can also encompass collective concerns, and in that way, implement the equality right. See S Cowen 'Can "dignity" guide South Africa's equality jurisprudence?' (2001) 17 *SAJHR* 34 at 51.

[629] 1996 (1) SA 984 (CC).

[630] For example, see *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 37 and *Bernstein & others v Bester & others NNO* 1996 (2) SA 751 (CC) para 65, and below.

[631] 2008 (1) SA 474 (CC).

[632] Ibid at para 57. Endorsed by *AB* at 51.

[633] Jordon ibid at paras 250-251. My emphases. It is important that the CC footnotes theorists who explicitly speak about relationality in autonomy. These footnotes are worth reproducing since the CC appear to be condoning a particular philosophy which in turn evidences Feldman's point (that a constitution is guided by differing philosophies). In this context, two separate works of Nedelsky are referred to, Nedelsky's work being dedicated to the idea of 'relational autonomy'. For example, the CC quotes Nedelsky *Reconceiving Rights as Relationships* quoted in van Wyk et al 63: '[D]ependence is no longer the antithesis of autonomy, but a pre-condition in the relationships - between parent and child, student and teacher, state and citizen - which provide the security, education, nurturing and support that make the development of autonomy possible ... the collective is a source of autonomy as well as a threat to it.' The CC also quote Oliver with approval: 'To define people as autonomous individuals is to underestimate the extent to which we are, inevitably and indeed beneficially, dependent on one another.' See D Oliver in J Jowell & Oliver (eds) *The Changing Constitution* 3 ed (1994) 461.

In *AB & another v Minister of Social Development*[634] the court went as far as to recognise that 'recent academic trends … echo the lessons of [South Africa's] past'. The court went on to say that these trends 'point to the inherently relational character of [autonomy]' which it suggests means the following: '[T]o be autonomous is to be socially and politically connected, rather than an agent of unfettered individual choice. … Autonomy is a necessary, *but socially embedded*, part of the value of freedom.'[635]

The most powerful indication that the CC has endorsed a relational version of autonomy is to be found in the case of *South African Police Service v Solidarity obo Barnard.*[636] The court states:

> 'An atomistic approach to individuals, self-worth and identity is not appropriate. This Court has recognised that we are not islands unto ourselves. The individual, as the bearer of the right to dignity, should not be understood as an isolated and unencumbered being. Dignity contains individualistic as well as collective impulses. Its collectivist attributes, including that we are "social beings whose humanity is expressed through … relationships with others."'[637]

Significantly, the court also reflected and endorsed the view that Kant's views on autonomy requires a relational approach in that Kant 'asks us to lay down for ourselves a law that embraces every other individual in a manner that extends beyond the interests of our more parochial selves'.[638]

It is clear then that, in the South African context at least (and arguably in other jurisdictions), autonomy is an important value to be promoted as it links to values such as dignity and freedom. Autonomy should be recognised in the attorney-client relationship. However, it does not necessarily follow that autonomy carries the weight or meaning ascribed to it by its liberal proponents. This is because the foundation, form, and content of the South African legal system differs from other jurisdictions. More so, the jurisprudence of its highest court has endorsed a view of autonomy that is different from the one espoused by neutral partisan proponents. How does this relational view affect the attorney-client relationship in South Africa? This is the subject of chapter 6. Suffice to note that, while there is some concession that the 'footprints of

[634] 2017 (3) BCLR 267.
[635] *AB & another v Minister of Social Development* 2017 (3) SA 570 (CC) para 51.
[636] 2014 (6) SA 123 (CC).
[637] Ibid at para 174. Footnotes omitted.
[638] Ibid at para 175 where the Court quotes Woolman *CLOSA* 36–63.

liberalism' appear on the face of South Africa's Constitution,[639] most jurists will agree that the Constitution creates – at a minimum – 'a radical *potential* to depart from a liberal approach'.[640] At most, it could be considered as a fully social justice-orientated document,[641] where autonomy is valued, but in a distinctly relational way.

#### *3.3.3.2 The need to link values to local and cultural norms*

As noted in 3.3.3.1, the content of the same concepts found in different constitutions (viz autonomy, dignity, equality etc) may differ, depending on the values and culture and context of a jurisdiction. In the section above, it was argued that the prioritisation of autonomy (understood in an individualistic way) may not 'fit' the South African legal system, since its supreme law is characterised as transformative rather than codificatory in nature.[642] South Africa's founding document – the Constitution – reflects priorities related to substantive equality and social justice, but is also framed by a preamble which explicitly recognises the idea of a pluralistic culture: 'South Africa belongs to all who live in it, united in our diversity.'[643]

So if we follow this view, what is the culture and context of South Africa, and how would this animate our constitutional values? Cornell argues that attempting to base our constitutional values purely on Western philosophy undermines proper legal pluralism as envisioned by the Constitution.[644] This view was firmly set out by the concurring opinion of Justice Mokgoro in *S v Makwanyane,* the first case heard by the South African CC,[645] where the constitutionality of the death penalty in SA was challenged. Here, Justice Mokgoro said:

---

[639] TF Hodgson 'The mysteriously appearing and disappearing doctrine of separation of powers: Towards a distinctly South African doctrine for a more radical transformative Constitution' (2018) 34 *SAJHR* 57 at 63. He quotes – appropriately for this thesis – Jawaharlal Nehru's warning: 'Somehow we have found that this magnificent Constitution that we have framed was later kidnapped and purloined by the lawyers.' See Hodgson ibid 65 fn 42.

[640] Ibid 63 (my emphasis).

[641] P Langa 'Transformative constitutionalism' (2006) 17 *Stell LR* 351. See also JC Froneman 'Legal reasoning and legal culture: Our "vision" of law' (2005) 16 *Stell LR* 3.

[642] This is not to say that the prioritising of autonomy in constitutive constitutional countries is the correct position to take, or fits best. My point here is that the transformative nature of the constitution makes the prioritising of autonomy especially doubtful. Luban & Rhode have been critics of the autonomy argument in the US for some time now. See below.

[643] Preamble, Constitution of the Republic of South Africa, 1996. See also J Church & J Church 'The constitutional imperative and harmonisation in a multicultural society: A South African perspective on the development of indigenous law' (2008) 14 *Fundamina* 1 at 4.

[644] D Cornell 'Bridging the span toward justice: Laurie Ackermann and the ongoing architectonic of dignity jurisprudence' 2008 *Acta Juridica* 18 at 19.

[645] *S v Makwanyane* 1995 (3) SA 391 (CC).

> 'I am of the view that our own (ideal) indigenous value systems are a premise from which we need to proceed and are not wholly unrelated to our goal of a society based on freedom and equality'.[646]

Justice Sachs – in the same case – agreed with this view:

> 'I wish to firmly express my agreement with the need to take account of the tradition, beliefs and values of all sectors of South African society when developing our jurisprudence. … Above all, however, it means giving long overdue recognition to African law and legal thinking as a source of legal ideas, values and practice. We cannot, unfortunately, extend the equality principles backwards in time to remove the humiliations and indignities suffered by past generations, but we can restore dignity to ideas and values that have long been suppressed or marginalised.'[647]

Significantly, both Justices Mokgoro and Sachs indicated their frustration that counsel in that matter had not properly presented evidence of these values. In this vein, Justice Mokgoro noted:

> 'In support of her main contention, Adv. Davids quite appropriately expressed concern for the need to consider the value systems of the formerly marginalised sectors of society in creating a South African jurisprudence. However, for reasons outlined in the concurring opinion of Sachs J, [that her submissions were not subjected to rigorous analysis[648]] the issue was regrettably not argued. Indeed even if her submissions might not have influenced the final decision of the court, the opportunity to present and argue properly adduced evidence of those undistorted values historically disregarded in South African judicial law-making would have created an opportunity of important historical value, injecting such values into the mainstream of South African jurisprudence. The experience would, in my view, also have served to emphasise that the need to develop an all-inclusive South African jurisprudence is not only incumbent upon the judiciary, let alone the Constitutional Court. The broad legal profession, academia and those sectors of organised civil society particularly concerned with public interest law, have an equally important responsibility and role to play by combining efforts and resources to place the required evidence in argument before the courts. It is not as if these resources are lacking;

[646] Ibid at para 304-305. Somewhat ironically, her support for this idea comes from the European Court of Human Rights (*Dudgeon v United Kingdom* (1982) 4 EHRR 149) where the court expressed the view at 184 that '[i]n a democracy the law cannot afford to ignore the moral consensus of the community. If the law is out of touch with the moral consensus of the community, whether by being either too far below it or too far above it, the law is brought into contempt'.
[647] *Makwanyane ibid* paras 361 and 365. See also C Himonga, M Taylor and A Pope 'Reflections on judicial views of ubuntu' (2013) 16 *PELJ* 372 at 393.
[648] *Makwanyane* para 374ff.

> what has been absent has been the will, and the acknowledgment of the importance of the material concerned.'[649]

This theme has been an increasing concern in the field of jurisprudence, where theorists question the validity of theories which take no account of place.[650] For example, Cotterrell notes that if jurisprudential enquiries are to have any value, they have to 'start from and must relate back to conditions of legal practice and experience *in their particular time and place*'.[651] Tamanaha similarly bemoans the lack of sensitivity to history in contemporary jurisprudence, and argues that in general, jurisprudential approaches fail to 'consider law in its social totality'.[652] In the specific context of South Africa, Bilchitz et al suggest that Justice Mokgoro's views lead to the conclusion that '[c]ourt decisions will be more readily comprehensive and persuasive if they connect with … African values'.[653]

In particular, South African commentators[654] observe that liberal arguments about protecting autonomy as a primary good of the legal system may not be in touch with local (viz African) norms and beliefs about not only what constitutes the good life, but also about the methods and aims in resolving private disputes. The argument here is that long-standing cultural elements usually constitute the legal norms in society. It is out of these cultural elements that certain customary laws, systems and processes grew, and it is appropriate that we turn to these elements to consider whether they are more effective and efficient than the prevailing approach to lawyering in that particular society,[655] or at least can be modified to take such elements into account. In sum, this failure may result in laws that do not adequately respond to legal need. Given that the Constitution recognises customary law, this inquiry is important.[656] It is

[649] Ibid para 306.
[650] For example, see Hutchinson who notes: 'What is progressive [in lawyering] can never be determined in advance or in the abstract; such assessment can only be made with attention to the local conditions and prevailing exigencies of the situation'. See Hutchinson 1995 *Alberta Law Review* 779.
[651] Cotterrell *Jurisprudence* (2013) 56. My emphasis.
[652] B Tamanaha *A Realistic Theory of Law* (2017) 1.
[653] Bilchitz et al *Jurisprudence* 94.
[654] See FD Mnyongani 'Duties of a lawyer in a multicultural society: a customary law perspective?' (2012) 2 *Stell LR* 352; M Chanock 'African constitutionalism from the bottom up' in H Klug & S Merry (eds) *The New Legal Realism: Studying Law Globally* (2016) 13; H Keep and JR Midgley 'The emerging role of *Ubuntu-botho* in developing a consensual South African legal culture' in F Bruinsma & D Nelken (eds) *Recht der Werkelijkheid* (2007) 30; and Himonga et al 2013 *PELJ* 372.
[655] N Ofako *Reconstructing Law and Justice in a Postcolony* (2009) chap 1.
[656] Sections 30-31 of the Constitution.

important as it signals a movement away from an 'imported' colonial legal system to an autochthonous system with which any South African can identify.[657]

For example, Mnyongani complains that 'the duties of a lawyer [in SA] are framed in an individualistic manner to respond to the needs of a western-inspired dominant legal system and are therefore inadequate to respond to the needs of a multicultural society'.[658] He further notes:

> 'Legal professional ethics in South Africa is a reflection of the western-inspired common law with its emphasis on the sovereign individual. Once the professional relationship is established, the best interest of the client becomes the preoccupation of the lawyer to the exclusion of the rest.'[659]

As Mnyongani implies, customary law's 'end' is not the idea of the autonomous individual, but rather focuses on the individual in community.[660] This has some interesting implications for how a lawyer might balance her traditional obligations to the client, the courts and to justice. Unfortunately, Mnyongani raises these issues, but does not attempt to solve them.[661] These issues are taken up in chapters 5 and 6.

Chanock, in turn, writes about the importance of a legal system that recognises local beliefs and norms as a way of ensuring that a legal system actually works in and for a society. While he does not deal with legal ethics per se, he writes on the importance of connecting law to people. In this regard, he comments that

> '[u]ntil Africans approach this instinctive feeling of place within their law, a rule of law, and therefore, constitutionalism, is chimerical. It can be approached at best, I think, through *legal processes* with which people are culturally and linguistically familiar and that are a part of

[657] It appears that 'autochthony' in the context of constitutions was first used by KC Wheare in *The Constitutional Structure of the Commonwealth* (1960). It refers to the fact that a constitution is 'home grown' or rooted in native soil. Wheare uses the concept to show that the constitution owes its validity and authority to local legal factors, rather than deriving from the colonising territory. See Wheare *Constitutional Structure* 89. A South African court used the term in *Mansingh v President of the Republic of South Africa* 2012 (3) SA 192 (GNP) 205H-206B to refer to the SA Constitution.

[658] Mnyongani 2012 *Stell LR* 355.

[659] Ibid 364.

[660] Ibid 366. See also C Himonga & T Nhlapo (eds) *African Customary Law* (2014) 23; and JC Bekker 'Nature and sphere of African customary law' in C Rautenbach & JC Bekker (eds) *Introduction to Legal Pluralism* (2014) 18.

[661] T Metz 'African Communitarianism and its prospects for an approach to lawyering in South Africa' *Guest lecture at Rhodes University,* 12 September 2018.

participatory democracy, rather than imposed instruments of a nominally representative state and a globalised human rights law.'[662]

Thus, Chanock's remarks mirror Mokgoro's concern that the need to infuse our legal system with local thought is so compelling on a legal, sociological and political basis that she believes that, without such infusion, a 'legitimate system of law for all South Africans' will not arise.[663] Significantly, while the CC has often relied on western philosophers such as Kant, Nedelsky and Dworkin to interpret constitutional values, it is the court's concerted effort to ground constitutional values in a local African value, Ubuntu, that I now turn to. Ubuntu is one such local value that holds great promise for considering alternative bases for action. However, the South African courts have never considered the role of the lawyer in the light of local thought, particularly ubuntu. This is the subject of chapter 6.

## 3.4 CONCLUSION

Given the ideas set out above, it follows that the justifications for the neutral partisanship role, viz being necessary for (1) the adversarial system, (2) the protection of liberal government, and (3) the protection of liberal values, are problematic. This is not to say that these justifications are totally defective. I conceded in this chapter that the adversarial system is no better than any other system; that upholding the institutions of state is an important end; and that client autonomy is important in the attorney-relationship. However, the devil is in the detail: just because the adversarial system is here to stay, it does not mean that the neutral partisanship role is a necessary corollary to it (or that it is best suited to it). Similarly, just because we value autonomy and upholding the law made by the institutions of state, does not mean that we ascribe the same weight or meaning to autonomy as neutral partisanship proponents would have us do, or that we see the institutions of state in a positivist-liberalist framework.

---

[662] Chanock in Klug & Merry *The New Legal Realism* 14.

[663] Y Mokgoro '*Ubuntu* and the Law in South Africa' (1998) *PELJ* 1 at 4. Significantly, Roux suggests that the CC has recently confronted 'the particular critique that the Constitution's rights are Western rights?' by seeking to locate notionally universal human rights in the specific history of South Africa's struggle against apartheid in its jurisprudence. He uses the case of *Mlungwana & others v S & another* 2019 (1) BCLR 88 (CC) as an example of this effort. Roux suggests that the CC treats the right to peaceful assemble in *Mlungawana* in a particular way to suggest that the right is not an alien Western right but 'a right that emerged out of South Africa's own, unfinished tradition of struggle against the abuse of political power'. Roux suggests that '[n]one of these passages is strictly speaking doctrinally required. Rather, they are intended to work a certain rhetorical effect in legitimating the work that the Court is doing.' See T Roux 'The Constitutional Court's 2018 term: Lawfare or window on the struggle for democratic social transformation?' (2020) *CCR* 1 at 38-39.

These issues can (and should) be raised in all jurisdictions that currently adopt the neutral partisanship role. However, I argue that there is a particular reason for South African lawyers to be cautious of this approach. This is because of its history, legal system and current socio-economic disparities. Apart from the misplaced reliance on autonomy in the individualistic sense, the neutral partisanship role is at odds with a model that may require a lawyer to take on far more responsibility for the harm caused to third parties and to the community. This is because lawyers are required to act in accordance with the values of the SA Constitution. Far from being a liberal and 'codifying' document, the Constitution has been described as transformative, and foregrounded in substantive equality.[664] If the lawyer's role has to be rooted in the constitutional frame, it follows that the lawyer's attention should be rooted in three focal points that come out of this constitutional frame, that is, autonomy as seen through substantive equality, the transformative imperative, and the need for local insight. These are issues taken up in the rest of this thesis.

[664] See for example, Moseneke DCJ's words in *Minister of Finance v Van Heerden* 2004 (6) SA 121 (CC) paras 23-24: 'For good reason, the achievement of equality preoccupies our constitutional thinking. When our Constitution took root a decade ago our society was deeply divided, vastly unequal and uncaring of human worth. Many of these stark social and economic disparities will persist for long to come. In effect the commitment of the Preamble is to restore and protect the equal worth of everyone; to heal the divisions of the past and to establish a caring and socially just society. … Our supreme law says more about equality than do comparable constitutions'.

# CHAPTER 4: ALTERNATIVE PERSPECTIVES ON THE LAWYER'S ROLE

> 'Sir Ernest's descendants remain equal before the law to a poor family in Limpopo whose five-year-old drowned in a pit toilet'.[1]

## 4.1 INTRODUCTION

The previous chapter set out the neutral partisanship principle and its shortcomings both (1) in general terms, but also (2) those that are peculiar, or at least particularly problematic, to the South African context.

This chapter considers alternatives to the neutral partisanship approach that have been developed, mainly in the United Kingdom, the United States, New Zealand, Australia and Canada. The chapter starts by examining how commentators have sought to 'categorise' these alternatives. The benefit of considering the attempts to categorise the approaches is that it gives the reader some insight into the common bases or arguments that animate the alternative approaches. These categories also allow us to explore the alternatives on a type of continuum moving away from the neutral partisanship approach. The second part of the chapter seeks briefly to describe some of the alternative approaches which have dominated the literature, and/or which may be compelling for other reasons. While the discussion is brief, I try to highlight the most important aspects of each approach. The chapter then questions whether any of the alternatives are workable in the South African context. This final section particularly focuses on whether these alternatives can accommodate the particular concerns of the South African jurisdiction discussed in chapter 3, namely: its transformative nature; an emphasis on relations in autonomy; and the need to include local cultural norms and insights.

## 4.2 CATEGORISING THE ALTERNATIVE APPROACHES

Scholars began to question the justifications for role-differentiated morality and the neutral partisanship in the 1970s. The point of departure for many scholars became one that is familiar to those in the field of jurisprudence, namely a debate about the intersection between law and morality, more specifically whether and how morality is instantiated into the law.

---

[1] R Suttner 'Law and the legal profession in a democracy under attack' *The Daily Maverick* 7 October 2019 available at https://www.dailymaverick.co.za/article/2019-10-07-law-and-the-legal-profession-in-a-democracy-under-attack/ ('Sir Ernest' is a reference to Ernest Oppenheimer, one of the earlier gold and diamond mine entrepreneurs in South Africa).

In this context then, scholars began to ask what this intersection means for the role and obligations of the lawyer.[2] In translating this into the legal ethics space, Pepper, for example, characterised this debate as defining the lawyer's professional role in the gap between 'what is legally permitted and what is just'.[3] It is useful to refer to Atkinson's 'fundamental question of professional ethics' where he asks:

> 'Should a professional always do all that the law allows, or should the professional recognize other constraints, particularly concerns for the welfare of third parties?'[4]

The answer to this question, Atkinson argues, divides scholars of legal ethics into two schools: those who recognise constraints other than law's outer limit, and those who do not.[5] This recognition is then also translated into those who accept the limits of ethical codes and those who do not.

Kruse takes on this question by dividing those proposing alternative approaches into 'traditionalists' and 'social justice theorists'.[6] She indicates that the traditionalists defend the neutral partisanship approach by appealing to the lawyer's role of providing the client with 'access to the law regardless of the purposes to which the client may wish to put the law'.[7] In contrast, she suggests that social justice theorists require a lawyer to play 'a more active role in conforming client conduct to the requirements of justice'.[8] Significantly, she finds that social justice models hold individual lawyers professionally responsible for closing the gap between law and justice by, for example, refusing legal services to clients seeking immoral ends, interpreting the bounds of what is legally permitted in the way that best promotes justice, and introducing moral considerations into client counselling.[9]

---

[2] A Woolley 'The problem of disagreement in legal ethics theory' (2013) 26 *Canadian Journal of Law and Jurisprudence* 181 at 188.
[3] SL Pepper 'Lawyers' ethics in the gap between law and justice' (1999) 40 *Texas Law Review* 181.
[4] R Atkinson 'How the butler was made to do it: The perverted professionalism of *The Remains of the Day'* (1995) 105 *Yale Law Journal* 177 at 184. Wendel asks the same question slightly differently: 'The central question in legal ethics is how a lawyer can justify doing an act that, if performed outside of the professional role, would call for moral condemnation' (WB Wendel 'The limits of positivist legal ethics: A brief history, a critique and a return to foundations' (2017) 30 *Canadian Journal of Law & Jurisprudence* 443 at 445). Of course, this question is a leading one for neutral partisan proponents, since the answer(s) would be the justifications in the previous chapter, and/or some additional reasons explored below. For those that take moral philosophy as a point of departure, or the critical theorists, the answer is simply that it cannot be justified! See the discussion at 4.5 below.
[5] Atkinson 1995 *Yale Law Journal* 184.
[6] K Kruse 'Lawyers, justice and the challenge of moral pluralism' (2005) 90 *Minnesota Law Review* 389 at 390.
[7] Ibid
[8] Ibid.
[9] Ibid 390-91.

For Nicolson & Webb and Hutchinson, those advocating for alternative approaches are not so much divided into camps, but are divided by influence. On the one hand, they argue that neutral partisanship proponents are inevitably influenced by formalism and liberalism, whereas those proposing alternatives are influenced by the lessons of critical theories such as realism, critical legal studies, or postmodernism on the other.[10] They also argue that neutral partisanship proponents (and those proposing modifications) hold a very narrow view of the law as nothing more than social ordering.[11] As a result, neutral partisanship supporters view the insights of the critical theorists regarding the nature of law and the sociological and political context as irrelevant. Invoking the same concerns as Kruse's social justice theorists, Nicolson & Webb argue that:

> '[l]awyers ethics [in the UK] are so dominated by the influences of formalism and liberalism that [lawyers] are discouraged from developing and displaying the type of ethical character and values which would enable them to uphold the rhetoric of justice and hence their claim to be an ethical profession'.[12]

Finally, and more recently, Luban & Wendel have sought to divide scholars into what they call the 'moral philosophy' camp and the 'political theory' camp.[13] They argue that, at least in the US, these two fields animate legal ethics scholarship. They argue that one camp uses the lens of moral philosophy to analyse the legal professional's role, particularly to challenge the neutral partisanship approach, while the other camp is made up of theorists who use political philosophy to defend the neutral partisanship role, but seek to qualify or limit the role in some way.[14]

What categorisation works best for the purposes of this chapter? Certainly, there is overlap and similarities between the points of departure mentioned above. However, I believe the best approach is to attempt to discover the underlying foundations of the alternative approaches,

---

[10] D Nicolson & J Webb *Professional Legal Ethics: Critical Interrogations* (1999) 2 & Hutchinson 1995 *Alberta Law Review* 773.
[11] Nicolson & Webb *Professional Legal Ethics* 192.
[12] Ibid 2.
[13] D Luban & WB Wendel 'Philosophical legal ethics: An affectionate history' (2017) 30 *Georgetown Journal of Legal Ethics* 337.
[14] For example, they seek to avoid its negative consequences (as set out in chap 3) by distinguishing between client's 'legal interests' and client's 'legal entitlements' (WB Wendel *Fidelity to Law* (2010)) or by distinguishing between a lawyer's 'mere-zeal' and 'hyper-zeal' in representation (T Dare *The Counsel of Rogues? A Defence of the Standard Conception of the Lawyers Role* (2009). See also T Dare 'Mere-zeal, hyper-zeal and the ethical obligations of lawyers' legal ethics' (2004) 7 *Legal Ethics* 24). See below.

Hence, the question must be: what categorisation is most explicit about its premises?[15] In this sense, the value of Luban & Wendel's categorisation is that it seeks to differentiate the approaches from their point of departure. So, moral theorists such as Luban and Rhode see the lawyers as individuals who have to reconcile their ordinary morality with their role. For so-called 'political' theorists such as Dare and Wendel, they focus on the role that lawyers play as agents in the context of a system of government.[16] So far so good. However, the problem with dividing the theorists into the 'moral philosophers' and 'political philosophers' in the way that Luban & Wendel do, is that it assumes that all political philosophers are working with a similar conception of law and/or adjudication – in other words, one that is animated by liberalism. Hence, all political philosophers mentioned by Luban & Wendel (barring Simon)[17] generally adopt the liberalist approach to law and social ordering that was criticised in chapter 3, both in respect of autonomy and protecting the liberal institutions of state.[18] In this way, Luban & Wendel ignore those theorists who argue for a moral activist approach from a political perspective. In chapter 3, I argued that this approach was problematic in SA given the values that animate our political landscape mentioned there. Thus, while Luban and Wendel's characterisation of political theorists account for liberal manifestations of that approach in the lawyer's conduct, it does not assist the reader to understand that many theorists (specifically those that they would possibly place in their 'moral philosophy' camp) would see morality as part of (or inextricably connected to) politics and law, or they would at least make what Woolley calls 'the post-modernist objection'.[19]

Given this distinction, I suggest that a better way of considering the alternatives to the neutral partisanship role is to visualise a continuum from adherents of formalism & liberalism on the one hand (who do not allow for morality to enter into the 'legal' framework), to critical legal

[15] It will be recalled from chap 2, that Dugard argued that adjudication in apartheid South Africa was problematic in that the judges failed to articulate their 'inarticulate premises'. J Dugard *Human Rights and the South African Legal Order* (1978) 374-82.
[16] M Winsor 'Government legal advisors through the ethics looking glass' in D Feldman (ed) *Law in Politics, Politics in Law* (2014) 117 at 119.
[17] Luban & Wendel 2017 *Georgetown Journal of Legal Ethics* include Simon's Dworkinian conception of the lawyer's role in the 'political philosophers' camp. In showing up this assumption of liberal leanings, it is telling to refer to Woolley's earlier categorisation of legal ethics approaches. She specifically separates Simon from her 'political philosophers' category leading her to divide the scholarship into three distinct fields: political philosophers, those adhering to a Dworkinian conception (viz Simon), and those who use ordinary morality as their point of departure. In this division, she appears to accept that not all political philosophers conform to liberal views. See Woolley 2013 *Canadian Journal of Law and Jurisprudence* 187.
[18] This view is aptly captured by Nicolson & Webb *Professional Legal Ethics* 2: 'Human flourishing is best achieved by allowing individuals maximum freedom to pursue their goals, restricted only by minimum rules of the game designed to prevent (illegitimate) harm to others and supported only a minimal state responsible for upholding these roles.'
[19] Woolley 2013 *Canadian Journal of Law and Jurisprudence* 195.

theorists, on the other hand, who do. This is implied by Nicolson & Webb's views, even if they never structured their arguments as such.

In the following section I consider approaches along the continuum and then consider which type of enquiry envisaged will work in the South African context. This is undertaken with a view to (1) provide an appropriate alternative role that can incorporate local custom (chapter 5); (2) to consider the application of this role in SA (chapter 6); and (3) convince lawyers in SA of that alternative role (chapter 7).

## 4.3 APPROACHES RETAINING FORMALISM & LIBERALISM

If one imagines neutral partisanship as being the most comprehensive translation of formalism and liberalism into the lawyer's role, the alternative approaches offered here remain in the formalist camp, but attempt to stave off some of the worst consequences of the role by providing certain qualifications and/or by denying certain traits common to formalism. Schlag tells us that, typically, formalism represents law in terms of a number of related traits: conceptualism, coherence, gaplessness, autonomy, and comprehensiveness.[20] For the purposes of legal representation, all these ideas are relevant. However, it is really the idea that the law is 'autonomous' and 'comprehensive' that suits the neutral partisan approach. Schlag interprets the autonomous aspect as follows:

> 'Autonomy rules out the notion that we must or can resort to extra- or trans- disciplinary knowledge or moral/political principles in order to understand law or to say what it is or should be.'[21]

Formalism is a descriptive and a normative theory of law, and the link between the descriptive and normative aspects is furnished by an insistence on fidelity to law.[22] Pepper, Fried and Freedman all tend to fall into this category since they subscribe to a greater or lesser degree to the comprehensive version of the neutral partisanship role, suggesting that it is a 'first-class

[20] Schlag 2009 *Iowa Law Review* 202.
[21] Ibid.
[22] Ibid 203.

citizenship model'[23] and that it may – in certain cases – even justify perjury.[24] Given that we have already covered these views in chapter 3 (albeit generally), this section considers those scholars who would seek to modify the neutral partisanship role by qualifying it in some way. This qualification, however, does not interfere with what they see as the normative content of the law, namely that it mandates that 'the duties of lawyers must be oriented toward respect for the law itself, not ordinary moral considerations'.[25]

The New Zealand ethicist, Dare, is one such theorist. Dare argues that the law, and the law only, can set the proper role for the lawyer. He sets out that his approach

> 'assumes that we can identify law and the reasons for action it provides in a particular case without settling our substantive moral disagreement about what we ought to do in that case; it assumes, that is to say, the separability of law and morality'.[26]

In essence, Dare finds the limits of lawyers' actions within the law itself which, in turn, is characterised by formalist ideas around specifically gaplessness and autonomy of the law. However – and this is what makes his approach an 'alternative' one – he advocates for a distinction between 'mere-zeal' and 'hyper-zeal' when pursuing the client's interests. In Dare's approach, mere-zeal is justified, but not hyper-zeal.[27] Dare defines 'mere-zeal' as the partisan behaviour of a lawyer in seeking to secure for the client all that the client is legally entitled to obtain under law. On the other hand, 'hyper-zeal' characterises the behaviour of the lawyer who will use the law to obtain any advantage that they can for their client, even if that advantage is not due under law, but which the law can be used to attain.[28] Webb characterises Dare's distinction as a rights-zeal versus advantage-zeal distinction[29] in that hyper-zeal seeks advantage, while mere-zeal seeks the client's proper entitlements in the law. Dare suggests in

[23] S Pepper 'The lawyer's amoral ethical role: A defense, a problem, and some possibilities' (1986) 4 *American Bar Foundation Research Journal* 613 at 615-7. For an extended discussion of this concept, see S Pepper 'A rejoinder to Professors Kaufman and Luban' 1986 *American Bar Foundation Research Journal* 657 at 659-61 & 667-8.
[24] M Freedman 'Perjury: The lawyer's trilemma' (1975) 1 *Litigation* 26. For an updated version of the lawyer's trilemma, see M Freedman 'Lawyer-client confidentiality: Rethinking the trilemma' (2015) 43 *Hofstra Law Review* 1025.
[25] WB Wendel *Fidelity to Law* (2010) 88.
[26] T Dare *The Counsel of Rogues? A Defence of the Standard Conception of the Lawyers Role* (2009) 63.
[27] Ibid 76.
[28] For a good summary of the distinction, see D Webb 'A review of T Dare, *The Counsel of Rogues? A Defence of the Standard Conception of the Lawyer's Role*' (2009) 12 *Legal Ethics* 249 at 249.
[29] D Webb 'Bounded autonomy and bounded zeal' (2009) 28 *University of Queensland Law Journal* 273 at 249.

this distinction that moral activists have been too quick to attribute the worst excesses of lawyer behaviour on the idea of zealous advocacy.[30] He notes:

> 'An understanding of the duty of zealous advocacy that portrays lawyers as being allowed or obliged to use every lawful tactic to prevent the legal system addressing a case is simply mistaken. … It goes wrong because it fails to see how the duties of lawyers *are derived from a proper understanding of their roles.* I am quite happy to concede that this may be a revision of the standard and well-pedigreed understanding of the standard conception. If it is, then so be it: it is one which gives proper place to the moral considerations which inform the lawyer's role, while holding on to the idea that such roles are subject to role-differentiated obligations.'[31]

It is significant for our later discussion that Dare defends but modifies the neutral partisanship role within his self-stated position as an 'exclusive' or 'hard' positivist. 'Exclusive positivism' can be defined as a position where morality may only be incorporated into legal decision-making through law itself – that is, through how the law itself incorporates and applies moral considerations.[32] This may be contrasted, even in small measure, with the next approach – that of Wendel's 'fidelity to law' approach. At the outset, it is useful to explain why Wendel comes 'after' Dare on the continuum. Wendel's concession that interpretive judgment is required in lawyering necessarily makes him an 'inclusive positivist', an approach also sometimes called 'soft positivism'. This is the view that morality can make its way into the legal system as a norm, but that there is no necessary connection between law and morality. The idea inherent in inclusive positivism is that moral conditions can be made part of the legal system by way of enactment through the positive law.[33] Thus, while Wendel still subscribes to a view that law is autonomous, he admits of certain instances where lawyers have to treat the law as having the ability, through the rule of recognition, to incorporate moral values understood as contingent social facts. Wendel sets out his view as follows:

> 'Inclusive positivists believe that moral principles may be a feature in a legal system in the sense that they are identified as part of law by the rule of recognition, as long as there is a conventional practice among officials of making decisions with reference to moral criteria.'[34]

[30] Dare *Counsel of Rogues* 78-86.
[31] Ibid 80.
[32] A Woolley 'Is positivist legal ethics an oxymoron' (2019) 32 *Georgetown Journal of Legal Ethics* 77 at 100.
[33] A Marmor 'Exclusive legal positivism' in JL Coleman & S Shapiro (eds) *The Oxford Handbook of Jurisprudence and Philosophy of Law* (2002) 104.
[34] WB Wendel 'Legal ethics and the separation of law and morals' (2005) 91 *Cornell Law Review* 67 at 72.

Wendel characterises his views as a 'fidelity to law' approach,[35] harkening back to Schlag's idea that it is this fidelity to law approach that provides the link between formalism as a descriptive and a normative theory of law.[36] Wendel's modification lies in his belief that lawyers should serve the fundamental value of fidelity to law, rather than fidelity to client's goals.[37] Working on this premise, he argues that a lawyer would be entitled to refuse to pursue client ends if those ends did not fit with the purpose of the legal system (which, in this case he sees in a liberalist form as a political institution essential to resolving disputes in a pluralist society). He distinguishes between client's legal *entitlements* and client's *interests*, arguing that only the former are the lawyer's concern. This, Wendel argues, rules out some suspect lawyer practices such as frustrating discovery, coaching witnesses, and throwing adversaries off balance,[38] since none of these practices accord with the purpose of the rules underpinning the practice. Wendel gives us an amusing example of when client's interests should not amount to client's entitlements in referring to the shenanigans of accountants in the Enron scandal. This reference deserves repetition here:

> 'Say you have a dog, but you need to create a duck on the financial statements. Fortunately, there are specific accounting rules for what constitutes a duck: yellow feet, white covering, orange beak. So you take the dog and paint its feet yellow and its fur white and you paste an orange plastic beak on its nose, and then you say to your accountants, 'This is a duck! Don't you agree that it's a duck?' And the accountants say, 'Yes, according to the rules, this is a duck.' Everybody knows that it's a dog, not a duck, but that doesn't matter, because you've met the rules for calling it a duck.'[39]

In both Wendel and Dare's accounts then it is clear that lawyers' personal moral beliefs are generally irrelevant,[40] but they differ on whether morality can feature as a part of the law. But even where morality can feature as a part of the law, it can only become part of the law through enactment, not through a lawyer's judgement.

[35] WB Wendel *Fidelity to Law* (2010).
[36] See discussion in 4.3 (Schlag 2009 *Iowa Law Review* 203).
[37] Wendel *Fidelity to Law* 59.
[38] Ibid 191.
[39] Ibid at 186-87 quoting B McLean and P Elkind *The Smartest Guys in the Room: The Amazing Rise and Scandalous Fall of Enron'* (2003) 142-43.
[40] C Parker & A Evans *Inside Lawyers' Ethics* 2 ed (2014) 36.

## 4.4 AN APPROACH ADOPTING DISCRETIONARY JUDGEMENT

The next approach along the continuum after exclusive, and inclusive, positivism is Simon's 'discretionary judgement' approach.[41] In criticising the neutral partisanship role, Simon suggests that the problem with the neutral partisanship role is not in its exclusion of ordinary morality, but in its 'implausibly narrow and anachronistic conception of law'.[42] Simon sees neutral partisanship as problematic in that it 'evades the problem of obligation by adopting a narrow, formal positivist definition of law and conjoining it to a categorical norm of obedience'.[43] This categorical approach is simply that a 'rigid rule dictates a particular response in the presence of a small number of factors',[44] which means that the decision maker has no discretion to consider factors that are not specified, or to evaluate specified factors in ways other than those prescribed by the rules.[45] Simon finds this approach problematic in that 'it is no longer apparent what it has to do with ethics or responsibility'.[46] Given this problem, Simon's main thesis is that lawyers' should replace this categorical reasoning with contextual reasoning.[47] This contextual reasoning requires that lawyers' base their judgement on open-ended standards requiring 'particularized discretionary applications rather than bright-line rules'.[48] Simon finds this type of reasoning entirely plausible when one considers that those within the legal system (specifically, officials such as judges, administrators and prosecutors) confront legal and factual indeterminacy all the time, but are still able to decide that one solution out of many plausible solutions is the best one.[49]

Importantly, Simon suggests then that lawyers' undertake *legal* analysis – rather than an analysis of their own moral intuitions.[50] He thus asks lawyers exercise their judgement to adopt *law's* morality rather than their *own* morality. In doing so, he relies on Dworkin's seminal work

[41] Before his iconic piece discussed below, Luban & Wendel observed that Simon in 1978 adopted a far left approach to lawyering that went as far as suggesting a kind of deprofessionalisation. They suggest that Simon abandoned this approach in favour of his 'discretionary judgment' approach in the 1980s. See WH Simon 'The ideology of advocacy: procedural justice and professional ethics' (1978) 36-7 *Wisconsin Law Review* 29 as observed by Luban & Wendel 2017 *Georgetown Journal of Legal Ethics* 343.
[42] WH Simon 'The past, present, and future of legal ethics: Three comments for David Luban' (2008) 93 *Cornell Law Review* 1365 at 1369. See also WH Simon *The Practice of Justice: A Theory of Lawyers' Ethics* (1998) 26-52.
[43] WH Simon 'The legal and the ethical in legal ethics: A brief rejoinder to comments on *The Practice of Justice'* (1999) 51 *Stanford Law Review* 991 at 996 and Simon *The Practice of Justice* 9.
[44] Simon *The Practice of Justice* 9.
[45] Ibid.
[46] Ibid 15.
[47] RW Gordon 'The radical conservatism of *The Practice of Justice*' (1999) 51 *Stanford Law Review* 919 at 924.
[48] Ibid.
[49] Ibid 927.
[50] Simon 1999 *Stanford Law Review* 1000.

*Law's Empire* in the process.[51] In his article 'Ethical discretion in lawyering',[52] Simon argued that '[t]he lawyer should take those actions that, considering the relevant circumstances of the particular case, seem most likely to promote justice'.[53] For Simon, 'justice' means to advance the values of the legal system.[54] Essentially, Simon's lawyer adopts a role that is intended to be the counterpart to Dworkin's ideal judge Hercules. It will be recalled from Dworkin's work that Hercules, in judging, must construct a coherent political-normative account that explains and justifies the outcome in any given case.[55] Like Hercules, Simon argues that a lawyer should reason in this way when the exigencies of the case demand it. Simon argues that whenever a lawyer takes on a case, she should consider the internal merits and relative merits of the matter in deciding how to act.[56] This lawyer is contrasted with the neutral partisanship lawyer who acts on a categorical norm: that a lawyer 'must – or at least may – pursue any goal of the client through any arguably legal course of action and assert any nonfrivolous claim' without regard to its effect on third parties or the public good.[57] In considering the relative merits of a matter, Simon asks lawyers to consider the uncontroversial claim that certain cases have more legal merit than others. Given that legal resources are limited, legal practitioners ought to decide on the relative merits of the case before them. Simon essentially implies that lawyers should not simply be required to take any case that raises an apparently legally permissible claim – but rather that they should give consideration to the legal rights or interests involved. Simon says here:

> 'In deciding whether to commit herself to a client's claims and goals, a lawyer should assess their merits in relation to the merits of the claims and goals of others whom she might serve'.[58]

He goes on to give some criteria for a lawyer to consider in this exercise: the extent to which the claims and goals are grounded in the law; the importance of the interests involved; and the extent to which the representation would contribute to the equalisation of access to the legal system.[59]

---

[51] R Dworkin *Law's Empire* (1986) 97.
[52] WH Simon 'Ethical discretion in lawyering' (1988) 101 *Harvard Law Review* 1083.
[53] Ibid 1090. Cf Nicolson & Webb *Professional Legal Ethics* 220.
[54] Simon 1988 *Harvard Law Review* 1083-84 & 1119-23.
[55] R Dworkin *Law's Empire* (1986) 97.
[56] Simon 1988 *Harvard Law Review* 1083.
[57] Simon *The Practice of Justice* 7-8.
[58] Simon 1988 *Harvard Law Review* 1092.
[59] Ibid 1093.

A good example of Simon's approach is the way in which the judge in *Mashishi v Mdladla* chastised the applicant's lawyer in that matter.[60] *Mashishi* involved an application to review a decision made more than five years after the fact in the Labour Court, with very little information on why the review was so late or the prospects of success. In what can be seen as both an internal- and relative-merits consideration, the judge suggested that the lawyer should never have taken on the case given the huge backlogs and delays in the Labour Court (viz internal merits) together with the significant lack of explanation for the delay or reasonable prospects of success (viz relative merits). Following a neutral partisanship approach, legal practitioners would not be required to compensate for any weaknesses in the institutions in issue: if the Labour Courts are over-extended and under-staffed, that is 'tough' for the institution but 'fair game'[61] for labour lawyers and their clients. Gordon has pointed out that Simon's approach effectively requires legal practitioners to cease viewing the law as a 'political terrain in which they may fight their client's battles to gain as much ground as they can'.[62] Instead, Simon's approach asks legal practitioners to see view the law as 'a repository of norms they must respect'.[63]

Similarly, Kruse considers that what most differentiates Simon's approach to the neutral partisanship role is the kind of consideration that takes primacy in lawyers' professional judgement. In all cases, a lawyer's primary commitment must be to promoting justice, not to advancing their clients' interests or to following their own moral compasses.[64] The essence of this approach is then purposive in nature: lawyers must ask what is the purpose of their particular legal system. Having worked this out, lawyers may not represent clients if by doing so, they go against the 'spirit' or purpose of the law as ascertained by the lawyer.[65] Simon suggests that while lawyers are not judges, they similarly 'instinctively rely on principles, policies, and informal norms' in understanding what the law permits or requires.

---

[60] [2018] 7 BLLR 693 (LC).
[61] These are Gordon's phrases in interpreting Simon's approach to the lawyers who acted in the US Lincoln savings-and-loan scandal. See Gordon 1999 *Stanford Law Review* 926.
[62] Gordon 1999 *Stanford Law Review* 927.
[63] Ibid.
[64] K Kruse 'Professional role and professional judgment: Theory and practice in legal ethics' (2011) 9 *University of St Thomas Law Journal* 250 at 265.
[65] FC Zacharias & BA Green 'Reconceptualizing advocacy ethics' (2005) 74 *George Washington Law Review* 1 at 11. See also SJ Levine 'The law and the "spirit of the law" in legal ethics' (2015) *Journal of the Professional Lawyer* 1.

While Simon's approach differs from Wendel and Dare, he would agree with them on two things. First, lawyers need to abstain from their *own* moral judgement about their clients.[66] Second, the law displays traits such as coherence, autonomy and comprehensiveness sufficient for the lawyer to resolve ethical dilemmas. However, contrary to Wendel and Dare, Simon would ask lawyers to engage their own powers of discretion to understand what justice requires within the law as stated.[67]

## 4.5 APPROACHES ADOPTING ORDINARY MORALITY AND/OR CRITICAL LEGAL THEORY

In considering the influences that animate the next approaches on the continuum, Luban & Wendel's categorisation has merit: Simon explicitly requires that lawyers consider *law's* morality, rather than their *ordinary* morality to guide their actions. This is in contrast to the next series of approaches, which suggest that lawyers have to be able to reconcile their actions with ordinary morality. They should, in effect, 'make decisions as advocate in the same way that morally reflective individuals make any ethical decision' to a greater or lesser extent.[68]

However, legal ethicists who follow this understanding may be influenced by critical legal theory that necessarily includes political (but not liberal) philosophy In other words, not all theorists who see ordinary morality as having a place in a lawyer's decision-making derive their rationale from moral philosophy, as Luban & Wendel suggest. Having recognised this, Luban & Wendel's views remain insightful in giving an overview of how these approaches have developed.

Luban & Wendel find that literature critiquing the neutral partisanship role (at this stage of the continuum) considers the 'apparent dissonance between impartial morality and the one-sided partisanship of the lawyer's role'.[69] This issue was exemplified by the English Whig historian, Thomas Babington Macaulay, who in the 1800s questioned the willingness of a lawyer:

---

[66] Luban & Wendel 2017 *Georgetown Journal of Legal Ethics* 354.
[67] Simon *The Practice of Justice* 100.
[68] DL Rhode *In the Interests of Justice: Reforming the Legal Profession* (2000) 67. See also Luban *Lawyers and Justice* 125. For descriptions of these views, see EJ Eberle 'Three foundations of legal ethics: Autonomy, community, and morality' (1993-4) 7 *Georgetown Journal of Legal Ethics* 89 at 115; Woolley 2013 *Canadian Journal of Law and Jurisprudence* 187 and Kruse 2005 *Minnesota Law Review* 422.
[69] D Luban 'Misplaced fidelity' (2012) 90 *Texas Law Review* 673 at 673.

> 'with a wig on his head, and a band around his neck [to] do for a guinea what, without those appendages, he would think it wicked to do for an empire'.[70]

This has led to the development of approaches that (1) have tended to focus on the individual lawyer as a moral agent, and (2) have sought to challenge the liberalism and formalism dominating the law. These approaches stand in direct opposition to the idea of the lawyer as a neutral partisan operating in a role-differentiated moral world. In these alternative conceptions of professional ethics '[r]oles cannot filter out morally pertinent pre-conventional descriptions of acts and actors'.[71]

Luban & Wendel identify that, despite concerns around the lawyer's role (as exemplified by Macauley's statement above), it was not until Wasserstrom's article 'Lawyers as professionals: Some moral issues'[72] in the 1970s that scholars began to challenge the justifications for the neutral partisanship role, and to suggest alternatives.[73] Wasserstrom's paper questioned whether the role requirements of one-sided loyalty to clients (which Wasserstrom noted 'rendered the lawyer systemically amoral and at worst more than occasionally immoral'[74]) could be reconciled with the requirements of basic morality. This is on the basis – as argued in chapter 3 – that the justifications could not totally absolve lawyers from moral responsibility for their actions. This being the case, lawyers cannot simply brush off causing harm to third parties on account of their role.[75]

### *4.5.1 Approaches rooted in ordinary morality*

One of the most detailed approaches on this side of the continuum is that of Luban's 'moral activist' approach, a term coined by Luban himself.[76] Some commentators see Luban's commentary as the 'conventional wisdom in the field'[77] (at least in the US jurisdiction)

---

[70] Luban *Lawyers and Justice* xxi quoting TB Macauley in *Critical and Historical Essays* (1926) 290 at 317. While Macauley was a historian, he also trained as a lawyer.
[71] AI Applbaum *Ethics for Adversaries: The Morality of Roles in Public and Professional Life* (1999) 109.
[72] R Wasserstrom 'Lawyers as professionals: Some moral issues' (1975) 5 *Human Rights* 1.
[73] Atkinson notes that Wasserstrom's article began what he calls 'the contemporary phase of criticism' as he notes that critics can trace their roots much further back, see chap 1. R Atkinson 'Beyond the new role morality for lawyers' (1992) 51 *Maryland Law Review* 853 at 857 fn 18.
[74] Rhode *In the Interests of Justice* 67.
[75] D Luban *Lawyers and Human Dignity* (2007) 128-47.
[76] Luban *Lawyers and Justice* 173-4.
[77] WB Wendel 'The limits of positivist legal ethics: A brief history, a critique and a return to foundations' (2017) 30 *Canadian Journal of Law & Jurisprudence* 443 at 446. Kruse, Simon and Tremblay agree noting that he 'pioneered the most comprehensive critique' at the time, had done 'more than anyone else to bring depth to the field' and 'established the issue of role morality in the central position' respectively. See Kruse 2005 *Minnesota Law Review* 422-23, Simon *The Practice of Justice* 248 and P Tremblay 'Practiced moral activism' (1995) 8 *St Thomas Law Review* 9 at 14.

following his 1988 book, *Lawyers and Justice.* Luban's stated aim in this book is 'to make law more just and the lawyer's clients more public spirited'.[78] This aim he has developed throughout his career. Luban found that the 'zeal' required in the neutral partisanship role meant 'pushing claims to the limit of the law and then a bit further, into the realm of what is "colorably" the limit of the law'; a limit which he saw as lying 'beyond moral limits'.[79]

Luban found this approach problematic and, as a result, his alternative approach is characterised by the idea that, unless professionals can muster a powerful moral justification for their actions, they remain subject to moral criticism as ordinary individuals.[80] In order to assess these moral justifications, he developed what he called the 'four-fold root of sufficient reasoning'.[81] In terms of this chain of reasoning, Luban requires lawyers to give a moral justification for any action performed within the professional role, these being:

a) The moral justification for the relevant institution (such as the legal system);

b) how essential the role of the partisan advocate is to the proper functioning of the institution (the lawyer);

c) the duty that requires action (how essential is the duty of zeal to fulfil the action), and

d) the action itself (whether the act is required).[82]

Luban argued that a failure at any stage of this chain of justification leaves the lawyer without an excuse for having violated ordinary moral demands. The effect of this reasoning tool is to require that lawyers analyse their actions in moral terms; a requirement specifically removed by the principle of non-accountability in the neutral partisanship role.[83] Thus, the weight of justification at the first step (viz any of the justifications set out in chapter 3) is passed along the four stages of reasoning.[84] Atkinson sets out that Luban's chain of justification does three things.[85] First, it does not allow a lawyer to move from her status as client representative to the moral legitimacy of doing whatever the law allows for a client (as allowed by the neutral

[78] Luban *Lawyers and Justice* xvii.
[79] D Luban 'The adversary system excuse' in D Luban (ed) *The Good Lawyer: Lawyers' Roles and Lawyers' Ethics* (1983) 83 at 89.
[80] Luban *Lawyers and Justice* 9-11.
[81] Luban *Lawyers and Human Dignity* 132. See Kruse's description of this analysis in 2011 *University of St Thomas Law Journal* 262.
[82] Ibid. See also Luban *Lawyers and Justice* 130-33.
[83] Farrow notes that neutral partisanship provides 'sheltered, role-differentiated refuge' – refuge that Luban would deny exists in his account of lawyering. See TCW Farrow 'Sustainable Professionalism' (2008) 46 *Osgoode Hall Law Journal* 51 at 57.
[84] Kruse 2011 *University of St Thomas Law Journal* 263.
[85] R Atkinson 'Beyond the new morality for lawyers' (1992) 51 *Maryland Law Review* 853 at 865.

partisanship approach). Second, he notes that Luban's 'longer chain' is carefully forged to be only as strong as its weakest link. Finally, the very link that joins ordinary moral values to the lawyer's role, being the adversary system, is never the strongest but is often the weakest link for Luban. For Luban, then, the justificatory link between the lawyer's dubious conduct and institutional good is – at times – too tenuous to bind the lawyer, but other times, strong enough to bind the lawyer against her own better judgement regarding the morally right result.[86] Essentially, through this process of reasoning, Luban advocates that lawyers should operate in a way that accepts that role morality is a presumption that can be rebutted.[87]

Amongst the practical examples offered up as a consequence of following this approach are ideas including: the prerogative to withhold legal services to persons whose projects lawyers found morally objectionable;[88] imposing a duty on the lawyer to actively steer clients in the direction of the public good (as conceived by the lawyer's own moral judgement);[89] and the refusal to pursue every client end or use every effective means to client ends.[90]

### *4.5.2 Approaches rooted in critical & postmodern legal theory*

Prominent theorists in this field are Hutchinson from Canada, and Nicolson & Webb from the UK.[91] While ordinary morality features centrally in their approaches, these theorists focus more on the *rationale* behind excluding ordinary morality, rather than the exclusion itself (although these are obviously linked – it is simply a matter of emphasis). A good example of this is the way in which Hutchinson characterises his problem with the neutral partisanship approach. He states as follows:

> '[The neutral partisanship approach] fails theoretically, empirically and ideologically – it is based upon a formalistic theory of law that is largely discredited and defunct as a serious attempt to understand law and its operation. It describes a version of legal practice that no

[86] Ibid 865-6.
[87] K Tranter and L Corbin 'Lawyers, clients and friends: A case study of the vexed nature of friendship and lawyering' (2008) 11 *Legal Ethics* 67 at 78. In Luban's words: 'My theory requires that lawyers … cannot hide behind their role or the adversary system to release themselves from moral obligations that they would have if they weren't lawyers'. See Luban 2010 *Georgetown Journal of Legal Ethics* 1101.
[88] D Luban 'The Lysistratian Prerogative: A response to Stephen Pepper' (1986) 11 *American Bar Foundation Research Journal* 637 at 642. Cf CW Wolfram 'A lawyer's duty to represent clients, repugnant or otherwise' in D Luban (ed) *Modern Legal Ethics* (1986) 224. Nicolson & Webb call this option 'conscientious objection' – see Nicolson & Webb *Professional Legal Ethics* 215.
[89] D Luban 'The noblesse oblige tradition in the practice of law' (1988) 41 *VanderBilt Law Review* 717 at 738. See also Luban *Lawyers and Justice* 171.
[90] See Nicolson & Webb *Professional Legal Ethics* 218-219.
[91] While Webb moved to Australia in 2014 from the UK, the book deals with the UK legal system. See https://law.unimelb.edu.au/about/staff/julian-webb.

> longer has any empirical validity or historical accuracy, if it ever did have; and *it defends both its informing theory and governing practice of lawyering as apolitical in such a way that merely serves to underline its very definite ideological commitments*.'[92]

Hutchinson contends then that proponents of the neutral partisanship role fail to appreciate what critical theorists have long maintained – that is, that the law is not nearly so determinate, objective and stable as formalists maintain.[93] He also argues that these proponents also fail to recognise that litigation and adjudication are much more 'value-laden and result-oriented' than they suppose.[94] What makes Hutchinson's contextual approach (an approach that he characterises as his 'ethical call to arms') particularly interesting is its obvious postmodern foundations.[95] Stemming from the postmodern view of law, Hutchinson denies that there are categorical normative approaches that can resolve the ethical dilemmas of legal practice. He claims that to suggest otherwise is a mere illusion.[96] Instead his 'most central recommendation' is

> 'to urge lawyers to take personal responsibility for what they say and do in their professional capacities … It is for each person to arrive at an informed and conscientious decision in accordance with his or her political and moral lights.'[97]

This approach is significant in its rejection of the possibility that a law or the lawyer can be neutral. Hutchinson comments that the insistence that lawyering is a neutral exercise (as implied by the neutral partisanship role) is 'as weak as it is wilful'.[98] Rhode implicitly agrees with Hutchinson when she reasons that 'ethically reflective analysis and commitments' by lawyers are required, rather than 'bright-line answers'.[99] The postmodern critique implies then that scholars in this field take seriously the lawyer's *personal* morality or sense of justice, rather than attempt to mandate a *shared* morality for lawyers, as Simon (with his Dworkinian

---

[92] A Hutchinson 'Legal ethics for a fragmented society: Between professional and personal' (1997) 5 *International Journal of the Legal Profession* 175 at 177-78. My emphasis.
[93] Hutchinson 1995 *Alberta Law Review* 773.
[94] Ibid.
[95] His postmodern take is particularly explicit in his 1995 article, but is present throughout his work. See A Hutchinson 'Calgary and everything after: A postmodern re-vision of Lawyering' (1995) 33 *Alberta Law Review* 768; Hutchinson 1997 *International Journal of the Legal Profession* 175; A Hutchinson 'Taking it personally: Legal ethics and client selection' (1998) 1 *Legal Ethics* 168 & A Hutchinson *Legal Ethics and Professional Responsibility* (1999). One of his latest works, A Hutchinson *Fighting Fair: Legal Ethics for an Adversarial Age* (2015) investigates how the theory of ethical warfare can/should influence legal practice – this later work is beyond the scope of this thesis but also has postmodern underpinnings.
[96] Hutchinson 1995 *Alberta Law Review* 781-82.
[97] Hutchinson *Legal Ethics and Professional Responsibility* 195.
[98] Hutchinson 1995 *Alberta Law Review* 773.
[99] D Rhode *In the Interests of Justice* 71.

conception) and Dare & Wendel (with their 'institutional settlement' approach) would require of lawyers. While it is beyond the scope of this thesis, this insight has resulted in scholars developing nuanced roles according to what they personally believe is morally bankrupt in the neutral partisanship role. Critical legal theorists in all its guises (for example, critical race theorists,[100] feminists,[101] postmodernists,[102] critical legal studies supporters[103]) have thus developed accounts of lawyering which capture, in the words of Hutchinson, the lawyers own 'political and moral lights'.[104] Thus, while the different approaches each have a distinct focus, these approaches encourage lawyers to have their own convictions about what it means to do justice in difference circumstances, and to seek out ways to act out those convictions as lawyers.[105] Whereas Dare, Wendel and Simon require lawyers to confine themselves to the idea of justice set out in the legal system itself, moral activism and postmodern ethics require lawyers to use legal practice to change the law itself if they consider such law unjust on their own moral reflection.

Nicolson & Webb propose another contextual approach[106] which shares many similarities with Hutchinson, especially in recognising the formalist assumptions of the neutral partisanship role. However, Nicolson & Webb arguably focus more on the problematic liberalist assumptions inherent in the neutral partisanship role. Their approach asks lawyers to focus on the context of the variations in clients' political, economic and social power, and then to tailor their representation accordingly.[107] In order to do this effectively, Nicolson & Webb require adherence to four principles, namely: loyalty, integrity, candour, and informed consent.[108]

---

[100] See for example, the articles (being a record of a symposium on critical race lawyering) in the (2005) 73 *Fordham Law Review*. For an overview of insights arising from that symposium, see SR Foster 'Critical Race Lawyering: Foreword' (2005) 73 *Fordham Law Review* 2027.

[101] K Abrams 'Feminist lawyering and legal method' (1991) 16 *Law & Social Inquiry* 373, referring in the main to Mackinnon's work: CA Mackinnon *Feminism Unmodified: Discourses on Life and Law* (1987) 315 and C Mackinnon *Toward a Feminist Theory of the State* (1989) 330. See also J Jack & DC Jack *Moral Vision and Professional Decisions: The Changing Values of Women and Men Lawyers* (1989).

[102] For example, GP López *Rebellious lawyering: One Chicano's vision of progressive law practice* (1992), A Alfieri 'Disabled clients, disabling lawyers' (1992) 43 *Hastings Law Journal* 769 at 811–28. For an overview of postmodern critique of lawyering, specifically in the context of poverty lawyering, see S Cumming & I Eagly 'A critical reflection on law and organizing' (2001) 48 *UCLA Law Review* 443 at 456 and the sources cited therein.

[103] Commentators link Abel and Gordon directly with the Critical Legal Studies (CLS) movement, while Lesnick, Menkel-Meadow, and Rhode could be seen as sympathisers, but not necessarily critics. See Luban & Wendel 2017 *Georgetown Journal of Legal Ethics* 341 fn 8. For an overview of CLS studies, albeit dated, see D Kennedy & KE Klare 'A Bibliography of Critical Legal Studies' (1984) 94 *Yale Law Journal* 461.

[104] Hutchinson *Legal Ethics and Professional Responsibility* 195.

[105] Parker & Evans *Inside Lawyers' Ethics* 39.

[106] Nicolson & Webb *Professional Legal Ethics* 213 & 277.

[107] Ibid 224.

[108] Ibid 281.

Carle comments that it is their emphasis on integrity,[109] together with deeper, and more nuanced understandings of autonomy and loyalty[110] that makes the approach particularly distinctive. This emphasis has the following effect:

> 'Notwithstanding the principle of loyalty, lawyers must recognise that they are implicated in and hence morally responsible for all actions taken on behalf of clients. They cannot pass on moral responsibility either to clients, who they have freely chosen to represent, or to the profession, which they have freely chosen to enter. Thus in deciding whether to undertake or to continue representation, or to engage in particular forms of representation, *lawyers are obliged to consider the impact on their personal moral integrity, the integrity of the profession as a whole, and the interests of affected third parties, the general public, and the environment.*'[111]

The emphasis on integrity also points to a return to the much earlier tradition of virtue ethics.[112] In this way, Nicolson & Webb place concern on the character of a lawyer, and in particular to a lawyer's commitment to take moral responsibility for their actions *inter alia* by deciding for themselves how they should respond to ethical issues.[113] For example, Nicolson & Webb argue that a poverty lawyer[114] would be most concerned with ensuring her client's voice be heard, and being sensitive to her client's needs, desires, and interests. However, a corporate context could mean that the lawyer would be more concerned with the impact of her client's actions on 'third parties, the general public and the environment.'[115]

Behind Hutchinson and Nicolson & Webb's approaches is their antagonism not only to formalism (as set out above) but also to liberalism. These theorists expressly doubt the claim that human flourishing is best achieved by allowing maximum freedom to pursue individual goals with minimal restriction together with a minimal state in much the same way as Luban

---

[109] See S Carle '*Professional Legal Ethics: Critical Interrogations* Book Review' (2003) 17 *Georgetown Journal of Legal Ethics* 165 at 172. Webb and Nicolson have also focused on integrity in separate commentaries, most notably: J Webb 'Being a lawyer/Being a human being' (2002) 5 *Legal Ethics* 130 especially at 132ff. Nicolson in turn discusses the importance of character/integrity in two different contexts: code compliance and education respectively: see D Nicolson 'Making lawyers moral? Ethical codes and moral character' (2005) 25 *Legal Studies* 601 and D Nicolson 'Education, education, education: Legal, moral and clinical' (2008) 42 *The Law Teacher* 145. Hutchinson also emphasises integrity as important (for example, by considering Kronman's application of *phronesis* in the lawyering context – as discussed in 3.2.1). See an example of his emphasis on integrity in Hutchinson 1997 *International Journal of the Legal Profession* 186.

[110] Nicolson & Webb *Professional Legal Ethics* 281.

[111] Ibid. My emphasis.

[112] Ibid 9.

[113] Ibid.

[114] The term 'poverty lawyer' or 'poverty law' is not commonplace in South Africa as it is in other jurisdictions. Generally, those practicing public interest litigation, mostly in pro bono departments of law firms or in civil society organisations such as the Legal Resources Centre, would be the equivalent in the SA jurisdiction.

[115] Nicolson & Webb *Professional Legal Ethics* 280.

suggests.[116] In a liberalist framework, the legal practitioner's task is to protect clients from the influence of others, so that clients will 'make their own rules, be their own rulers'.[117] Critical theorists doubt that this end is a proper one (ie is it justice?) given its effect on others and the community. As Cochran notes: 'Liberal lawyering reinforces liberal culture, a culture where we live in what Alasdair MacIntyre describes as a society of strangers'.[118]

Both Hutchinson and Nicolson & Webb anticipate that critics will claim that their approaches are unworkable given the so-called relativistic (and/or nihilistic) nature of its postmodern foundations.[119] The gist of this criticism is that if each person's conception of right and wrong is as good as or as valid as anyone else's, then this would result in lawyers abandoning reasoning, or taking on an 'anything goes' approach.[120] Nicolson & Webb refute that an application of their approach will result in this type of unfettered moral reasoning. Instead, they argue that, in their contextual approach, a lawyer's reasoning will always be guided by two important contextual factors: the type of dilemma involved, and the type of legal work involved.[121] Within these two contexts, they note that many factors will be relevant which either affect the application of the justifications for neutral partisanship, or provide reasons for lawyers to pursue ends or means to which they have moral objections.[122] Hutchinson similarly refers to the importance of context but also suggests that this type of decision-making is familiar territory for the lawyer. In this regard he notes:

---

[116] Ibid 2.

[117] RF Cochran Jr 'Enlightenment liberalism, lawyers, and the future of lawyer-client relations' (2011) 33 *Campbell Law Review* 685 at 687.

[118] Ibid. Cochran goes on to note (at 688) that while liberalist theorists claim to be neutral, in fact their decision-making framework steers the client toward making 'self-serving choices'. He goes on to note: 'It imposes a regime of client autonomy – clients are directed to make choices based on consequences to themselves. Clients are a bundle of rights and liberal theory suggests that the lawyer should enable them to become more and more independent of others. The Enlightenment liberal ideal is CS Lewis's picture of hell from "The Great Divorce": Autonomous people on the outskirts of a city who continually move further and further away from one another.'

[119] Hutchinson 1997 *International Journal of the Legal Profession* 185 and Nicolson & Webb *Professional Legal Ethics* 224.

[120] Hutchinson 1998 *Legal Ethics* 173. Similarly, Atkinson asks: 'In the realm of ethics, how are we, as conscientious citizens, and citizens who are also lawyers, to find guidance for our personal and professional conduct in a world without objectively ascertainable values?' See Atkinson 1992 *Maryland Law Review* 870. The concern then, of course, is that a lawyer can determine rights through his or her subjective values. This is a concern raised by the SCA in South Africa, albeit in a different context, in *Van der Berg v General Council of the Bar of South Africa* [2007] 2 All SA 499 (SCA). The court quotes at para 17, with approval, Baron Bramwell's explanation in 1871 that 'a man's rights are to be determined by the Court, not by his [solicitor] or counsel … A client is entitled to say to his counsel, I want your advocacy, not your judgment; I prefer that of the Court'.

[121] Nicolson & Webb *Professional Legal Ethics* 224.

[122] Nicolson & Webb *Professional Legal Ethics* 224. Nicolson & Webb are perhaps unique in their emphasis on the important role that codes and legal education can play. For them, codes and legal education assists in the development of lawyers' moral character and can, at a minimum, supplement obligation-based ethical approaches. See Nicolson & Webb *Professional Legal Ethics* 283.

> 'None of this should be taken to mean that ethical behaviour and decision-making is condemned to be irrational or arbitrary, only that what counts and operates as reason is never outside of its informing context. Moreover, the alleged uncertainty of a contextual approach is no more or less inefficient than compliance with any other legal standard; certainty is not a virtue in and of itself. For instance, in determining whether their professional conduct meets the tortious standards of negligence, lawyers are accustomed to engage in a similar kind of contextualised judgement and assessment.'[123]

Hutchinson also denies that taking on a postmodern attitude in legal practice will result in relativism and nihilism. Instead, his approach allows a legal practitioner to recognise that values are constructed within particular social and historical contexts. However, at the same time a legal practitioner can accept that standards do develop about what is and is not acceptable behaviour, even though those standards are never themselves outside of debate and transformation.[124] Thus, he notes, even if we accept that morality is not objective, it does not follow that one substantive moral position is as good as any other or that 'nothing matters'.[125] Atkinson explains this view as follows:

> 'Even if the moral sceptics are right on the metaethical issues, and the moral score is not to be transcribed from the music of the spheres, it does not follow that every note sounded by ordinary morality over the centuries is sour.'[126]

The legal ethics scholars in this sense can be described as pragmatic postmodernists in that Hutchison and Nicolson & Webb remain committed to law as a normative enterprise, but without the 'modern clatter of objective foundations, fixed legal meaning and determinate methodologies'.[127]

## 4.6 THE 'ETHICS OF CARE' APPROACH

The ethics of care approach does not fit neatly on the continuum of alternatives to neutral partisanship. As a result, I 'suspend' it above the continuum somewhere between moral activism and the critical contextual approaches. As with moral activism and the critical

[123] Hutchinson 1998 *Legal Ethics* 173.
[124] Hutchinson 1998 *International Journal of the Legal Profession* 185.
[125] For example, Hutchinson 1995 *Alberta Law Review* 779 challenges lawyers to 'condemn unfailingly the injustices of the present system, but at the same time, to affirm constantly the possibilities for transformation; to be a deconstructive pessimist and a reconstructive optimist.'
[126] Atkinson 1992 *Maryland Law Review* 885.
[127] W le Roux & K van Marle 'Postmodernism(s) and the law' in C Roederer & D Moellendorf *Jurisprudence* (2004) 354 at 373.

contextual approaches, ethics of care scholars emphasise the use of the lawyer's personal ethics in the practice of law. However, the approach provides a unique perspective in that it shifts the 'ends' of legal representation from the attainment of 'rights' and/or 'justice' to the emphasis on the preservation of relationships and the avoidance of harm.[128] The ethics of care approach does not exclude a critical gaze in that it is entirely possible for a lawyer adopting a contextual approach (such as Hutchinson's approach) to determine that, in a particular setting, personal and relational issues should take precedence over what the law may or may not technically provide. Nicolson & Webb's contextual approach certainly leaves it open for legal practitioners to adopt an ethics of care approach, depending on context. This is because their approach is influenced by the ethics of alterity, which bears many similarities to the ethics of care approach, something that they recognise.[129]

In contrasting moral activists with ethics of care theorists, Jack & Jack characterise the difference as one of moral orientation: moral activists generally follow an 'ethics of rights' approach, while ethics of care lawyers follow an 'ethics of care'.[130] The ethics of care is linked most often to the work of Gilligan. Gilligan's work proposes that the traditional rights-orientated theories in moral reasoning privilege typical male forms of ethical reasoning and ignore the generally female approach of care-based ethics.[131] Even though Gilligan attempts to stave off essentialising roles,[132] the approach's gendered nature relies on somewhat stereotypical attributes of men and women: the approach characterises the male 'rights-based' approach as standing on principle irrespective of the consequences; whereas the female 'care-based' approach leads to more pragmatic ends, namely seeking to uphold relationships and

[128] J Alleggretti 'Rights, roles and relationships: The wisdom of Solomon and the ethics of lawyers' (1992) 25 *Creighton Law Review* 1119 at 1119.
[129] One can certainly gauge these similarities in that alterity requires engagement with the 'Other' to acquire self-consciousness. Nicolson & Webb *Professional Ethics* 46-49 further explain that the self is not some sort of atomistic individual, but one whose awareness of self is rendered ethically meaningful by respect, compassion and love for the Other.
[130] J Jack & DC Jack *Moral Vision and Professional Decisions: The Changing Values of Women and Men Lawyers* (1989) 5-12, 20-26 & 55-65.
[131] C Gilligan *In a Different Voice: Psychological Theory and Women's Development* (1982). The most influential applications of the ethics of care has been by Jack & Jack, as well as Mendel-Meadow. See Jack & Jack *Moral Vision and Professional Decisions* and C Menkel-Meadow 'Portia in a different voice: Speculations on a women's lawyering process' (1985) 39 *Berkeley Women's Law Journal* 589. See also C Menkel-Meadow 'Portia redux: Another look at gender feminism and legal ethics' in S Parker & C Sampford (eds) *Legal Ethics and Legal Practice* 25.
[132] Despite this, critics see Gilligan as essentialising roles. See J Williams 'Deconstructing gender' (1989) *Michigan Law Review* 797 (Williams argues against embracing stereotypes about the personalities of women and men) and AP Harris 'Essentialism in feminist legal theory (1990) 42 *Stanford Law Review* 581 (Harris takes aim at feminists who essentialise middle class white women's socially constructed values).

protect loved ones from harm.[133] In addition, linking to the ideas set out in the contextual approach above, the ethics of care approach requires attention to the specific context of the moral dilemma, rather than attempting to resolve these dilemmas with abstract and universalistic reasoning.[134]

The empirical claim that the ethics of care is typically 'female' in nature has long been debated and criticised[135] but, as Parker & Evans point out, the approach has developed a life beyond the gender debate.[136] The ethics of care approach in the lawyering terrain then has been characterised by three aspects: holism, lawyer-client participation, and a preventative problem-solving approach.[137] One of its most positive attributes is that it is seen as a holistic approach to clients and their problems. It requires that lawyers incorporate moral, emotional and relational dimensions of a problem into the legal solution. Essentially, it sees relationships, including both the client's network of relationships and the lawyer's own relationships with colleagues, family and community as more important than the institution of the law or system and social ideas of justice and ethics.[138] Thus, the ethics of care lawyer can be said to be more interested in *personal* change than *social* change.

## 4.7 WHAT APPROACH BEST FITS THE LAWYER'S ROLE IN SOUTH AFRICA?

In chapter 3 I explored the harms occasioned by neutral partisanship and whether the justifications offered in its defence were sufficient, or at least outweighed the harms it wrought on clients, legal practitioners and the community. Finding this not to be the case, I considered the approach as insufficient and inappropriate to the South African context, not only because of these general concerns, but also because of the particular context and history of the South African legal landscape. I argued that neutral partisan proponents take a particular liberal view of autonomy that is out of kilter with the SA jurisdiction. In addition, even if one accepted a more relational view of autonomy, I argued that it ought not to be the *only* value upheld by the legal profession, given other important constitutional values such as equality and dignity (which can be described as dignity-as-relation). In this way, I argued that the vision of the SA

[133] Parker & Evans *Inside Lawyers' Ethics* 44.
[134] Nicolson & Webb *Professional Legal Ethics* 35.
[135] For example, see in general: O Flanagan *Varieties of Moral Personality: Ethics and Psychological Realism* (1991) chaps 9-11; and in relation to lawyering: D Rhode 'Gender and professional roles' (1994) 63 *Fordham Law Review* 39.
[136] Parker & Evans *Inside Lawyers' Ethics* 44.
[137] Ibid 47.
[138] Ibid 45.

Constitution is one of transformation, not retention of the status quo. While neutral partisanship fits quite naturally with an individualist and libertarian ethos, with its limited government and negative conception of liberty, the SA Constitution is not founded on what Davis and Klare have characterised as a 'bleak social vision',[139] but instead requires a different approach to law. I also found that the adversarial system excuse was only weakly justified, leading to a view that it cannot provide immunity for lawyers' conduct, without more.

### *4.7.1 Approaches retaining formalism & liberalism*

The question then is to ask is whether the approaches along (or suspended above) the continuum of alternative approaches are appropriate in the SA jurisdiction. It is useful to start with those theorists who have not sought to change the neutral partisanship role, but to modify it. It will be recalled that these modifications come in the form of a distinction, first, between mere-zeal and hyper-zeal (Dare) on the one hand, and client entitlements and client interests (Wendel) on the other hand.

Immediately, these modifications appeal to a South African concerned with issues around moral pluralism (a reality in SA with its diversity of people, together with the constitutional recognition of customary law). However, this appeal quickly fades when one recognises that, even with these modifications, these approaches do not necessarily diminish the harm created by the role (to client, to lawyer and to community). These harms therefore remain. These alternative approaches retain perspectives that are at odds with the vision of the SA Constitution as transformative, and its interpretation of the values of dignity, equality and freedom as relational.

It is perhaps in the context of access to justice that these approaches are most inappropriate in SA (and possibly elsewhere). Given SA's context as officially the *most* unequal society in the world,[140] the idea that one adopts a role that *presumes* an equal playing field in lawyering/litigation is simply inadequate. Wendel as much as admits this problem when he states that his approach 'is an account of the ethics of lawyers in a *basically just society*'.[141]

---

[139] Davis and Klare 2010 *SAJHR* 411.

[140] As noted in 3.3.3, South Africa has a Gini Co-efficient (an international measurement of relative poverty in a country or region) of approximately 0.6. This is consistently the lowest of all countries on this scale. See H Kruuse 'Vuku'zenzele ("Arise and Act"): Lawyers and access to justice in South Africa' in H Whalen-Bridge (ed) *The Role of Lawyers in Access to Justice: Asian and Comparative Perspectives* (2021) *(forthcoming).*

[141] WB Wendel 'Razian authority and its implications for legal ethics' in C Parker 'Forum: Philosophical legal ethics: Ethics, morals and jurisprudence' (2010) 13 *Legal Ethics* 165 at 191 at 198-99. My emphasis. More recently, Wendel addresses this issue again but admitting that the law as enacted 'has the potential to conceal

Even in this characterisation of society, this response is deficient: does he mean 'just' as in whether South Africa's constitutional democracy provides *theoretically* for access to justice, or 'just' as to whether reality and practice show otherwise? As Cochran notes: 'Ultimately, liberal lawyering is likely to advance the autonomy of those who can afford lawyers at the expense of those who cannot.'[142]

There is also the spectre, as South Africans well know from their apartheid history discussed in chapter 2, that the adoption of the neutral partisanship role can lead to an anesthetisation of conscience. Wendel recognises that his (and implicitly Dare's) approach may be characterised as alienating or dehumanising where the legal practitioner, a moral agent, may be turned into the instrument of 'the law' or/and 'the state'. In this recognition, Wendel admits and recalls 'the horrors of the 20th century'[143] (surprisingly, he excludes apartheid as an example) where people too easily became agents of collective atrocities and enabled evil by simply continuing to do their jobs (an outcome which his critics say follows from the neutral partisan role, however modified). However, Wendel's response is not to deny the truth of the observation, but to say that 'little follows from it' in terms of understanding the normative significance of the legal profession as it exists in modern, essentially just societies.[144]

For those who have endured the oppressive apartheid regime, the idea that modern, essentially just, societies are now the 'order of the day' is simply naïve and/or a position that erroneously presumes that 'just' societies are those that provide theoretically for 'justice' understood as social ordering. On the contrary, in SA legal practitioners should be aware of the fragility of constitutional democracy, that the Constitution is not self-executing and can be changed (as the Zimbabwe and Kenyan examples show).[145] Thus, those responsible for its execution cannot lay idly by.[146]

---

illegitimate hierarchies and social injustices'. However, he suggests that this cannot change the underlying conceptual thesis that the law claims to have the normative authority where it is established by those who exercise lawful authority. See WB Wendel 'The rule of law and legal-process reasons in attorney advising' (2019) 97 *Boston Law Review* 107 at 140.

[142] Cochran Jr 2011 *Campbell Law Review* 688.

[143] Wendel mentions figures like Adolf Eichmann and Maurice Papon as examples in Wendel 2010 *Legal Ethics* 198.

[144] Ibid.

[145] In Zimbabwe, after 33 years, their Constitution has been amended 20 times while the Kenyan Constitution has been 'unwrapped' 50 times by 2010. See P Mulumba 'Why have constitutions in Africa failed to stand the test of time?' *Daily Monitor* 29 April 2018 available at https://www.monitor.co.ug/OpEd/Letters/Why-have-constitutions-Africa-failed-stand-test-time/806314-4535066-uorxm9/index.html.

[146] Cameron says as much when he noted in a conference paper in 2009: 'The rule of law [in South Africa] still needs vigilant protection. It needs protection not only against politicians, but against *timid, cowardly and silent lawyers*. It needs protection against judges who may be arrogant, idle, or inert.' See E Cameron 'Dugard's moral

It is also necessary to comment directly on whether the modifications provided by Dare and Wendel do the job they say they do. Ironically, Webb[147] notes that Dare's distinction between mere-zeal and hyper-zeal (and by inference, Wendel's distinction between client entitlement and client interest) reinforces the critics' case against the idea of law as relatively determinable. Webb notes in this regard that, while Dare produces clear *philosophical* distinctions between his two concepts, in practice, the distinction degenerates 'into a banal discussion about what is a right accorded by law and what is an advantage that the law can be used to obtain but to which no right exists'.[148] This, Webb tells us, is no more or less than a discussion about the law in the given instance. Sutherland also sees the irony in this context when he asks:

> 'Can there really be a useful distinction between "legal rights" on one hand, and on the other hand "interests" which lie *inside* the realm of "legal rights"? It seems to be a semantic joust. How can one persist in this distinction without construing "interests" to be *unlawful* desires; ie *outside* the ambit of legal rights? In my view, if behaving with "hyper-zeal", as conceived, counsel remains within [*sic* – outside] the law, how can that be distinguished from mere-zeal? If hyper-zeal is construed as behaving unlawfully, the norms of the profession cannot and do not, *per se* approve of such conduct, and the distinction serves no purpose.'[149]

Given Wendel's concession about the conditions necessary for his approach to operate (viz 'a basically just' society, however conceived), the failure to take into account the unequal playing field, and given the stated difficulty of determining 'mere-' from 'hyper-', and 'entitlement' from 'interest', these approaches appear inadequate to meet the needs of the South African (or arguably, any) context. In addition, one cannot ignore the underlying conservatism/liberalism of both theorists' view on the role of law. Dare's lawyer, for example, is seen as 'a force not for change, but for stability'.[150] Wendel and Dare both prescribe to the idea that lawyers are part of the liberal institutions of state who do nothing more than regulate citizens in a neutral manner (also referred to as 'facilitating co-ordination' or 'law as social ordering'). This view is challenged by the transformative nature of South Africa's constitution. Even outside of the SA jurisdiction, scholars question whether understanding law as social order simply reveals a

---

critique of apartheid judges: lessons for today' *Conference in honour of John Dugard – University of the Witwatersrand* 2 October 2009. My emphasis.

[147] Webb 2009 *Legal Ethics* 251. Webb's point is the mere-zeal / hyper-zeal distinction still begs the question of who gets to decide what a client is entitled to?

[148] Ibid 251.

[149] Sutherland *A Defence of the Standard Conception* 39-40 & 47. Original emphasis.

[150] Webb 2009 *Legal Ethics* 255.

'pragmatic goal' rather than a 'conceptual truth', one that can be 'satisfied imperfectly and can be compromised to serve other competing goals'.[151]

Finally, scholars have recently challenged these modified neutral partisanship approaches for their 'tidy account' of the institutional settlement.[152] These challenges have been most prominently made by Davis,[153] Salyzyn[154] and Zipursky.[155] The bases for the challenge is familiar to South African legal scholars as they raise similar issues to those debated about judges and lawyers operating within the apartheid legal system.[156] The challenge is this: scholars such as Wendel and Dare wish to ground the ethical obligations of lawyers in the law itself. However, how is a lawyer to interpret law, and especially the law governing lawyers, if they may not go beyond the law itself? Davis argues that no one will dispute that the law governing lawyers may establish some constraints on how far a lawyer may go in pushing the boundaries of the client's legal entitlements. However, how is a lawyer to interpret the rules governing these boundaries? The reality then is that these rules themselves require interpretation: there are many situations in which a lawyer has to exercise judgement to determine the client's entitlements. This is a basic recognition of Hart's idea that rules do not determine their own application.[157] If they do not determine their own application, then it follows that there must be at least *some* principles of legal ethics that cannot be sourced directly in client's legal entitlements. The most plausible source of these principles, according to Davis and Salzyn, is in first-order morality, including considerations of justice or other moral principles such as non-deception and the protection of human dignity. In other words and as recognised by Wendel: 'There can be no such thing as positivist legal ethics if a lawyer must, or even may, refer to these considerations when considering what is owed to a client'.[158]

---

[151] JP Davis 'Legal dualism, legal ethics, and fidelity to law' (2016) *Journal of the Professional Lawyer* 1 at 37.
[152] See Wendel 2017 *Canadian Journal of Law & Jurisprudence* 451.
[153] Davis 2016 *Journal of the Professional Lawyer* 1 & JP Davis 'Legal, morality, duality' 2014 *Utah Law Review* 55.
[154] A Salyzyn 'Positivist legal ethics theory and the law governing lawyers: A few puzzles worth solving' (2014) 42 *Hofstra Law Review* 55.
[155] BC Zipursky 'Legal positivism and the good lawyer: A commentary of W Bradley Wendel's *Lawyers and Fidelity to Law*' (2011) 24 *Georgetown Journal of Legal Ethics* 1165.
[156] This debate has its roots in the now famous Wacks-Dugard debate, where Wacks contended that no moral judge could continue to participate in the institutionalised injustice of apartheid, and the only moral option was to resign. Dugard, on the other hand, argued that judges should not resign since there was still scope under apartheid for moral judges to do justice. See R Wacks 'Judges and Injustice' (1984) 101 *SALJ* 266; J Dugard 'Should judges resign? – A reply to Professor Wacks' (1984) 101 *SALJ* 286 & R Wacks 'Judging judges: A brief rejoinder to Professor Dugard' (1984) 101 *SALJ* 295. For a commentary post-apartheid on the issue, see R Wacks 'Injustice in robes: Iniquity and judicial accountability' (2009) 22 *Ratio Juris* 129.
[157] HLA Hart *The Concept of Law* 2 ed (1994).
[158] Wendel 2017 *Canadian Journal of Law & Jurisprudence* 453.

### *4.7.2 Approaches adopting ethical discretionary judgment*

If the modified versions set out in 4.7.1 above do not suit the South African landscape (and possibly elsewhere too, given the criticisms above), then does Simon's 'discretionary judgment' approach do a better job? On the face of it, Simon's approach holds much promise in the SA context. Given SA's constitutional democracy, Simon's requirement that one look at 'law's morality' would entail that SA lawyers faithfully interpret the Constitution to work out what is required of the lawyer in any circumstance. Given that the South African Constitution was drafted with a view to the future (for example, Nkabinde J describes it as caring, participatory, horizontal, transformative in chapter 3), and its being hailed as one of the most progressive Constitutions in the world,[159] Simon's approach would require lawyers to act accordingly. Broadly speaking, Simon asks lawyers to work out what the legal system requires, on the basis that it is a good guide to directing lawyers' actions.

This approach bears certain similarities to Dugard's central thesis in his book *Human Rights and the South African Legal Order*,[160] written at the height of apartheid. In an attempt to stave off the worst excesses of apartheid, Dugard suggested in similar terms (and also relying on Dworkin's work) that South African judges[161] should pay attention to the legal values inherent in the law (which he saw as its Roman-Dutch common law heritage). He believed that, by doing so, judges (and lawyers) would find values such as those emphasising freedom and equality before the law.[162] As discussed in chapter 2, it was Dugard's contention that a reliance on these sources of law could have ameliorated the human-rights abuses prevalent in the

[159] For example, Sustein calls it 'the most admirable constitution in the history of the world' (quoted in T Carothers 'Blessings of liberty' *New York Times* 14 October 2001 available at https://www.nytimes.com/2001/10/14/books/blessings-of-liberty.html?pagewanted=all. US Supreme Court Justice Ruth Bader Ginsburg sparked controversy in the US for a remark she made on the South African Constitution. Shortly after the fall of President Hosni Mubarak of Egypt, the dissolution of parliament, and the suspension of Egypt's constitution. She visited Cairo. When asked by a television interviewer whether Egypt should copy and paste from existing constitutions around the world like that of the United States, Justice Bader Ginsburg responded as follows: 'You should certainly be aided by all the constitution-writing that has gone on since the end of World War II. I would not look to the US constitution if I were drafting a constitution in the year 2012. 1 might look at the constitution of South Africa. … It really is, I think, a great piece of work that was done. [...] Yes, why not take advantage of what there is elsewhere.' See W le Roux 'The Bader Ginsburg controversy and the Americanization of post-apartheid legal culture' (2014) 59 *American Studies* 519 at 519.

[160] (1978). See also J Dugard 'The judicial process, positivism and civil liberty' (1971) 88 *SALJ* 181.

[161] His message was predominantly aimed at the judiciary but not exclusively so.

[162] Dugard *Human Rights* 71 & 393. As mentioned in chapter 2, Dugard refers to writings of the Dutch jurists Grotius and Voet, to support this approach, and quotes the latter (at 71): 'A law has various requirements. In the first place indeed it ought to be just and reasonable – both in its matter, for it prescribes what is honourable and forbids what is base; and in its form, *for it preserves equality and binds citizens equally.'* My emphasis. For the original, see Voet *Commentarius ad Pandectas* 1.3.5.

apartheid state.[163] However, critics noted that the problem with Dugard's argument (following this Dworkinian conception) was that it assumed that the legal ideals and values of the apartheid legal system could in fact be read in this way. What if, upon a diligent investigation into 'finding' the legal ideals and values of the SA legal system – specifically focusing on apartheid statutes – revealed that the legal ideals and values of the legal system was the separation and oppression of the black race by all means necessary?[164] Thus, the problem with Dugard's approach was that the principles inherent in the SA apartheid legal system were incoherent in that the Roman-Dutch common law values and the explicit statutory discriminatory 'values' clashed.[165] Given this incoherence, the approach arguably failed as it presumed that the legal system's ideals and values are discoverable and coherent in the first place: an idea first put into doubt by critical legal studies scholars.[166]

Would adopting Simon's approach under South Africa's Constitution suffer this same criticism? In answering this question, it is useful to survey the general criticism of Simon's work, and then to assess whether such criticism is valid today.

Following a similar line of argument to Dugard's critics, Atkinson points out that Simon's approach fails to show that the particular legal system's spirit, values, ideals and purposes are worth pursuing in the first place.[167] If a lawyer found the legal system to discriminate as its primary purpose, then strictly speaking lawyers would have to be faithful to those

[163] See also E Mureinik 'Dworkin and apartheid' in H Corder (ed) *Law and Social Practice* (1988) 181 and E Mureinik 'Security and integrity' 1987 *Acta Juridica* 197 in relation to the search for deeper principles within the apartheid legal system.

[164] Le Roux points out the problems inherent in applying Dworkin's approach in SA, despite admiring the creativity of the critics. He notes that critics of the apartheid system did not have the benefit that Dworkin had of locating principles in the Bill of Rights as part of the US constitution. Instead, they had to work within a constitutional framework 'unfriendly to rights'. Thus, in order to overcome these limitations, they saw Roman-Dutch common law as constituting the founding principles of South African and urged courts to enlist these principles as presumptions of statutory interpretation. However, as set out below, these principles were directly contrary to the manifest will of the racist apartheid legislature. See W le Roux 'The Bader Ginsburg controversy and the Americanization of post-apartheid legal culture' (2014) 59 *American Studies* 519 at 523.

[165] Christodoulidis notes in relation to judges: 'The question whether the common law gave judges a genuine resource to interpret statute law in ways that modified the oppressive intent of the legislators or whether it became itself infected by this wickedness is one that has troubled legal theorists writing on South Africa.' See E Christodoulidis '"End of history" jurisprudence: Dworkin in South Africa' 2004 *Acta Juridica* 64 at 68-9.

[166] For representative texts of CLS thought, see D Kennedy 'Legal education and the production of hierarchy' (1982) 32 *Journal of Legal Education* 591*;* M Tushnet 'Critical legal studies and constitutional law: An essay in deconstruction' (1984) 36 *Stanford* Law *Review* 623*,* and R Unger *The Critical Legal Studies Movement* (1986). For texts looking at CLS in the South African context, see K Klare 'Transformative constitutionalism and legal culture' (1998) 14 *SAJHR* 146 and T Madlingozi 'The Constitutional Court, court watchers and the commons: A reply to Professor Michelman on constitutional dialogue, "interpretive charity" and the citizenry as *sangomas*' (2008) 1 *CCR* 63. As one reviewer of Wendel's book puts it: 'One attorney's sound reasoning is another lawyer's speciousness'. See J Foster *Book Review: Lawyers and Fidelity to Law* available at http://www.lpbr.net/2011/06/lawyers-and-fidelity-to-law.html.

[167] Atkinson 1992 *Maryland Law Review* 894ff.

discriminatory ends on this account, all the while ensuring that they were not influenced by an account favourable to their client. While Simon calls on the lawyer to consider 'justice', Atkinson suggests that it is not justice in the broad meaning of the word, but in this context it is a consideration of a particular legal system's ideals and values.[168] West, a US commentator, problematises this approach when she asks:

> 'Do we really *want* lawyers, as professionals, to identify the demands of justice with even an idealized, deep-digging interpretation of *extant law?* Is our law really *that* good? What happens if it falls from grace? What happens if our deepest, most fundamental, most basic law, when best read in its most moral light, takes a disastrously bad, immoral, evil turn and becomes utterly, inarguably unjust? What if it already has? Who will notice, and who will not? Will a legal profession first trained, and then *required,* to equate justice with the best possible interpretation of extant law not be *less* inclined than their positivist brethren to recognize wide-scale, state-sanctioned evil?'[169]

While Atkinson and West's critiques resonate in the US jurisdiction (and in SA before the Constitution), it is arguable that they have less purchase in SA today. This is because of the differences in the two legal systems as evidenced in the SA and US constitutions. Where a legal system endorses concepts such as classical liberalism, negative liberty, facilitating co-ordination, and the minimal state, (as the US Constitution arguably does, or at least has been interpreted as such), it is more troubling to ethics scholars than where a constitution invites lawyers to re-vision the law in terms of its founding provisions that are to be interpreted broadly (as the SA Constitution does[170]). There appear to be two distinctive reasons why the criticism against Dugard (and by implication, Simon) would not necessarily apply today. First, the underlying values of the legal system are much more specific, clearer and coherent;[171] and second, there is much more coherence in the interpretative stance in relation to these values.[172]

---

[168] Ibid.
[169] R West 'The zealous advocacy of justice in a less than ideal legal world' (1999) 51 *Stanford Law Review* 973 at 984. West's original emphasis is kept.
[170] Sections 8 and 39 read in the light of the founding values of the Constitution. While not directly relevant, it is noticeable that certain rights are determined to be non-derogable under a state of emergency, specifically life and dignity: see s 37(5) of the Constitution.
[171] The idea that the SA constitution is much more 'specific' than many other constitutions, is set out in Chaskalson CJ's comments in *Ferreira v Levin NO & others; Vryenhoek & others v Powell NO & others* (1) SA 984 (CC) para 176.
[172] Ibid para 213.

The new constitutional dispensation does not suffer from the extreme incoherence and contradiction that animated the apartheid system.[173] The SA Constitution spells out in its founding provisions that the SA Constitution is one, sovereign, democratic state founded on the following values:

> '(a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.
>
> (b) Non-racialism and non-sexism.
>
> (c) Supremacy of the constitution and the rule of law.
>
> (d) …'[174]

It further sets out that any law or conduct inconsistent with it is invalid,[175] that the courts and state have a duty to must promote the founding values, and that the development of the law must fall in line with these founding values.[176]

It is arguable then that the SA legal system is not as incoherent as the critical legal theorists would say of other jurisdictions. This is because of the strong imperative throughout the Constitution to ensure that the founding values of dignity, equality and freedom are furthered in any law or adjudication of that law. It is also more specific than other constitutions,[177] making the ambit of rights easier to interpret. Of course, it goes without saying that the meaning (and weight) of these values are still contested or contestable.[178] Nonetheless, any meaning or weight attributed to these values would depend on some background understanding about the law, or the lawyer's role.[179] The Constitution itself, as well as the jurisprudence coming out of the CC, directs that the resolution of these contestations occur in a way that is specifically

---

[173] See Christodoulidis 2004 *Acta Juridica* 68-69.
[174] Section 1 of the Constitution.
[175] Section 2 of the Constitution.
[176] Sections 8 and 39 of the Constitution. The Interim Constitution (IC) Act 200 of 1993 had similar provisions: Section 4 of the IC provided that any law inconsistent with the provisions of the Constitution shall 'be of no force and effect to the extent of the inconsistency'. Section 98(2)(c) allowed the CC to enquire into 'the constitutionality of any law, including an Act of Parliament, irrespective of whether such law was passed or made before or after the commencement of [the Interim] Constitution.' See also subsecs 98(5)-(6) of the IC.
[177] Chaskalson notes in *Ferreira v Levin* para 176 that '[t]he United States Constitution … contains none of the detail found in Chapter 3 of our Constitution' and therefore, the interpretative stance adopted in that jurisdiction must necessarily differ.
[178] It goes without saying that there are debates concerning the weighting of rights dealing with equality, religious freedom, culture etc. For a recent resolution of the weighting of rights, see *Qwelane v SAHRC & others* 2020 (2) SA 124 (SCA) para 3 where the SCA notes that the case 'brings into focus the tension between hate speech and freedom of expression.'
[179] WH Simon 'Role differentiation and lawyers' ethics: A critique of some academic perspectives' (2010) 23 *Georgetown Journal of Legal Ethics* 987 at 990.

contextual and distinctly different from the textual way that neutral partisanship adherents would adopt. The CC has said on many an occasion that rights must

> 'not be construed in isolation, but in its context, which includes the history and background to the adoption of the Constitution, other provisions of the Constitution itself and, in particular, the provisions of the [Bill of Rights] of which it is part.'[180]

Do other criticisms of Simon's approach have purchase in South Africa? For example, Rostain argues that interpreting 'law's morality' would not eliminate pro-client bias.[181] Instead, she notes that pro-client bias under his approach would persist, if not increase. She argues that this is the case because the approach gives too much discretion to the legal practitioner. In this way, legal practitioners would simply use their discretion to adopt their clients' perspectives of the world. Simon's response to this criticism is relevant as much in the US as it is in SA. He responds by noting that, while lawyers may have relations with clients that engender bias, they and their clients also have other relations with third parties that may involve both 'material incentives' and 'psychological pressures' toward cognitive detachment *from* clients.[182] He then goes on to note that concerns about implementation should not be allowed to 'swamp the ideal'.[183] Simon suggests that various regulatory reforms could deal with this issue,[184] but primarily argues that identifying pro-client bias is part of the discretionary judgement process:

> 'A lawyer who recognizes he has a pro-client bias should, in hard cases, be less confident about conclusions that sacrifice nonclient to client interests than about conclusions that sacrifice client to nonclient interests. She should be more committed to reconsidering the former conclusions. She should strive harder to avoid circumstances in which her decision is not subject to check or review by other institutions and actors not subject to her bias.'[185]

Even if we could trust lawyers to give good faith interpretations of the law without taking into account their various biases, what about Simon's insistence that a legal practitioner does not

---

[180] *Ferreira v Levin* para 46 quoting Chaskalson P. See also *S v Zuma* 1995 (2) SA 642 para 15; *S v Makwanyane* 1995 (3) SA (CC) 391 para 9; and *S v Mhlungu* 1995 (3) SA 867 (CC) para 8.
[181] T Rostain 'Waking up from uneasy dreams: Professional context, discretionary judgment, and *The Practice of Justice*' (1999) 51 *Stanford Law Review* 955.
[182] Simon 1999 *Stanford Law Review* 1005. For an example of where a legal practitioner would have material incentives *against* the client, see DB Wilkins 'Race, ethics, and the first amendment: Should a black lawyer represent the ku klux klan' (1995) 63 *George Washington Law Review* 1030.
[183] Simon 1999 *Stanford Law Review* 1005.
[184] Simon *The Practice of Justice* 203-14.
[185] Simon 1999 *Stanford Law Review* 1005. See also Simon's description of how a legal practitioner might take account of awareness of his own bias in decision-making in a case study, see Simon *The Practice of Justice* 151-6.

need to consider her 'ordinary morality', but only 'law's morality'? In chapter 2, I reported that the TRC suggested that if legal practitioners had had recourse to their ordinary morality, then apartheid would not have thrived in the way it did. Atkinson notes that, 'against the ordinary moralists, [Simon] insists on exorcising all extra-legal spirits as phantoms, if not chimeras'.[186]

However Atkinson may be too conservative as to what Simon sees as 'law's morality' in the context of South Africa, where legal arguments regarding transformation are commonplace.[187] This idea is highlighted by Mohamed CJ in *S v Makwanyane*:

> 'All Constitutions seek to articulate, with differing degrees of intensity and detail, the shared aspirations of a nation; the values which bind its people; … ; and the moral and ethical direction which that nation has identified for its future. In some countries, the Constitution only formalizes, in a legal instrument, a historical consensus of values and aspirations evolved incrementally from a stable and unbroken past to accommodate the needs of the future. The South African Constitution is different: it retains from the past only what is defensible and represents a decisive break from, and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular, and repressive and *a vigorous identification of and commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos, expressly articulated in the Constitution.* The contrast between the past which it repudiates and the future to which it seeks to commit the nation is stark and dramatic.'[188]

Thus, when Simon suggests that lawyers follow 'law's morality', he includes 'principles, policies, and informal norms' that may not take the form of commands or 'rules'[189] but which form part of the SA constitutional ethos. Simon's view is that '[i]f legal norms can be elaborated in terms of intelligible social purposes, those purposes can serve as grounding for both judicial decision and lawyer conduct'.[190] The notion of transformation, as set out in Mohamed CJ's judgment above, is the central social purpose. This social purpose then requires legal practitioners to conceive of the principles of the legal system in substantive ways, within the parameters of 'law' and its articulated purpose.

---

[186] Atkinson 1992 *Maryland Law Review* 864.
[187] Roederer goes on to suggest that transformation arguments in the US would likely appear to be 'too political to be a valid argument' given that US lawyers and judges adopt a 'historical' modality which tends to rely on the framers intent. See C Roederer 'Mapping the jurisprudential terrain in the search for truth in law' in C Roederer & D Moellendorf *Jurisprudence* (2004) 1 at 19.
[188] 1995 (3) SA 391 (CC) para 262. My emphasis.
[189] WH Simon 'Role differentiation and lawyers' ethics: A critique of some academic perspectives' (2010) 23 *Georgetown Journal of Legal Ethics* 987 at 1000.
[190] Ibid 1008.

Further, and importantly, I will argue in the next chapter that the law *itself* invites a so-called 'extra-legal spirit' to inform interpretation, this 'spirit' being Ubuntu. Essentially, Simon notes that critics of his approach exaggerate the necessary distance between ordinary morality and legal ethics.[191]

### *4.7.3 Moral activist approach*

Given the findings of the TRC in respect of legal practitioners under apartheid, the moral activist approach immediately resonates in a post-apartheid context. It challenges the idea that 'legal interpretation can remain moderately determinate even without resort to the interpreter's own preferences, moral views, or political views.'[192] Instead, moral activists look at (1) ordinary morality to justify/defend their conduct, and/or (2) consider the diverse context of the legal advice in considering how to act.

As discussed earlier, Luban's fourfold root of moral reasoning requires lawyers to justify their reasoning beyond self-referential platitudes such as 'autonomy is good because it is good', and 'blame the game, not the player' retorts. It will be recalled that it was implicit in the reasoning of the TRC's findings[193] that if lawyers in SA had used their ordinary moral judgement, they would have realised the immorality of the ends of the apartheid state. Instead, they relied on role morality and participated in a system that was palpably unjust, without taking any responsibility for their actions within that system (Of course, for those that supported apartheid, there was no need to rely on role morality to justify one's conduct).

It could be argued that the apartheid legal system was an aberration in that the criticism cannot be directed at the zealous representation of a client, but rather at the lawyer's willingness to participate and condone the system in the first place. However, most lawyers, once they were embedded in the system, failed to consider the morality of clients' ends and means – especially when they acted on behalf of the state. In this context, Luban would argue that lawyers in SA should have favoured their moral judgement in a situation where they found a conflict between

[191] Simon goes on to say: 'This defect could be viewed as unfair to lawyers in painting their role as less morally attractive than it need be or as overly generous to them in offering an undeserved measure of immunity from lay moral criticism' See WH Simon 'Role differentiation and lawyers' ethics: A critique of some academic perspectives' (2010) 23 *Georgetown Journal of Legal Ethics* 987 at 988.
[192] Zipursky 2011 *Georgetown Journal of Legal Ethics* 1173.
[193] See 2.7.2.

their professional role and their morality.[194] This is not to say that moral activist lawyers did not exist in SA – there are several examples of moral activist lawyers who actively used legal practice to attempt to change the prevailing legal system. Abel aptly titles a book about the practice of these lawyers as 'politics by other means'[195] – an explicit recognition that lawyers used their professional skills to push legal reform. However, while many of these activists acted with aggressive partisanship tactics to further justice, theirs was not a position of neutrality,[196] thus moving them into the moral activist camp.

Atkinson sees interesting implications for Luban's moral activist reasoning, which potentially affects the approach's viability in South Africa. Atkinson tells us that, while Luban requires lawyers to justify their actions on behalf of clients in terms of additional and generally more restrictive criteria, he appears to maintain that lawyers in their professional capacities must still do things that will give them moral pause as conscientious individuals. Atkinson considers the results as follows:

> 'The flavor of zealous advocacy is thus not wholly lost. The limits on what a lawyer may properly do for clients are found by something other than a direct recourse to ordinary morality. In that sense, [Luban's approach] is still a role morality.'[197]

Rather than criticising Luban for condoning conduct that may give us moral pause, I find this to be a positive attribute, since it admits of certain contexts where zealous partisanship may be necessary to vindicate rights (the usual example given is the criminal law context). However, Atkinson picks up on another challenge: Luban sees role morality in similar ways to Simon. This view is that role morality is derived from mandatory, objective norms.[198] The problem then becomes one where this view negates the essence of Luban's approach that ordinary morality feature centrally in any ethical decision-making. In other words, it requires:

> 'individual responsibility for the pursuit of collective goals and conformity with publicly imposed paradigms, *not* for individually determined values and orderings of values. But as

---

[194] Luban *Legal Ethics* 63. For an interesting case study where Wim Trengove SC gives an account of one such dilemma that he experienced, watch the United Nations *Ethics 4 Justice Programme* 'An ethics case study with Advocate Wim Trengove SC' (2019) available at https://www.youtube.com/watch?v=ia2pz4mlyJw&t=568s.
[195] R Abel *Politics by Other Means: Law in the Struggle against Apartheid, 1980-1994* (1995).
[196] For example, exploiting loopholes in apartheid law to establish their client's cause S Budlender, G Marcus & N Ferreira *Public Interest Litigation and Social Change in South Africa: Strategies, Tactics and Lessons* (2014) 6 available at https://www.atlanticphilanthropies.org/wp-content/uploads/2015/12/Public-interest-litigation-and-social-change-in-South-Africa.pdf.
[197] Atkinson 1992 *Maryland Law Review* 859.
[198] Ibid.

> individuals press, at Luban and Simon's invitation, *for an account of public norms that squares with an objective standard of right and justice,* they find themselves at odds with collective interpretations of those norms. Either the individual or the collective may, of course, be wrong, but there is a more radical possibility – the norms may not really be universal.'[199]

In the South African context (and arguably elsewhere[200]), accepting Atkinson's critique – that norms may not be universal – does not necessarily mean that we cannot agree that particular values are worth pursuing in a particular legal system, and that those values should form the basis for our legal system, despite the localised nature of those norms. Using ideas from moral sceptics such as Atkinson and Hutchinson, we can accept that morality is not objectively 'out there'. We can also accept that it does not lead us, in and of itself, to our own selfish or nurtured inclinations, or the moral abyss and nihilism that Fried and others would have us believe it does.[201] Instead, it is reasonable to suggest that legal practitioners can recognise that values are constructed within particular social and historical contexts, but at the same time accept that standards do develop about what is, and is not, acceptable behaviour for SA's constitutional democracy.[202] These standards are to be found in the Constitution.[203] The Constitution then is a point of departure for all lawyers. It is the 'institutional morality' developed in the light of South Africa's context. Accepting that the Constitution sets standards that legal practitioners should follow does not, as Hutchison fears, mean 'theoretical closure and practical dogma'.[204] It simply means that the legal practitioner's interpretative stance has to take its point of departure from the Constitution's contents and its underlying philosophy.

But what of Luban's suggestion that ordinary morality is the best foundation for legal ethics? The challenge in adopting an ordinary morality approach is the recognition, made by Rawls and others, that citizens hold firmly to moral beliefs derived from a diversity of moral, religious,

---

[199] Ibid 870.

[200] For discussions of transformative constitutionalism in other jurisdictions, see in general A von Bogdandy, E Ferrer Mac-Gregor, M Morales Antoniazzi, F Piovesan (eds) *Transformative Constitutionalism in Latin America* (2017). See also M Hailbronner 'Transformative constitutionalism: Not only in the Global South' (2017) 65 *American Journal of Comparative Law* 527.

[201] For a discussion of these concerns, see Hutchinson 1995 *Alberta Law Review* 769-70.

[202] Hutchinson 1998 *International Journal of the Legal Profession* 185.

[203] This is not to say that the CC accepts a type of 'basic structures' doctrine which effectively requires one to see the Constitution as 'an invisible yet all-pervading standard that exists […]'. (See A Govinjee & R Kruger 'The basic structure doctrine debate: South African explorations' in S Jain & S Narayan (eds) *Basic Structure Constitutionalism: Revisiting Kesavananda Bharati* (2011) 209 at 225). The CC was faced with the question of whether the basic structures doctrine applied in South Africa in *United Democratic Movement v President of the RSA* 2002 (11) BCLR 1179 (CC) para 12. While the Court did not commit to this view (since they found it unnecessary for the purposes of the matter before them), it did indicate that the basic structures doctrine was problematic.

[204] Hutchinson 1995 *Alberta Law Review* 778.

and philosophical sources.[205] Accepting this to be the case, Kruse suggests that relying on personal morality may be problematic in that:

> '[m]oral pluralism recognizes the existence of a diversity of reasonable yet irreconcilable moral viewpoints, none of which can be objectively declared to be "right" or "wrong" from a standpoint outside of its own theoretical framework.'[206]

To suggest then that ordinary morality is a better approach to lawyering than neutral partisanship suggests that there is some type of common morality, or at least social consensus, on certain issues. If this were the case, legal practitioners could then 'filter out' matters which they find morally problematic in their personal life. However, they then effectively collapse professional ethics into their personal morality. This is concerning in that legal practitioners who use their personal morality to guide their conduct and representation 'will not always produce the social goods that society legitimately expects from a regime of professional ethics'.[207] Thus, in the context of a country as diverse and heterogeneous as South Africa, there may be important issues that lawyers refuse to take up because of their personal morality. This may be in spite of explicit rights set out in the Constitution and statutory law. Parker & Evans similarly suggest that a major problem of this approach is that it does not prescribe any particular duty to the law and the legal system where a legal practitioner believes her client's cause to be just – or unjust.[208] For example, there may be legal practitioners (and judges[209]) who – following beliefs ingrained during apartheid – may refuse to represent black South Africans or refuse to treat black South Africans in a manner that is consistent with the new constitutional order. These legal practitioners' personal morality may have been influenced by erroneous apartheid propaganda regarding the 'swart gevaar',[210] the threat of communism ('rooi gevaar'),[211] and general beliefs in the superiority of the white race.[212] In apartheid South

[205] J Rawls *Political Liberalism* (1993) xvi.
[206] Kruse 2005 *Minnesota Law Review* 393.
[207] DB Wilkins 'In defense of law and morality: Why lawyers should have a prima facie duty to obey the law' (1996) 38 *William & Mary Law Review* 269 at 274. My emphasis.
[208] Parker & Evans *Inside Lawyers' Ethics* 15.
[209] For an interesting account of influences on prominent judges and legal writers of the time, see E Cameron 'Legal chauvinism, executive mindedness and justice – LC Steyn's impact on South African law' (1982) 99 *SALJ* 38; E Cameron 'Lawyers, language and politics – In memory of JC de Wet and WA Joubert' (1993) 110 *SALJ* 51 & E Zitzke 'The history and politics of contemporary common-law purism' (2017) 23 *Fundamina* 185.
[210] The 'black peril'.
[211] The 'red peril'.
[212] It is important to note that it was not just the apartheid system that perpetuated these views. These views already existed. See FA Mouton 'Going against the creator: FS Malan, Cape liberalism and white supremacy in South Africa, 1895 – 1936' (2007) 32 *Journal for Contemporary History* 144 at 144 where he notes that the era of 1895-1936 was 'an era of racism, oppression and exploitation during which South African whites feared Africans as a barbarous threat to their supremacy'.

Africa, the state propagated the idea that black people (supported by communist countries) aimed at destroying religion, confiscating private property, overthrowing the state and creating a black republic where blacks and coloureds would take over.[213] The concept of 'ordinary morality' was thus culturally shaped by state and church.[214] While certain legal practitioners were able to see and fight the injustice of the legal system, for many lawyers the discrimination in the legal system confirmed their problematic moral beliefs.

But, even if one does not consider the history of SA, there are contemporary beliefs – some shaped by culture, religion and politics – that may clash with the constitutional order.[215] There is thus a problem in using 'ordinary morality' as an effective response or alternative to neutral partisanship, particularly in a country that is still characterised by a diversity of views and massive inequality.[216] Moreover, the legal profession is still dominated by a small minority of the population, with the result that a particular type of morality may take precedence in how law is practised.[217] Instead, and as Davis & Klare note, while rules may be recognised as 'historical contingent human products',[218] and while rules also may be 'assessed from any

[213] W Visser 'The production of literature on the "red peril" and "total onslaught" in twentieth-century South Africa' (2004) 49 *Historia* 105 at 109. Chaskalson describes racial discrimination during apartheid as a 'powerful ideology' (see A Chaskalson 'From wickedness to equality: The transformation of South African law' (2003) 1 *Icon* 590). Narvaez & Rest note that '[m]oral judgement cannot be reduced to cultural ideology, or vice versa. But when each construct is measured separately, then combined, the product predicts powerfully to moral thinking.' See D Narvaez, I Getz, JR Rest & SJ Thoma 'Individual moral judgment and cultural ideologies' (1999) 35 *Developmental Psychology* 478 at 478.

[214] Bilchitz notes that one of the key elements of apartheid was the fact that the ideology itself was at least partly 'pseudo-theological'. See D Bilchitz 'Should religious associations be allowed to discriminate?' (2011) 27 *SAJHR* 219 at 237. Significantly, Zitzke notes that conservative legal academics expressed some angst about the introduction of human rights which would, in their minds, 'open the door for the flourishing of sodomy, Satanism, sex shops, suicide, scandalous textual interpretation, and an array of other "evils" not necessarily starting with the letter "s"'. See Zitzke 2017 *Fundamina* 185.

[215] For example, sexual orientation, child marriage, marital rape are all issues influenced by religious and cultural contexts. For a discussion of cultural issues in marital rape, see L Mwambene & H Kruuse 'Marital rape and the cultural defence in South Africa' (2018) 29 *Stell LR* 25.

[216] Nicolson & Webb *Professional Ethics* 223 capture the issue when suggesting that '[t]he problem with reliance on "common morality" is that it may go no further than cultural anthropology in merely identifying a society's moral consensus, without providing normative arguments for why such consensus should be followed'.

[217] See for example, the South African Legal Fellows Network 'Demographic survey of large corporate law firms, South Africa, May 2013' (the SALFN report) as discussed in J Klaaren 'Current demographics in large corporate law firms in South Africa' (2014) 7 *African Journal of Legal Studies* 584. Klaaren notes at 590 that the chief finding of the survey is that South Africa's major corporate law firms are still dominated by white men, especially in their upper echelons: '80% of the chief executives of the 12 firms canvassed in the survey were white men as were 72% of all managing partners. Further, the picture at the CEO/managing partner level was replicated in the ownership and remuneration structures of the firms: 53% of all equity partners were also white and male.' For more recent information, see LexisNexis/Law Society of South Africa *Attorneys' Profession in South Africa 2016 Review* available at https://www.lssa.org.za/upload/LSSA-LexisNexis---Infographic-Report-2016-Survey-of-the-Attorneys-Profession.pdf. The survey notes that white males still dominate in the senior positions of law firms, as well as overall.

[218] D Davis & K Klare 'Transformative constitutionalism and the common and customary law' (2010) 26 *SAJHR* 403 at 410.

normative vantage point',[219] adopting the common foundational commitments (as set out in the Constitution) provide legal practitioners with the ability to do justice to their role and to their clients.

In addition, as Wilkins observes, collapsing personal and professional ethics underestimates the importance of having normative communities, such as the legal profession, 'with their own traditions and values that can both stand as a counterweight to the power of the state and serve as a necessary arena for individual human flourishing.'[220] So, while Wilkins notes that Luban's discussions across professional boundaries are an important counterweight to the legal profession's natural tendency towards insularity, communities dedicated to, say, constitutional values and modes of thought, need to be encouraged.[221] Without this allegiance to the legal framework, it is possible that a legal practitioner will 'make his [or her] life out of what personal scraps and shards of motivation his inclination and character suggest: idealism, greed, curiosity, love of luxury, love of travel, a need for adventure or repose'.[222] Certainly, if media reports and some disbarment judgments are anything to go by, greed and a love of luxury appear to animate some South African lawyers' 'morality'.[223] Nicolson & Webb sums up this issue by claiming that just because there is social consensus on particular moral issues, this does not entail that we ought to follow it.[224] Instead, there needs to be normative arguments why such consensus should or should not be followed that go beyond our individual ideas.[225] Again, as

[219] Ibid.
[220] Wilkins 1996 *William & Mary Law Review* 275.
[221] Ibid.
[222] Fried 1976 *Yale Law Journal* 1088-89.
[223] D Chambers 'Eastern Cape judges gunning for greedy attorneys' *IOL News* 12 January 2017 available at https://www.timeslive.co.za/news/south-africa/2017-01-12-eastern-cape-judges-gunning-for-greedy-attorneys/; *KwaZulu-Natal Law Society v Moodley and Another* [2014] ZAKZPHC 37 at para 2: '[F]ar too many cases involving lawyer greed are featuring on the court rolls these days and the present matter is yet another'; A Carlisle 'Greedy lawyer admits R4m overcharge' *Dispatch Live* 10 November 2017, available at https://www.dispatchlive.co.za/news/2017-11-10-greedy-lawyer-admits--r4m-overcharge/. *General Council of the Bar of South Africa v Geach & others, Pillay & others v Pretoria Society of Advocates and Another, Bezuidenhout v Pretoria Society of Advocates* 2013 (2) SA 52 (SCA) at para 198 where the judge characterised a number of advocates as acting with 'dishonesty fuelled by greed'. O Rogers 'High fees and questionable practices' (2012) 25 *Advocate* 40 commented on the case in noting that it revealed 'a number of advocates of considerable experience allowed themselves to be led astray by the allure of money'. He added: 'The elements of dishonesty and impropriety, which were held to have characterised their conduct should not, however, be allowed to mask the possibility that their behaviour is simply a gross manifestation of a wider malaise'.
[224] Nicolson & Webb 223. For example, the CC in *S v Makwanyane and Another* 1995 (3) SA (CC) 391 para 87 accepted that the majority of South Africans would probably agree that the death sentence should be imposed in extreme cases of murder. However, the court noted that '[t]he question before us, however, is not what the majority of South Africans believe a proper sentence for murder should be. It is whether the Constitution allows the sentence'.
[225] Nicolson & Webb 223.

Davis & Klare reason: 'Transformative possibilities flow from the distributive and culturally constitutive power of law.'[226]

Despite arguments against adopting a moral activist approach for the reasons expressed above, there are some important ideas that could and should guide legal practitioners' actions. First, it should be accepted that legal practitioners cannot escape moral censure for particular role-related actions as well as of their role itself.[227] Even if we accept this to be the case, legal practitioners need to behave in a way that is different from ordinary citizens. This is because they have been given a monopoly by the state to occupy a position of trust with respect to their clients' interests and the public purposes of the legal framework.[228] As a result, the legal practitioner must show allegiance to the legal framework. However, that allegiance does not exclude the use of complex ethical judgment. Simon makes it clear that allegiance to the framework is important. Simon illustrates this point with his discussion of the legal practitioner's actions in the US film *The Verdict* in his book *The Practice of Justice*.[229] The importance of this illustration is that it does not deal with the 'big' issues such as race, gender, sexual orientation, but on moral viewpoints that people may have on everyday issues. In a response to Luban's critique of Simon's approach to the facts of the film,[230] Simon says:

> 'The argument I made in the book depended on the premise that the clients' right to recover damages for the death of their child caused by the defendants' negligence was a value of great weight. *But as a purely moral matter, I do not believe this*. I have doubts about whether society should try to provide monetary compensation to adult family members for the emotional loss arising from the death of children. Moreover, I do not believe as a moral matter that all acts of even serious negligence deserve sanction or that sanctions for such acts should take the form of private damage actions. (I am generally a supporter of doing away with the tort system in favor of expanded systems of health and social security and of occupational regulation.) *So when I say that the client's interest in recovery is an important one, I mean that the law makes it important. I would not necessarily have voted to give them their right. But since the legal system*

[226] Davis & Klare 2010 *SAJHR* 410.
[227] Wilkins *William & Mary Law Review* 274. Gordon 1999 *Stanford Law Review* 919 suggests that this idea is the most controversial aspect of Simon's approach. Gordon notes at 924-25 that 'I suspect that for a great many readers, the most arresting claim of [*The Practice of* Justice] will be that lawyers must take personal responsibility for the quality of justice, and – to some extent – for the production of just outcomes, in every representation, even when doing so may work against the client's interest, or at any rate the client's short-term interest as the client perceives and presents it. I predict that it is this view of lawyers' obligations, and the effective examples Simon uses to explain how to apply it in practice, that are most likely to arouse the indignation and resistance of ordinary lawyers'.
[228] Ibid.
[229] WH Simon *The Practice of Justice* 100-3.
[230] D Luban 'Reason and passion in legal ethics' (1999) 51 *Stanford Law Review* 873 at 888-90.

*has institutionalized a social practice of allowing for such recovery, I think it is important that people in their situation should have a reasonable opportunity to pursue their claims.'*[231]

This explanation is a good illustration of why allegiance to the legal framework is important, and that reference to ordinary morality may not deal with the matters as moral activists often envisage.

### *4.7.4 Contextual approaches adopting postmodern and critical legal theory*

In chapters 4 I have shown how neutral partisanship, however modified, is simply an inadequate and inappropriate role for the legal practitioner in SA today. While the moral activist approach and the ethics of care approaches have certain advantages, there are also shortcomings. Therefore, I have argued so far that Simon's discretionary judgment theory has the most potential to realise a proper role for the SA legal practitioner. Do the theories offered by scholars adopting postmodern and critical legal theory offer a better alternative?

Those in this camp, such as Nicolson & Webb, adopt a contextual approach. Since they reject that objective moral truths exist, they rely on a dialogical ethics foundation to construct what 'morally matters' in a particular community. The foundation is then the commitment to construct morality through interacting with 'the Other' in a responsible way. [232] Dialogical ethics suggests that we are not an 'abstract thinking ego'. Instead, we only acquire self-consciousness through engaging with another person.[233]

The idea of interacting with the 'Other' has particular resonance in South Africa, given the country's legal record of discrimination and subjugation. In commenting on approaches to private law in South Africa, Zitzke notes that 'we should venerate neither the common law nor the Constitution and we should use whatever tools we have at our disposal to contribute towards realizing the needs of the loveless, the poor and other exploited human beings'. [234] In attempting to limit the infinite nature of 'otherness', theorists have pointed to a specific concern for the 'excluded' other – that is, 'the stranger, the outsider, the alien or underprivileged'.[235] In this way, the approach differs from the ethics of care approach, which usually focuses on retaining and/or developing the immediate and personal relationships to the client.

---

[231] Simon 1999 *Stanford Law Review* 997-8. My emphasis.
[232] Nicolson & Webb *Professional Legal Ethics* 46. In general, see Z Bauman *Postmodern Ethics* (1993) & E Levinas *Ethics and Infinity* (1985).
[233] Ibid.
[234] See Zitzke 2017 *Fundamina* 224.
[235] Douzinas, Goodrich and Hachamamovich cited in Nicolson & Webb *Professional Legal Ethics* 48.

There is much to be said for the lessons learnt from postmodernism if one characterises the ethics scholars as 'pragmatic' postmodernists.[236] The 'engagement of the other' can act as a point of departure about what matters. Lenta, while not commenting on the legal practitioner's role per se, points to the particular benefits of postmodern strategies in the SA legal system:

> 'Postmodern strategies might be deployed in order to argue for the historical contingency of colonial forms of knowledge, such as the currently dominant liberal legal discourse. … Through resistance to ethnocentric determinations and intervention in the mechanics of the colonial constitution of the Other through legal discourse, poststructuralism can be utilised to recuperate agency for the subaltern (the racially, economically and otherwise downtrodden) and reintroduce forms of knowledge (traditional African jurisprudence for example) marginalised or "damaged" through the epistemic violence of the coloniser'.[237]

The insights of the postmodern commentators thus hold much value for SA lawyers in that they highlight the limitations of the existing, imposed colonial meanings,[238] particularly when challenging liberalist and formalist modes of thinking.

Although postmodern strategies do have some value, I believe the burden of requiring lawyers to adopt 'postmodern analytical and interpretive techniques' in determining their practice does not guarantee that justice will be served. Given the history of South Africa, and its widespread inequality and systemic problems, I am doubtful that a postmodern approach is capable of achieving the type of justice envisaged by the Constitution. On an ad hoc and individual basis, this might be so. However, given the largely conservative legal culture, the systemic injustice, and the transformational nature of the Constitution, postmodern techniques may be useful but may not necessarily connect with what the drafters of the Constitution saw as what 'morally matters' in the legal framework. It simply may be a question of rhetoric: if one wants to persuade the members of the SA legal profession to change their behaviour, will SA legal practitioners be convinced by a postmodern approach? In the context of the American legal practice (which Klare suggests is much less conservative than the SA legal profession), Simon suggests not, and justifies why 'law's morality' is a more effective stance:

> 'I emphasize *legal* rhetoric because I want to take advantage of the tendency in the professional culture to associate law with relatively objective, rational, socially grounded judgment. At the

[236] As characterised in 4.5.2 above.
[237] P Lenta 'Just gaming? The case for postmodernism in South African legal theory' (2001) 17 *SAJHR* 173.
[238] Ibid 200. See also J van der Walt 'Law as sacrifice' 2001 *TSAR* 710.

> same time, I want to escape the corresponding tendency to associate moral judgment with relativism and subjectivism. For lawyers and law students, law has weight and palpability. To deny this is nihilism. On the other hand, to deny that moral values have more than a subjective basis is the conventional wisdom. Thus, the lawyer who appeals to *moral* judgment against "the law" is accused of "playing God" or "imposing her own values".'[239]

### *4.7.5 Ethics of care*

The ethics of care approach asks lawyers to focus on relationships rather than rights. This is a powerful idea for SA legal practitioners, given that under apartheid the law directly broke down relationships through statutes such as the Immorality Act,[240] the Prohibition of Mixed Marriages Act,[241] more generally, the Group Areas Act,[242] and indirectly through the labour migrancy that resulted from the formation of separate 'Bantustans' for black South Africans.[243] However, as Parker & Evans point out, an obvious disadvantage of this approach is the likelihood that it would have a 'conservative' impact on legal rights generally,[244] since its focus is on avoiding conflict and preserving small-scale networks of relationships, rather than dealing with systemic injustices or achieving larger scale legal and social change.

In the context of South Africa, where systemic injustices loom large, this approach is certainly valuable should a context demand it. Contexts such as family law, children's rights and certain small claims court matters come immediately to mind.[245] However, as a general approach to legal ethics, the ethics of care approach risks paying insufficient attention to the broader notions of justice, equality and rights and the need for transformative systemic impact on society as a whole.[246] Perhaps seeing ethics of care as *part of* a contextual approach works better than seeing it as a substantive approach in and of itself. Again, how this could be done is discussed in chapter 6.

---

[239] Simon 1999 *Stanford Law Review* 992.
[240] Act 5 of 1927.
[241] Act 55 of 1949.
[242] Act 41 of 1950.
[243] Bantu Homelands Citizenship Act 26 of 1970.
[244] Parker & Evans *Inside Lawyers' Ethics* 49.
[245] In fact, much of the more recent legislation in family and child law require mediation as a preferred form of resolution before proceeding to litigation. See for example, the Children's Act 35 of 2005 and family law conferencing in the Child Justice Act 75 of 2008. For an interesting case where the court chastised the lawyers (and in fact ordered costs against them) for not attempting to resolve a family dispute prior to embarking in litigation, see *MB v NB* 2010 (3) SA 220 (GSJ). The judgment was approved by the SCA in *S v J* [2010] ZASCA 139. In general, introducing court-annexed mediation in the lower courts of SA, one reason given is that it serves to 'preserve relationships between litigants or potential litigants'. See Rules of Court: Amendment: Mediation chap 2, *GG* 37448 RG 10151 *GN* 183, 18 March 2014.
[246] Nicolson & Webb *Professional Legal Ethics* 38.

## 4.8 CONCLUSION

In this chapter, I briefly discussed the approaches that legal ethics theorists have offered as an alternative to the neutral partisanship role, either through modification or qualification or rejection. Through this process, I considered the ability of each approach to meet the needs of the SA legal system and its relatively new constitutional democracy. Given the three main challenges discussed in chapter 3, it appears to me that Simon's ethical discretionary approach holds the most promise for legal practitioners operating in the SA legal system. Simon asks legal practitioners to reason contextually and substantively, but to do so in ways that favour the furtherance of the values and purposes of the legal system, which in SA are explicitly set out in the Constitution and its Bill of Rights. Adopting Simon's approach is relatively easy since the design of the legal system explicitly promotes such judgement. However, legal practitioners have to take responsibility for their actions: the approach does not allow them to hide behind laws, rules and codes, but requires them actively to account for their decisions. If this approach were to be followed, legal practitioners would not be able to think of themselves as 'butlers to their more powerful clienteles'.[247] Rather, they should see themselves as adopting a justice-serving ethic.

While there have been criticisms of the Constitution as a solve-all, this criticism does not inhibit the possibilities inherent in following Simon's approach. This is because the Constitution (and the CC through its jurisprudence) has invited a type of interpretive stance towards the legal framework that considers what norms animate the legal framework. In fact, Simon requires that where legal practitioners identify defects in the legal system, they need to act, individually and collectively, to correct them.[248]

How does this correction work, especially where a good faith attempt to find the principles in the legal system may generate several plausible and conflicting conclusions about its purposes? This is where the SA Constitution provides a unique way of inviting legal practitioners to engage with values outside its four textual corners. As Moseneke sets out:

[247] Gordon 1999 *Stanford Law Review* 929.
[248] Ibid.

> 'Perforce our constitutional interpretation is set *against the backdrop of the values of the South African society*. Constitutional adjudication must occur within that holistic, value-based framework. The Constitution is a repository of the values which bind its people.'[249]

The Constitution requires everyone to interpret the law in line with the foundational values of freedom, equality and dignity. Moreover, given the transformative nature of the Constitution, any law that is not in line with these values must be developed so as to fall in line.[250] The implication then is that lawyers cannot rely on the so-called 'institutional settlement' where such settlement requires an interpretative attitude that calls on something *beyond* positive law to provide normative guidance to lawyers. The challenge for lawyers is, as Wendel sets out,

> 'that the law appears to run out just when the ethical rubber hits the road – when it comes to specifying the interpretative attitude that lawyers ought to take with respect to the law applicable to their clients' situation and particularly to the law governing lawyers'.[251]

Thus, what the law actually permits is *itself* the ethical question that needs to be addressed. This can be seen in the various ways that legal practitioners have used procedural rules. In chapter 1, I referred to Zuma's legal practitioner and how he saw himself as being permitted to adopt a 'scorched earth policy' by using procedural rules for the client's ends.[252] In chapter 3, I referred to courts chastising legal practitioners for using those same rules for the client's ends, since those ends were not in line with the purpose behind the rules being (ab)used.[253] The point is that the interpretive attitude of the lawyer may vary depending on whether she adopts a broad or narrow interpretation of the law, including whether to use law in a formalist, or purpose way. How one represents clients then must therefore 'be located in some extra-legal value or end', and not solely on the text of the law.[254] In the next chapter, I argue that this 'end' or 'value'

---

[249] D Moseneke 'The fourth Bram Fischer memorial lecture: Transformative adjudication' (2002) 18 *SAJHR* 309 at 315.

[250] The South African Constitution is unique in its requirement that courts expressly 'develop the common law'. Judges are required to develop the common law either directly (where the common law is inconsistent with specific rights, according to s 8 of the Constitution) or indirectly (where the common law falls short of the spirit, purport and objects of the Bill of Rights according to s 39(2) of the Constitution). Fagan challenges this direct/indirect method (following the German model). Instead, Fagan believes that courts may develop the common law for one of three reasons: (1) to give better meaning to constitutional rights (in terms of s 8), (2) for the sake of justice (in terms of s 173), or (3) because of the common law itself (s 39(3)). Fagan then notes that only once one of these three reasons is met, then s 39(2) of the Constitution is invoked whereby the spirit, purport and objects of the Bill of Rights determines that standard according to which the development is to take place. See A Fagan 'The secondary role of the spirit, purport and objects of the Bill of Rights' (2010) 127 *SALJ* 611 at 621-622. See also Zitzke 2017 *Fundamina* 219.

[251] Wendel 2017 *Canadian Journal of Law & Jurisprudence* 456-57.

[252] The advocate in this matter was Adv Kemp J Kemp, see 2.7.4.

[253] *W v H* 2017 (1) SA 196 (WCC) and *ST v CT* 2018 (5) SA 479 (SCA).

[254] Wendel 2017 *Canadian Journal of Law & Jurisprudence* 456-57.

may be found in the African philosophy of ubuntu. Given Hutchinson's and Nicolson & Webb's ideas around a 'contextual approach' in lawyering, I believe that there is merit in embedding values in a particular context. Bilchitz, for example, suggests that while SA's constitutional values are universal, there may be a need to 'draw on local values to support universal ones'.[255] Over a range of judgments, the CC, and other courts, have endorsed this type of approach. It is perhaps the concurring judgment of Mokgoro J in South Africa's death penalty case[256] that exemplifies this approach, as noted in chapter 3, in relation to the need to incorporate local insights:

> 'I am of the view that our own indigenous value systems are a premise from which we need to proceed and are not wholly unrelated to our goal of a society based on freedom and equality.'[257]

It may well be argued by Kruse, Wendel and others – in keeping with their concern about the plurality of beliefs in society – that there is no 'one' value or moral system in most societies. Thus, while indigenous value system(s) are prevalent in South Africa, it is not clear the extent to which a value like Ubuntu or any indigenous value systems are shared across diverse communities. As a result, these theorists would probably argue that lawyers need to abide by the terms of the 'institutional settlement' as discussed in chapter 3. But what if the actual 'institutional settlement' *allows* for the incorporation of a distinct indigenous value system? In the postamble to the interim Constitution, Ubuntu – a distinct indigenous value system – was incorporated into the text. While the final Constitution did not have a postamble, courts have continued to refer to Ubuntu as a reference point for interpretation of the law. In Bennett's words, the incorporation of the single word 'Ubuntu' 'thus created a gateway for African ideas and values to infuse South African law'.[258] Courts, he notes, have used Ubuntu to resolve a variety of issues. Could it be used to provide a reference point for a role for the lawyer in SA in considering what 'morally matters' in representation? This is the subject of the next chapter.

[255] Ibid.
[256] *S v Makwanyane* 1995 (3) SA 391 (CC).
[257] Ibid para 304.
[258] T Bennett 'Ubuntu: An African equity' (2011) 14 *PELJ* 30 at 32.

# CHAPTER 5: UBUNTU AND ITS POTENTIAL TO GUIDE LAWYERING IN SOUTH AFRICA

> 'The spirit of Ubuntu, part of the deep cultural heritage of the majority of the population, suffuses the whole constitutional order. … It is a unifying motif of the Bill of Rights, which is nothing if not a structured, institutionalized and operational declaration in our evolving society of the need for human interdependence, respect and concern.'[1]

## 5.1 INTRODUCTION

In chapter 3 I argued that the neutral partisanship approach suffers from a variety of harms which makes the approach only weakly justified, if at all. In addition, I suggested that the characteristics of the approach were out of kilter with the needs of the South African legal system in a fledgling constitutional democracy. In chapter 4, I considered the alternatives to the neutral partisanship approach offered by theorists across jurisdictions. In that chapter, I concluded that the approaches modifying, but not dispensing with, neutral partisanship (for example, those theories offered by Dare and Wendel) did not suit the South African legal system. These approaches were problematic in that they continue to rely on liberal and formalist foundations that do not match the purposes or ends of the SA legal system. Following this concern, I then explored the approaches developed by the critical legal theorists, and those theorists relying on ordinary morality. While these approaches are right to question many of the underlying foundations of the neutral partisanship approach, I found these approaches wanting in the SA context. In my opinion, these approaches do not sufficiently commit legal practitioners to a shared meaning of what 'morally matters' and what was necessary for the transformation of a wicked legal system (as the apartheid system has been described). While I accepted that there is no fixed meaning as to 'what morally matters' (a lesson from the postmodernists and critical theorists), I agree with Hutchinson's suggestion that a community may come together and decide what this may mean in context.[2] In SA, I argue that the constitution-making process that occurred in the Constitutional Assembly shortly after the fall of apartheid constituted a process where the community 'came together', as Hutchinson requires.[3]

---

[1] Sachs J in *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 37.
[2] See 4.5.2.
[3] The process was one that spanned several years, commencing with a multi-party negotiating forum to draft an interim Constitution, to an elected National Assembly that drafted the final Constitution, subject to pre-agreed constitutional principles that bound all stakeholders as to what 'morally matters'. The constitution-making process

Given the context of the change of legal system in SA (what some have called SA's 'revolution'),[4] I found it problematic that individuals should be left to themselves to decide what morally matters. Given the explicitly transformative nature of the Constitution in the wake of apartheid, and adopting Wilkins' views,[5] I suggested that it was important that legal practitioners express some sort of allegiance to the legal framework, but should still be able to exercise their judgement in carrying out their work. I then argued that Simon's discretionary judgement approach had the potential to meet this brief. This chapter now unpacks this idea by investigating how Simon's approach could be applied and/or adapted to meet the needs of the South African system. The chapter considers how Simon's approach requires practitioners to use their discretion in considering the applicability of principles in the resolution of an ethical issue, and how practitioners should consider the weight that any particular principle should bear on an issue.

What appears to make Simon's approach useful in the SA context is that he does not presume that the legal system will be liberal and formalist in nature. Instead, Simon asks the legal practitioner to work out what the legal system is about, and to commit to those ends. Given the discussions in earlier chapters setting out three particular aspects of the SA legal system – relational autonomy, its transformative nature, and the need for local insights – I consider whether the African concept of Ubuntu can be developed along the lines of Simon's approach as a principle that articulates the purpose and ends of the SA legal system.

In what follows, I look at the content of Ubuntu, historically and currently, some objections to its use as a legal concept, and in what way courts have used Ubuntu to resolve legal disputes.

---

is captured in R Spitz & M Chaskalson *The Politics of Transition: A Hidden History of South Africa's Negotiated Settlement* (2000). I recognise (as Spitz and Chaskalson point out) that the process at times involved horse-trading and compromise. Nevertheless, I accept overall that it was a good faith attempt to commit the country to a new order. This is captured in Mohamed J's dictum in *S v Makwanyane* 1995 (3) SA 391 (CC) at para 261 where he notes: 'The South African Constitution … retains from the past only what is defensible and represents a decisive break from, and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular, and repressive and a vigorous identification of and commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos, expressly articulated in the Constitution.' It is also useful to repeat Nelson Mandela's foreword in P Andrews and S Ellman *The Post-Apartheid Constitution: Perspectives on South Africa's Basic Law* (2001) where he characterises the SA Constitution as 'a solemn pact' and 'a charter … which is truly shared by all its people'.

[4] John Kane-Berman characterises the South African situation in 1990 as a 'silent revolution'. See J Kane-Berman *The Silent Revolution* (1991). The implication of this terminology is the idea that SA's 'revolution' did not require the overthrow of the old legal system, but rather a retention of the existing laws to the extent that they were consistent with the values of the new regime. See also D Cornell 'Introduction: Transitional justice versus substantive revolution' in D Cornell (ed) *Law and Revolution in South Africa: Ubuntu, Dignity and the Struggle for Constitutional Transformation* (2014) 1 at 10-11.

[5] See 4.7.3.

In the next chapter, I consider whether SA legal practitioners might use Ubuntu in a similar way to the courts in making ethical decisions regarding their conduct and representative work.

## 5.2 WHAT IS UBUNTU? ITS HISTORICAL CONTEXT AS A PHILOSOPHY, WAY OF LIFE AND CUSTOMARY CONCEPTION OF LAW

### *5.2.1 The etymology of Ubuntu and its origins*

Ubuntu has been called African law's 'nucleus and its indigenous philosophy of life'.[6] However, the concept resists an easy definition.[7] Metz suggests that Ubuntu is often used to sum up a particular view of what is morally fundamental to live a genuinely human way of life or to become a real person.[8] Ubuntu is a word from the South African Bantu languages,[9] its prefix *ubu-* evoking the idea of 'be-ing in general,[10] while its root *-ntu,* signifies primal being.[11] Together then, it is said that *ubu-* is orientated towards *-ntu* as 'being becoming whole'.[12]

---

[6] D Ndima 'The resurrection of the indigenous value system in post-apartheid African law; South Africa's constitutional and legislative framework revisited' (2014) 29 *SAPL* 294.

[7] This point is made by a host of scholars: C Himonga 'Exploring the concept of Ubuntu in the South African legal system' in U Kischel & C Kirchner (eds) *Ideologie und Weltanschauung im Recht* (2012) 1 at 2; C Himonga, M Taylor & A Pope 'Reflections on judicial views of Ubuntu' (2013) 16 *PELJ* 372 at 374; Y Mokgoro 'Ubuntu as a legal principle in an ever-changing world' in F Diedrich (ed) *Ubuntu, Good Faith and Equity: Flexible Legal Principles in Developing a Contemporary Jurisprudence* (2010) 710; T Bekker 'The re-emergence of *Ubuntu*: a critical analysis' (2006) 21 *SAPL* 333 at 334; N Bohler-Muller 'Some thoughts on the *Ubuntu* jurisprudence of the Constitutional Court' (2007) 28 *Obiter* 590 at 591; R English 'Ubuntu: The quest for an indigenous jurisprudence' (1996) 12 *SAJHR* 641 at 641ff; and J du Plessis 'Fairness and diversity in the South African law of contract' in SP Donlan & J Mair *Comparative Law Mixes, Movements, and Metaphors* (2020) 47 at 48.

[8] T Metz 'Dignity in the Ubuntu tradition' in M Düwell, J Braarvig, R Brownsword, and D Mieth (eds) *Cambridge Handbook on Human Dignity* (2014) 310 at 310. See also M Munyaka & M Motlhabi 'Ubuntu and its socio-moral significance' in MF Murove (ed) *African Ethics: An Anthology of Comparative and Applied Ethics* (2009) 63. Munyaka & Motlabi note that 'Ubuntu, as a concept, remains an old philosophy and way of life, which has for many centuries sustained the African community in South Africa, and Africa as a whole'.

[9] The descriptor 'Bantu' has an uneasy history. In using the term, I corresponded with a linguist about the nature and use of the term. The linguist advised that the term was originally coined in the 19th Century as a name for the Bantu language group of the Niger Congo language family. There are about 600 languages in the Bantu language family including all the official SA languages (except English and Afrikaans). It does not include any of the Khoisan languages though. The name comes from the fact that so many of these languages use the term 'bantu' to refer to 'people' and it is posited that this is also the proto-Bantu word for people so it is primarily a linguistic diagnostic. Then sometime after that (especially during apartheid) the word was repurposed as an ethnic designator ie the word 'bantu' referring to the people who speak this group of languages. At this stage, attempts were made to justify apartheid as an ethnic policy as opposed to a purely racial policy. The linguist writes: 'Needless to say, it was just playing semantics and everybody could see through it: it was used as a racial term and it has become an ethnic slur in South Africa as a result. Unfortunately, people still use it in this sense as a racial or ethnic designator.' See correspondence with M de Vos dated 6 September 2019 (on file with author, cited with his permission). Notwithstanding, some authors have used the descriptor without suggesting it as problematic. See for example, VC Mutwa *Indaba My Children* (1998) who refers several times to the 'high laws of the bantu' (for example, at 624).

[10] MG Ramose 'The ethics of *Ubuntu'* in PH Coetzee & APJ Roux *The African Philosophy Reader* 2 ed (2003) 379.

[11] M Tschaepe 'A humanist ethic of *Ubuntu:* Understanding moral obligation and community' (2013) 21 *Essays in the Philosophy of Humanism* 47 at 48.

[12] Ibid.

Ubuntu has been associated with the Zulu saying '*umuntu ngumuntu ngabantu*',[13] meaning 'persons depend on persons to be persons';[14] or '*umuntu ngumtu ngabayne abantu*', translated as 'a person is a person through other people'.[15] Metz explains that while these phrases connote empirical or even metaphysical ideas that one needs others in order to exist, they also convey a normative outlook.[16] Philosophers such as Ramose,[17] Menkiti,[18] Wiredu[19] and Gyekye[20] have identified that the 'movement towards' personhood is central to Ubuntu. So for instance Wiredu[21] states that one can be more or less of a person, self or human being, but the more one is, the better. Ramose notes that 'the logic of Ubuntu is towards-ness'.[22] In other words, the moral agent's ultimate aim in this framework should be to become a full person, a real self or genuine human being. Van Niekerk, among others, sees this idea as closely connected to Aristotelian virtue ethics through the need to commune.[23] This latter concept of community is emphasised by Gyekye, whose description of Ubuntu has been quoted with approval in the CC:

> 'An individual human person cannot develop and achieve the fullness of his/her potential without the concrete act of relating to other individual persons'.[24]

---

[13] See Mokgoro J in *Makwanyane* para 308 and Ngcobo J in *Bhe v Magistrate, Khayelitsha (Commission of Gender Equality as amicus curiae); Shibi v Sithole; South African Human Rights Commission v President of the Republic of South Africa* 2005 (1) 580 (CC) para 163. See also Keep & Midgley in Bruinsma & Nelken *Recht der Werkelijkheid* 29.

[14] A Shutte *Ubuntu: An Ethic for a New South Africa* (2001) 3. The parallel idea in the Sotho languages is *botho*, derived from the saying '*motho ke motho ba batho ba bangwe*'. See Keep & Midgley in Bruinsma & Nelken *Recht der Werkelijkheid* ibid.

[15] See Patel J in *Crossley v The National Commissioner of the South African Police Services* [2004] 3 All SA 436 (T) para 18.

[16] T Metz & JBR Gaie 'The African ethic of *Ubuntu/botho:* Implications for research on morality' (2010) 39 *Journal of Moral Education* 273 at 275.

[17] Ramose in Coetzee & Roux (eds) *The African Philosophy Reader* 379.

[18] I Menkiti 'Person and community in African tradition thought' in RA Wright (ed) *African Philosophy: An Introduction* (1979) 171.

[19] K Wiredu 'The African concept of personhood' in HE Flack & EE Pellegrino (eds) *African-American Perspectives on Biomedical Ethics* (1992) 104.

[20] K Gyekye *Tradition and Modernity: Philosophical Reflections on the African Experience* (1997) 48-52.

[21] Wiredu in Flack & Pellegrino *African-American Perspectives* 104.

[22] Ramose in Coetzee & Roux *The African Philosophy Reader* 382.

[23] See J van Niekerk *Ubuntu and Moral Value* (2013) unpublished PhD thesis, Wits University. See also Metz & Gaie 2010 *Journal of Moral Education* 275.

[24] As per Langa CJ in *MEC for Education: Kwa-Zulu Natal v Pillay* 2008 (1) SA 474 (CC) para 53. One writer, Menkiti, (with whom Gyekye disagrees) argues for a 'processual' account of personhood where one is, quite literally, only a person through other persons. While most theorists admit of the development of personhood, none suggest that one has *no* personhood at the beginning but for Menkiti. See IA Menkiti 'Person and community in African traditional thought' in RA Wright (ed) *African Philosophy: An Introduction* 3 ed (1984) 171 at 172-74. Gyekye contests Menkiti's understanding, arguing that Menkiti misinterprets the examples he uses from the Akan culture to support his arguments. K Gyekye *Tradition and Modernity: Philosophical Reflections on the African Experience* (1997) 299, and 301-5.

Ubuntu's conception of the person differs from most western conceptions, which are often associated with the utilitarian moral tradition and Kant.[25] Contrary to Ubuntu's 'toward-ness', the utilitarian moral tradition considers that what gives a person moral status are features internal to them.[26] For Kant, 'human' is a normative term in and of itself. Vice reinforces this view: 'to be "human" is already to be valuable, to have equal moral status, and is not a merely biological, non-normative term'.[27] To be human then, in Kant's view, is to be valuable in a special way; one does not have to prove one's worthiness or earn dignity (as Ubuntu implies); it inheres in one regardless of what one does, solely by virtue of being rational.[28] As is evident from the quote above, though, rationality alone is not sufficient in the Ubuntu framework. Instead, to attain personhood (or to develop human excellence), the central way to do so is to commune with, or interact harmoniously with, others.[29]

Gade explains that many of the phrases associated with Ubuntu are synecdoches, with a variety of different meanings assigned to the concept in the last two centuries, contributing to the politics around the concept.[30] Part of the challenge in ascertaining Ubuntu's meaning has been as a result of the lack of early written sources on Ubuntu, given the oral tradition in pre-colonial African thought.[31] However, scholars see this as a challenge, but not a bar, to understanding. As a result, most scholars in recent years have sought to categorise or define Ubuntu more specifically.[32] Some scholars focus on Ubuntu as describing the quality of a person.[33] In this way, if one acts in a humane way towards others, one is more of a person. This is best articulated in a saying most often associated with Ubuntu: 'a person is a person because of other people or through other people'.[34] Some scholars have focused on Ubuntu as a way of

[25] I use Kant as the exemplar, but there are other accounts of moral worth in this tradition. For example, according to Locke it is a sense of ownership of ourselves and what we work on; and according to Bentham it is our capacity to feel pleasure or feel satisfied.
[26] T Metz 'Reconciliation as the aim of a criminal trial: *Ubuntu's* implications for sentencing' (2019) 9 *CCR* 113 at 118.
[27] Kant sometimes speaks of rationality as that feature, and sometimes autonomy (our ability to set ourselves the moral law). See S Vice 'Dignity and equality in *Barnard*' (2015) 7 *CCR* 135 at 141. Cf the discussion that Kant may have more relationality in his views than currently set out, see chap 3, section 3.4.3.
[28] Ibid 142. See also D Cornell 'Is there a difference that makes a difference between Ubuntu and dignity' (2010) 25 *SAPL* 382 at 398.
[29] Metz 2019 *CCR* 118.
[30] C Gade 'The historical development of the written discourses on Ubuntu' (2011) *South African Journal of Philosophy* 303 at 306. Gade traces the earliest written reference to Ubuntu to a text in 1846.
[31] Ibid.
[32] See in general L Praeg and S Magadla 'Introduction' in L Praeg (ed) *Curating the Archive* (2014) 1-7. See also T Metz 'What do we mean when we speak of Ubuntu?' available at http://mg.co.za/article/2014-11-14-what-do-we-mean-when-we-speak-of-Ubuntu.
[33] Van Niekerk *Ubuntu and Moral Value* chap 1.
[34] A Nguni saying that Tutu uses to explain Ubuntu. See D Tutu *God has a Dream: A Vision of Hope for our Time* (2004) 25.

life, or even a prescriptive guide. For example, Shutte suggests that if our deepest moral obligation is to become more fully human, then we actively need to enter more and more deeply into community with others.[35] Finally, some scholars have ascribed both descriptive and prescriptive qualities to Ubuntu.[36]

For the purposes of this thesis, it is useful to distinguish these approaches in terms of Ubuntu-praxis and Ubuntu-theory.[37] Praeg considers Ubuntu-praxis to be the lived expression of certain humanistic values. It is a lived philosophy, or a world-view. Descriptive approaches fall under this category. On the other hand, the creation of Ubuntu-theory is the result of the effort to create a written form of Ubuntu-praxis.[38] Thus, Ubuntu-theory reflects the norms that supposedly make up Ubuntu-praxis. Prescriptive approaches fall into the Ubuntu-theory conception. For the purposes of this thesis, we are concerned with Ubuntu-theory since it is important to consider whether the norms it espouses have value in the context of legal representation.

### *5.2.2 The use of Ubuntu in its historical context*

Scholars point out that the Ubuntu was applicable in small-scale subsistence-based communities where the survival of the individual depended on the community and vice versa.[39] Sachs (writing extra-curially) suggests:

> 'The particular rules used to further social cohesion in the past were directly related to the social, cultural and family formations of the time. When production was done mainly be household members working together as a family, tending the fields and looking after the cattle and the home, then the land and the home were centers of social and political relationships.'[40]

---

[35] Shutte *Ubuntu* 30. Shutte goes on to explain: 'So although the goal is personal fulfilment, selfishness is excluded' (ibid). See also Bennett *Ubuntu* 31-2.

[36] J Gathogo 'African philosophy as expressed in the concepts of hospitality and Ubuntu' (2008) 130 *Journal of Theology for Southern Africa* 39 at 46 says that Ubuntu 'can be interpreted as both a factual description and a rule of conduct or social ethic. It both describes human beings as 'being-with-others' and prescribes what 'being-with-others' should be all about'.

[37] This is Praeg's distinction as discussed by A Prinsloo in his thesis *Prolegomena to Ubuntu and other Future South African Philosophy* (unpublished MA thesis, Rhodes University, 2013) at 7-8.

[38] Ibid 8.

[39] GJ van Niekerk 'A common law for Southern Africa? Roman law or indigenous African law?' (1998) 31 *CILSA* 159 at 168-9 and the authorities cited therein.

[40] A Sachs 'Towards the liberation and revitalization of customary law' in Cornell & Muvangua *Ubuntu and the Law* 303 at 310. See also T Maluleke 'The misuse of "Ubuntu"' (1999) 53 *Challenge* 1 at 12-13 where Maluleke critically suggests that '[w]e forget that Ubuntu must be understood within the context of a mainly feudal socio-economic system in which the chief, the chiefdom, the clan and the extended family, were crucial providers of wealth and value.'

Ngcobo J has similarly noted its use in *Bhe & others Khayelitsha Magistrate & others*[41] (a case dealing with male primogeniture in the customary law of succession):

> 'At the heart of the African traditional structure was the family unit. The family unit was the focus of social concern. Individual interests were submerged in the common weal. The system emphasised duties and responsibilities as opposed to rights. … A sense of community prevailed from which developed an elaborate system of reciprocal duties and obligations among the family members. This is manifest in the concept of *Ubuntu – umuntu ngumuntu ngabantu* – a dominant value in African traditional culture. This concept encapsulates communality and the inter-dependence of the members of a community. As Langa DCJ put it, it is a culture which "regulates the exercise of rights by the emphasis it lays on sharing and co-responsibility and the mutual enjoyment of rights". It is this system of reciprocal duties and obligations that ensured that every family member had access to basic necessities of life such as food, clothing, shelter and healthcare.'[42]

In its historical context of close community structures, then, Ubuntu required that members exhibit humane qualities and respect towards each other.[43] A failure to recognise Ubuntu would not only constitute the contravention of a social norm, but it would be actionable, in that non-adherence to it was seen as a threat to the survival of the community itself.[44] If a person violated Ubuntu (for instance by not respecting social norms of reciprocal rights and duties), a principal function of Ubuntu would be to restore social relations. This much is noted in *Dikoko v Mokhatla*,[45] where the CC referenced Ubuntu to justify its order that a person who had defamed another must apologise to the person defamed. In so doing, the court found that the principal objective of Ubuntu was 'restorative' rather than 'retributive', but that Ubuntu required action nonetheless.[46]

---

[41] 2005 (1) SA 580 (CC).
[42] *Bhe* ibid paras 163-4. Footnotes omitted.
[43] MB Ramose 'An African perspective on justice and race' (2001) 3 *Polylog: Forum for Intercultural Philosophy* (2001) 1 at para 8.
[44] Du Plessis in Donlan & Mair *Comparative Law* 49.
[45] 2006 (6) SA 235 (CC) paras 68 and 113ff.
[46] Ibid. While it is beyond the scope of this thesis, Metz offers a compelling argument as to why Ubuntu does not simply require a kumbaya attitude, and that reconciliation in Ubuntu may indeed require hardship for the offender. See Metz 2019 *CCR* 126. In *Malotsa & others v S* [2020] ZALMPPHC 32 at para 32 the court was at pains to point this out in dismissing an appeal on conviction and sentence for rape: 'Ubuntu is expressed in justice no less than in mercy. Justice is the foundation of all human relations, and the fruit of its love. It has often been the purpose of evil minds to divorce mercy from truth and justice, and this is often driven by the motive of escaping unpleasant consequences. … Justice calls the wrongdoer to account and that account ought to be dealt with in a just and merciful manner'.

While Ngcobo J's words cited above reflects that Ubuntu places individual interests after community interests, scholars have pointed out that Ubuntu, in practice, is more complex than a collectivist approach.[47] In particular, scholars point out that the concept requires that the individual is indeed entitled to dignity and respect, but that such entitlements cannot be enjoyed in isolation: they must simultaneously be accorded to other members of the group.[48] In this way, Ubuntu has been described as 'group-centred individualism' in that it acknowledges the importance of individual interests, but simultaneously emphasises the group of which the individual forms part.[49]

Pieterse notes that Ubuntu is best understood by considering its norms through the lens or 'traditional' worldview held by African people.[50] This worldview sees the universe and all beings, living and dead, as continuously interacting and interdependent metaphysical forces which forms a unified 'field of force' to which all the component forces (living, dead, material or spiritual) contribute equally.[51] Shutte notes this field of force is made up of '*seriti*' – that is, 'the energy or power that both makes us ourselves and unites us in personal interaction with others'.[52] The ideal way to deal with *seriti* is to strive to maintain an equilibrium between the different forces.[53] In practice, this means that individuals (as component forces) are viewed as distinct but essentially inseparable from other individuals, the community, and the other components making up *seriti*.[54] Van Niekerk notes that it is in this sense that Ubuntu is simultaneously about the individual and the community:

> 'The welfare of the community is inextricably linked to the welfare of the collectivity and that, in turn, is inextricably linked to an harmonious relationship with the ancestors and nature. Although man is at the centre of things, man can be defined only in relation to other men. And the community can likewise be defined only with reference to its individual members.'[55]

Cornell has noted that the supernatural elements of the concept need not discourage its application in contemporary times, and that it is enough to understand *seriti* as a means of

[47] T Metz 'Ubuntu as a moral theory and human rights in South Africa' (2011) 11 *AHRLJ* 532 at 538.
[48] See the discussion of case law in the following section as examples of this.
[49] A Shutte *Philosophy for Africa* (1993) 361. Van Niekerk 1998 *CILSA* 169.
[50] M Pieterse '"Traditional" African Jurisprudence' in Roederer & Moellendorf *Jurisprudence* (2004) 438 at 444.
[51] Shutte *Ubuntu* 52-58.
[52] Shutte *Ubuntu* 55. *Seriti* is found in both the Sesotho and Tswana languages. It translates into dignity and / or integrity, depending on the context in which it used.
[53] D Johnson, S Pete & M du Plessis *Jurisprudence: A South African Perspective* (2001) 205-6.
[54] Pieterse in Roederer & Moellendorf *Jurisprudence* 444.
[55] Van Niekerk 1998 *CILSA* 168.

emphasising interdependence.[56] Ubuntu, she notes, brings an understanding of personhood that is absent from western jurisprudence.[57] She compares the foundations of western jurisprudence with that of the foundations of African thought. She suggests that the social contract is the basis of western jurisprudence, with the individual at its centre.[58] For example, in the case of the Hobbesian social contract, individuals co-operate only because they fear each other and find security in transferring their right to violence to the state, who commits in turn to protecting them.[59] Cornell notes that the original rationale to co-operate (viz enter into a social contract) in African society is different and important in that it 'provides us with a very different notion of the founding principle of law'.[60] Rather than cooperating out of antagonism and fear, Cornell suggests that, in African thought, individuals sought to co-operate and commit to customs regulating their behaviour because of *seriti* – that is, the belief that interdependence 'makes us ourselves and unites us in personal interaction with others'.[61] She quotes Mokgoro J in setting out the characteristics that she suggests supports this alternative original conception of law:

- 'the original conception of law perceived not as a tool for personal defence, but as an opportunity given to all to survive under the protection of the order of the communal entity;

- communalism which emphasises group solidarity and interests generally, and all rules which sustain it, as opposed to individual interests, with its likely utility in building a sense of national unity among South Africans;

- the conciliatory character of the adjudication process which aims to restore peace and harmony between members …'[62]

In its historical context, then, Ubuntu operated as a custom that regulated people's conduct within the community. It was not merely social convention that could be disregarded at will. While this may not meet the typical western accounts of what makes some norm 'law',[63] the

[56] D Cornell 'A call for a nuanced constitutional jurisprudence: Ubuntu, dignity and reconciliation' (2004) 19 *SAPL* 666 at 674. Similarly, Metz believes that Ubuntu can be reconstructed into secular claims that do not rely on highly contested metaphysical claims about the existence of 'imperceptible agents such as ancestors and forces such as witchcraft'. See Metz 2019 *CCR* 120.
[57] Cornell 2004 *SAPL* 668.
[58] Ibid.
[59] K Furman *Exploring the Possibility of an Ubuntu-based Political Philosophy* (unpublished MA thesis, Rhodes University, 2012) 39. See also JAI Bewaji and MB Ramose 'The Bewaji, Van Binsbergen and Ramose debate on *Ubuntu'* (2003) 22 *South African Journal of Philosophy* 378 at 398.
[60] Cornell 2004 *SAPL* 669.
[61] Shutte *Ubuntu* 55.
[62] Mokgoro quoted in Cornell 2004 *SAPL* 669.
[63] O Oyowe 'What is law? Positivism and traditional African societies' in D Bilchitz, T Metz and O Oyowe (eds) *Jurisprudence in an African Context* (2017) 19 at 32.

community accepted that Ubuntu regulated their conduct.[64] This insight is important in a foundational sense: instead of a legal system focusing on the dignity of individuals to live a life of their choice, the focus is on the dignity of individuals by virtue of their capacity to relate to other people.

## 5.3 UBUNTU AS A LEGAL NORM IN SOUTH AFRICA'S CONSTITUTIONAL DEMOCRACY?

While Ubuntu was part of the living customary law of the indigenous people of South Africa, it played no part in South African common law or legislation until 1993.[65] However, following negotiations at Codesa after the fall of apartheid, Ubuntu was included in the historic epilogue of the interim Constitution.[66] This epilogue read as follows:

> 'The adoption of this Constitution lays the secure foundation for the people of South Africa to transcend the divisions and strife of the past, which generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge. *These can now be addressed on the basis that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for Ubuntu but not for victimisation*.'[67]

Scholars puzzled over its status, given its inclusion in what seemed like a nice-to-have but 'diffident [and] … apparent afterthought'.[68] It certainly set up the context in which the TRC's work could take place,[69] but there was some doubt as to whether the epilogue would be anything more than simply an aspirational exhortation for the nation to unite. While the historical record of the drafting process is very thin on the rationale behind Ubuntu's inclusion, certain commentators have suggested that it was included because customary laws and values had played a subordinate role in SA's legal history, and that this needed correcting.[70] Scholars

---

[64] Ramose 2001 *Polylog: Forum for Intercultural Philosophy* 8.
[65] See chap 1 for a description of SA's mixed legal system.
[66] Interim Constitution of the Republic of South Africa 200 of 1993.
[67] My emphasis.
[68] Bennett *Ubuntu* 92.
[69] Included in the preamble to the Act. See 2.7.2 for a description of the work of the TRC.
[70] H du Plessis 'Pluralism, uBuntu and the use of open norms in the South African common law of contract' (2019) 22 *PELJ* 1 at 23; Pieterse in Roederer & Moellendorf (eds) *Jurisprudence* 441. Note that ss 33(2), 33(3), 35(3) & 181(2) of the Interim Constitution of the Republic of South Africa Act 200 of 1993 recognised customary law in general. Section 211(3) of the Final Constitution states: 'The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law'. Section 39(2) of the Final Constitution states: 'When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.' In *Alexkor Ltd & another v The Richtersveld Community & others* 2004 (5) SA 460 (CC) the court said that

have also suggested that it was foreseen that Ubuntu could be used as a 'restorative tool' to correct the injustices of the past.[71] The CC tackled this issue directly in its judgment in *Azapo v President of the Republic of South Africa.*[72] The case dealt with the legislation setting up the TRC.[73] The court found, inter alia, that the post-amble was a 'legitimate part' of the interim Constitution,[74] and it had 'no lesser status than any other part of the Constitution'.[75] This meant (as the court found) that its content could be used to justify limits on the rights set out in the Constitution, just like any other constitutional provision.[76]

Significantly, Ubuntu played an important role in the first matter heard by the newly established CC. This was the case of *S v Makwanyane.*[77] As noted earlier,[78] the court found the death penalty to be unconstitutional in this matter. The court viewed the death penalty's retributive and group cathartic bases for punishment (as the death penalty was viewed) as inconsistent with an Ubuntu-based jurisprudence of reconciliation, restorative justice and democratic solidarity.[79]

Mokgoro J's judgment in *S v Makwanyane* regarding Ubuntu is oft-quoted, and while the quote below from the judgment is lengthy, it is worth repeating given its acknowledgement of its historic context (as discussed above), and her comparison with relational concepts in other jurisdictions or cultures:[80]

> 'Generally, *Ubuntu* translates as *humaneness*. In its most fundamental sense, it translates as *personhood* and *morality*. Metaphorically, it expresses itself in *umuntu ngumuntu ngabantu*,

indigenous law 'must now be seen as an integral part of our law' (at 478G-H) and that when a custom is approved 'indigenous law feeds into, nourishes, fuses with and becomes part of the amalgam of South African law' (at 479C-D).

[71] Du Plessis 2019 *PELJ* 23.

[72] 1996 (4) SA 671 (CC).

[73] In particular, the applications challenged the constitutionality of s 20(7) of the Promotion of National Unity and Reconciliation Act (the Reconciliation Act) Act 34 of 1995. This section provided amnesty to those who committed political crimes during apartheid in exchange for truthful disclosure of political crimes before the TRC. The applicants argued that s 20(7) section violated their right to a fair trial as protected by s 22 of the interim Constitution. Section 22 provided as follows: 'Every person shall have the right to have justiciable disputes settled by a court of law or, where appropriate, another independent or impartial forum.'

[74] *Azapo* para 12. While not relevant to this thesis, the court also found that the amnesty provision was necessary in that it allowed for information on crimes that were committed during apartheid and which normal criminal investigations would be unable to uncover. See also *Azapo* para 36.

[75] Ibid para 14. While this judgment clarified Ubuntu's status, Ubuntu in and of itself never played a role in the decision of the court. For a discussion of the case and Ubuntu's non-use, see Furman *Exploring the Possibility of an Ubuntu-based Political Philosophy* 34.

[76] *Azapo* para 14.

[77] Ibid.

[78] Chapter 3, at section 3.4.2.1.

[79] *Azapo* para 14.

[80] Ibid para 308.

> describing the significance of group solidarity on survival issues so central to the survival of communities. While it envelops the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity, in its fundamental sense it denotes humanity and morality. Its spirit emphasises respect for human dignity, marking a shift from confrontation to conciliation. In SA *Ubuntu* has become a notion with particular resonance in the building of a democracy. It is part of our rainbow heritage, though it might have operated and still operates differently in diverse community settings. In the Western cultural heritage, respect and the value for life, manifested in the all-embracing concepts of *humanity* and *menswaardigheid* are also highly priced. It is values like these that section 35[81] requires to be promoted. They give meaning and texture to the principles of a society based on freedom and equality.'

In the same case, Langa J's description of Ubuntu is also useful in its emphasis on the duty of the individual towards the community:[82]

> 'It is a culture which places some emphasis on communality and on the interdependence of the members of a community. It recognises a person's status as a human being, entitled to unconditional respect, dignity, value and acceptance from the members of the community such person happens to be part of. It also entails the converse, however. The person has a corresponding duty to give the same respect, dignity, value and acceptance to each member of that community. More importantly, it regulates the exercise of rights by the emphasis it lays on sharing and co-responsibility and the mutual enjoyment of rights by all.'[83]

While some scholars are sceptical of such statements,[84] Bennett argues that Ubuntu in *Makwanyane* was arguably 'one of the principal grounds for effecting a major change to the law', and was at the same time 'established as a core, constitutional value on a par with life and dignity'.[85]

However, when the final Constitution came into force in 1996, significantly, the epilogue was dropped, and the reference to Ubuntu with it. The question thus arose again as to Ubuntu's

---

[81] Of the interim Constitution. The equivalent section in the final Constitution is s 39.
[82] *Makwanyane* para 224. See also Mahomed J at para 263. According to Shutte *Ubuntu* at 12: 'The idea of community is the heart of traditional African thinking about humanity. … This means that a person depends on personal relations with others to exercise, develop and fulfil those capacities that make one a person…'.
[83] As set out by Keep & Midgley in Bruinsma & Nelken *Recht der Werkelijkheid*, the duty aspect is something that is not often emphasised in international human rights jurisprudence, the African Charter for Human and Peoples' Rights being the exception: see arts 27, 28 and 29 of the Charter for provisions that incorporate principles similar to that of *Ubuntu-botho*, available at. https://www.achpr.org/legalinstruments/detail?id=49.
[84] J van der Walt *Law and Sacrifice: Towards a Post-Apartheid Theory of Law* (2005) 111.
[85] Bennett *Ubuntu* 71.

status. Whereas the CC had said that the epilogue to the interim Constitution had equal status to the other provisions of the Constitution in *Azapo*, since the final Constitution had no such epilogue, it was initially thought that the courts' use of Ubuntu in its reasoning would come to an end. However, the courts have continued to refer to Ubuntu in a variety of cases, and in this way, the courts have cemented its place in South African jurisprudence. In fact, scholars have argued that Ubuntu has to be 'read in' into other procedural and substantive provisions of the Constitution. For example, s 39(2) of the Constitution states as follows:

> 'When interpreting any legislation, and when developing the common law or customary law, every court … must promote the spirit, purport and objects of the Bill of Rights.'[86]

According to Davis & Klare, this procedural section requires courts to 're-imagine *all* law in the spirit of Ubuntu'.[87] In terms of its substantive content, scholars such as Cornell & Mavungua have suggested that Ubuntu should be central in any interpretation of equality, dignity and freedom.[88] Even where there is no particular procedural or substantive constitutional provision, Bennett has explained that courts have used (and can use) Ubuntu to 'modify the effect of strict application of the law'.[89] In this way, Ubuntu has become an important aspect of SA's constitutional framework. However, the reception of the concept has not been without objection or contestation. For the most part, these objections can be grouped as follows:

- the concept is too vague;
- it fails to acknowledge the value of individual freedom;
- Ubuntu fits traditional, small-scale culture more than modern industrial society; and
- Ubuntu is just western communitarianism in another garb.[90]

---

[86] Section 39(2) of the Constitution.
[87] DM Davis & K Klare 'Transformative constitutionalism and the common and customary law' (2010) 26 *SAJHR* 403 at 411. My emphasis.
[88] Cornell & Muvangua *Ubuntu and the Law* 74.
[89] Bennett *Ubuntu* 61, 67 and 69.
[90] See for example, similar objections listed by Metz and Bennett. See Metz 2011 *AHRLJ* 532 and Bennett *Ubuntu* 36-59. Of course, my list is not exhaustive but represents, in my opinion, recurrent criticism of the concept. Van Binsbergen is perhaps the most radical critic of the use of the concept, but for reasons that lie beyond the scope of this thesis. Essentially he argues that Ubuntu is 'a contemporary academic construct, called forth by the same forces of oppression, economic exploitation, and cultural alienation that have shaped Southern Africa society over the past two centuries' (W Van Binsbergen 'Ubuntu and the globalisation of Southern African thought and society' (2001) 15 *Quest – An African Journal of Philosophy* 53 at 62. Bewaji & Ramose 2003 *South African Journal of Philosophy* 379 summarise the central tenets of Van Binsbergen's criticism. The authors note that Van Binsbergen questions: '(a) The contemporaneous nature of the Ubuntu concept , and construct or what he calls an "etic

I briefly discuss and dispense with these objections below, before turning to the question of how the courts have used Ubuntu in adjudication.

### *5.3.1 Ubuntu as a legal norm is too vague*

Almost every writer concerned with Ubuntu has raised the issue of language and definition as a barrier to understanding the concept. In this regard, some scholars suggest that Ubuntu does not admit of the precision required in order to 'render a publicly-justifiable rationale for making a particular decision'.[91] These scholars, following the liberal tradition, are 'rule-committed'.[92] As such, these scholars find it important that the law has clear and certain rules in the interests of commercial certainty, rather than open-ended standards.[93] As an example of this thinking, consider Raz's comment in relation to the similar debate between rules and principles: 'Principles, because they prescribe highly unspecific acts, tend to be more vague and less certain than rules.'[33] While he provides no empirical evidence of this position, this type of position is representative of a typical positivist normative proposition.[94]

Given that Ubuntu is open-ended, scholars sharing this positivist outlook are sceptical of Ubuntu being capable of meeting this legal need for certainty. Other scholars are wary of the ease with which the concept can be manipulated given its vagueness.[95] Kroeze similarly complains that Ubuntu is a 'bloated concept' in that it 'tries to do too much' and, as a result, 'simply collapses under the weight of expectations'.[96] Matolino & Kwindingwi in turn argue that the popularity of Ubuntu has resulted in it becoming 'anything to anyone who so wishes

---

construction, in an alien format"; (b) The intellectualistic nature of Ubuntu, making it a curiosity devised by members of an extraneous academe and there political potentates with diverse agendas "of excessive pursuit of individual gain"; (c) The "utopian and prophetic" idealism and dream-like surreality of the concept in the class of such ideologies as African Socialism, African communalism, consciencism etc; (d) The concept as a product of a Northern Atlantic globalism or responses thereto'.

[91] Metz 2011 *AHRLJ* 533.

[92] J Barnard-Naude '"Oh, what a tangled web we weave ..." Hegemony, freedom of contract, good faith and transformation – towards a politics of friendship in the politics of contract' (2008) 1 *CCR* 155 at 156. Barnard-Naude in turn quotes D Kennedy 'Form and substance in private law adjudication' (1976) 89 *Harvard Law Review* 1685 at 1685 where he links individualism with rule-adherence: 'individualism seems to harmonise with an insistence on rigid rules rigidly applied.'

[93] D Hutchison & C Pretorius (eds) *The Law of Contract in South Africa* 3 ed (2017) 24. In the context of legal ethics, Simon 2010 *Legal Ethics* 201, for example, argues that theorists such as Pepper (advocating a neutral partisanship approach) and Wendel (advocating a modified neutral partisanship approach) appear committed to rule-type answers to ethical issues. Simon surmises that '[t]hey do not want lawyers to make fully contextual judgments. They see legal ethics norms as typically "exclusionary" in the sense that they forbid the lawyer to take full account of the full range of relevant circumstances. But the move from master value to the commitment to rules to guide practice usually occurs tacitly. Even where recognised, it does not receive sustained analysis.'

[94] JB Braithwaite 'Rules and principles: A theory of legal certainty' (2002) 27 *Australian Journal of Legal Philosophy* 47 at 54.

[95] B Matolino & W Kwindingwi 'The end of Ubuntu' (2013) 32 *South African Journal of Philosophy* 197 at 201.

[96] IJ Kroeze 'Doing things with values II: The case of Ubuntu' (2002) 13 *Stell LR* 252 at 260.

to deploy it'.[97] McKaiser argues further that it is 'a terribly opaque notion [that is] not fit as a normative moral principle that can guide our actions, let alone be a transparent and substantive basis for legal adjudication'.[98] Van der Walt, commenting in 2005 on the CC's Ubuntu jurisprudence, suggested that the court's non-specific feel-good phrases 'would have had John Lennon (*Imagine All the People*) scrambling for new verses'.[99]

Part of the problem, as many scholars recognise, is working with a concept in a language other than one's own. Bennett points out, for example, that translating words from a different language can result in a distortion of meaning.[100] In fact, scholars argue that there is no translation for the concept into abstract western concepts.[101] As surveys on Ubuntu in literature evidence, the nature of Ubuntu is said to be unclear and ambiguous, leading to authors describing it as a 'kaross of mystery'.[102] Scholars thus find the concept 'by and large' empty. Some commentators have gone so far as to point out that one cannot work in African concepts and philosophy at all if one does not speak one of the Nguni languages or one is not of African descent.[103]

There is certainly evidence to suggest that Ubuntu risks becoming 'anything to anyone' and has been used politically to shore up support for certain agendas.[104] Commentators have argued that the use of Ubuntu in this way has led to a failure to develop a rigorous, critical tradition

[97] Matolino & Kwindingwi 2013 *South African Journal of Philosophy* 201.
[98] McKaiser quoted by Metz 2011 *AHRLJ* 533. In the context of adjudication, Sachs J cautions that Ubuntu should not be used simply as 'a phrase to be invoked from time to time to add a gracious and affirmative gloss to a legal finding already arrived at'. See *Dikoko v Mokhatla* ibid para 113.
[99] Van der Walt *Law as Sacrifice* 110.
[100] T Bennett 'Ubuntu: An African equity' (2011) 14 *PELJ* 30 at 31. See also Bennett *Ubuntu* 9 and his discussion of 'loan words' at 11-4.
[101] Y Mokgoro 'Ubuntu and the law in South Africa' (1998) 1 *PELJ* 15. Mokgoro J concludes that the western use of abstractions 'defies the very essence of the African worldview' that describes ideas through real contexts. I Keevy 'The Constitutional court and Ubuntu's "inseparable trinity"' (2009) 34 *JJS* 61 at 64 & 69 who quotes Koka et al in noting that 'Ubuntu resists the dictate of western logic and western rites of argumentation with their demands for distinctive definitions'. See also MJ Bhengu *Ubuntu: The Global Philosophy for Humankind* (2006) 46 who argues that there is no English word for Ubuntu.
[102] A kaross is a cloak made of sheepskin, or other animal hide, with the hair left on. See H Chisholm (ed) 'Kaross' in *Encyclopaedia Britannica* 11 ed (1911) available at https://en.wikipedia.org/wiki/Kaross.
[103] P Hountondji *African Philosophy: Myth and Reality* 2 ed (1996) (translated by H Evans & J Ree) 53: 'The Africanness of our philosophy will not necessarily reside in its themes, but will depend above all on the geographical origin of those who produce it and their intellectual coming together. The best European Africanists remain Europeans, even (and above all) if they invent a Bantu "philosophy," whereas the African philosophers who think in terms of Plato or Marx and confidently take over the theoretical heritage of Western philosophy, assimilating and transcending it, are producing authentic African work.' Van Niekerk suggests that in this way Hountondji commits to a geographical and (more or less) cultural restriction on the philosophers who are to produce African philosophy. See van Niekerk *Ubuntu and Moral Value* 37.
[104] For example, Cornell notes that the concept has been deployed to privilege 'dangerous hierarchies [and] corrupt tribal authorities'. See Cornell 2010 *SAPL* 382.

on behalf of Ubuntu, and African philosophy in general.[105] While many of the uses of Ubuntu have been benign (for example, using Ubuntu as 'feel good' terminology or 'marketing devices' in management or business contexts[106]), some commentators have suggested a nefarious[107] intent of users of the concept, asking: what functions or interests does invoking Ubuntu serve in a particular social context?[108] Two contemporary examples of such self-seeking use suffice. First, it has been argued that Ubuntu has been used in the past as a basis to introduce highly stratified patriarchal structures in traditional communities through different versions of traditional courts bills.[109] Secondly, and on the other side of the spectrum, some commentators argue that Ubuntu has been used to support South Africa's capitalist economy through its use in corporate governance narratives.[110]

However, as several commentators forcefully argue,[111] one cannot define Ubuntu through its misuse,[112] or even its alleged absence in contemporary African society.[113] In piercing the veil

[105] A Mbembe 'African modes of self-writing' (2002) 14 *Public Culture* 239. See also L Praeg 'An answer to the question: What is Ubuntu' (2008) 27 *South African Journal of Philosophy* 367.
[106] R English 'Ubuntu: The quest for an indigenous jurisprudence' (1996) 12 *SAJHR* 641. For an example, see CG Christians 'Ubuntu and communitarianism in media ethics' (2004) 25 *Ecquid Novi* 235.
[107] This terminology comes from Metz in his review of Praeg's books: see T Metz 'What do we mean when we speak of Ubuntu?' <http://mg.co.za/article/2014-11-14-what-do-we-mean-when-we-speak-of-Ubuntu>.
[108] Ibid, see also L Praeg & S Magadla (eds) *Curating the Archive* (2014) chap 1.
[109] See one version: Traditional Courts Bill [B1-2017], GG 40487 of 9 December 2016. For example, Zolani Mkiva, the spokesperson for Contralesa is recorded as saying: 'Contralesa supports the [Traditional Courts Bill] because it is the only African court system that still upholds *the values of Ubuntu* in terms of how it deals with justice' quoted by J W Bornman 'Challenging the Constitution for tradition' available at http://journalism.co.za/indepth/joburgjustice/?page_id=881. Cf J Williams & J Klusner 'The traditional courts bill: A women's perspective' (2013) 29 *SAJHR* 276 and S Weeks 'The traditional courts bill: Controversy around process, substance and implications' (2011) 35 *SA Crime Law Quarterly* 3. The latest version of the bill retains the patriarchal structures, see A Claasens 'Traditional Courts Bill props up a system spawned by apartheid' *Sunday Times* 10 March 2019 available at https://www.timeslive.co.za/sunday-times/opinion-and-analysis/2019-03-10-traditional-courts-bill-----props-up-a---system--spawned-by---apartheid/.
[110] The most important of which is the *King Report on Governance for South Africa* (2009) which defines Ubuntu at 23 as 'Simply put, Ubuntu means humaneness and the philosophy of Ubuntu includes mutual support and respect, interdependence, unity, collective work and responsibility. It involves a common purpose in all human endeavour based on service to humanity (servant leadership)'. For a criticism of this definition, see DFP Taylor 'Defining ubuntu for business ethics – a deontological approach' (2014) 33 *South African Journal of Philosophy* 331 at 334.
[111] Prinsloo *Prolegomena* 9.
[112] I Keevy has come under considerable criticism for view that Ubuntu is associated with cultural practices which are not attractive, and therefore Ubuntu is problematic, effectively conflating the concept with unattractive cultural practices. See I Keevy 'Ubuntu versus the core values of the South African Constitution' (2009) 34 *JJS* 19. The same could be argued in the way in which the cab rank rule has been used to pursue self-interest agendas rather than potentially the real reason for its existence: access to justice for all (see G Robertson *The Tyrannicide Brief: The Story of the Man who sent Charles I to the Scaffold* (2007)).
[113] Nicolson argues that the fact that Africans 'do not always exemplify ideas such as ubuntu does not mean that traditional African values are discredited or of no significance, any more that the activities of some Middle Eastern rulers negate the validity of Islamic values, or the activities of President Bush and his advisers negate the validity of traditional Christian values'. He goes on to justify this stance: 'It is often true that people fail to live out their stated values. But the crises in Africa do mean that we must be careful not to overstate the hold that traditional African ethics have in practice in African society. They perhaps exist as a concept, as an ideal, as a lodestar, but

of Ubuntu, it is necessary to distinguish between the public, populist and 'own-agenda-pushing' narratives on the one hand, and the way in which scholars and the courts have managed to construct meaning that grows out of an understanding of its characteristic elements, on the other hand.[114] Essentially, and as Metz argues, 'Ubuntu, when interpreted as an ethical theory, is well understood to prescribe honouring relationships of sharing a way of life and caring for others' quality of life'.[115] Cornell and Muvangua argue similarly that

> 'Ubuntu is about the moralisation of social relations, and what this means precisely changes with the social bond it seeks to maintain. The task before the new SA is to move away from a society in which ethical relations between human beings have been completely shattered.'[116]

In fact, in the context of legal interpretation, legal scholars argue that its very nature as open-ended makes it valuable as a legal principle.[117] These scholars also contest the assumption that tightly specified rules increase legal certainty.[118] For example, Du Plessis, drawing on the work of Hawthorne, argues that Ubuntu should be seen as valuable in the context of open norms:

> '[Critics of the] open-endedness of Ubuntu, to some extent, also ignore the fact that open norms have always played, and will always play, a role in the development of the law because "lawmakers cannot foresee every possibility and provide decisions on every eventuality". Open norms play an important role in the interpretation and development of the law because they enable value judgments and reflect the fact that the classical conception of the rule of law is just "not flexible enough to cope with the complexities of modern society". Thus, the introduction of Ubuntu as an open norm that can be used in legal interpretation and development reflects the change in the South African legal culture from a conservative legal positivistic one under apartheid into a culture that promotes a value-based approach to law as envisaged by the Constitution.'[119]

---

not always as a fully lived reality'. See RN Nicolson 'Introduction' in RN Nicolson (ed) *Persons in Community: African Ethics in Global Culture* (2008) 1 at 6.

[114] Metz 2011 *AHRLJ* 536.

[115] T Metz 'Just the beginning for Ubuntu: Reply to Matolino and Kwindingwi' (2014) 33 *South African Journal of Philosophy* 65 at 71.

[116] D Cornell & N Muvangua *Ubuntu and the Law: African Ideals and Postapartheid Jurisprudence* (2012) 13.

[117] Mokgoro in Diedrich (ed) *Ubuntu, Good Faith and Equity* 710. See also Himonga in Kischel & Kirchner *Ideologie und Weltanschauung im Recht*; Bohler-Muller 2007 *Obiter* 595.

[118] Braithwaite 2002 *Australian Journal of Legal Philosophy* 50. For example in the US jurisdiction, CS Diver 'The optimal precision of administrative rules' (1984) 93 *Yale Law Journal* 65 sets out that: '[v]agueness is a common affliction of regulatory standards, especially those that rely on such open-ended terms as "in the public interest", "feasible", or "reasonable".'

[119] HG du Plessis *The Harmonisation of Good Faith and Ubuntu in the South African Common Law of Contract* (2017) unpublished LLD, Unisa 92. Footnotes omitted.

So, scholars point to the fact that lawyers deal with open norms in every day practice, and that their use in the common law is necessary, if not more so, in the context of the Constitution's mandate.[120] One need only consider concepts like bona fides, public policy, boni mores, wrongfulness, rationality, fairness and reasonableness as examples of such open norms to understand this current application.[121] Scholars who appeal to open norms in other areas of law suggest that fears that the use of open norms will 'result in intolerable uncertainty' are exaggerated.[122] In any event, they argue that sacrificing some certainty for better resolutions of disputes is justified.[123]

### *5.3.2 Ubuntu fails to acknowledge the value of individual freedom*

Some scholars fear that Ubuntu amounts to a kind of collectivism where the individual is sacrificed for community interests.[124] For example, Oyowe maintains that human rights and African values (such as Ubuntu) do not belong together.[125] This is because of the ostensible binary created by two very distinct final goods to be promoted: individual freedom on the one hand, and communal relationship on the other.[126] Many communitarian theories face this same criticism.[127] Metz suggests this type of criticism implies that Ubuntu represents a type of group-

---

[120] L Hawthorne 'The end of bona fides' (2003) 15 *South African Mercantile Law Journal* 271 at 277. See also D Bhana 'The role of judicial method in the relinquishing of constitutional rights through contract' (2008) 24 *SAJHR* 300 at 317. At the time, Bhana suggested that the courts (at 328-9) were reluctant to use concepts such as ubuntu into the interpretation of private law principles because they were unwilling to sacrifice legal certainty and private autonomy to the 'communitarian power' of constitutional values of freedom, equality and dignity.

[121] Bennett *Ubuntu* 161 sees Ubuntu as 'a type of metanorm equivalent to such common-law principles as good faith and equity'. See also T Naude & C Koep 'Factors relevant to the assessment of the unfairness or unreasonableness of contract terms: Some guidance from the German law on standard contract terms' (2015) 26 *Stell LR* 85 at 87. Naude & Koep qualify this idea where they say: 'Obviously absolute certainty and predictability are impossible ideals when applying open norms like fairness and reasonableness, because so much depends on the facts of each case. It is still useful, however, to identify factors that would inform the application of these open norms, in the interest of providing more predictability. The goal of predictability is part of the fairness ideal. It would be unfair to potential litigants if they had no idea how a court would approach their dispute on the fairness of a term, and therefore no idea of the wisdom of spending lawyer's fees and time on the dispute.' Furman, in arguing that courts often use concepts before settling on a definitive meaning, references Justice Potter Stewart's comment in *Jacobellis v Ohio* 378 US 184. In this matter, while trying to settle on a clear definition of pornography, the Justice concluded that 'I will know it when I see it'. See Furman *Exploring the Possibility of an Ubuntu-based Political Philosophy* 36.

[122] See D Bhana & M Pieterse 'Towards a reconciliation of contract law and constitutional values' (2005) 122 *SALJ* 865 at 866; AM Louw 'Yet another call for a greater role for good faith in the South African law of contract: Can we we banish the law of the jungle, while avoiding the elephant in the room? (2013) 16 *PELJ* 44 at 49-50 and 68-69.

[123] Ibid.

[124] A Oyowe 'Strange bedfellows: Rethinking *Ubuntu* and human rights in South Africa' (2013) 13 *AHRLJ* 103 at 111ff.

[125] Ibid 104. Oyowe suggests that 'trying to account for human rights within a normative system that fundamentally prizes some communal or relational good over individual ones is like attempting a trick the aim of which is to eat one's cake and have it'.

[126] Ibid.

[127] D Nicolson & J Webb *Professional Legal Ethics* (1999) 38-39.

think and an uncompromising majoritarianism, which is not only the opposite of the ideals of a liberal tradition, but of a constitutional democracy based on the values of freedom, equality and dignity.[128] Kroeze is similarly critical of the way in which the CC has contrasted Ubuntu with individual freedom:

> '[I]f liberalism is individualistic, *Ubuntu* must be communitarian; if liberalism emphasises individual rights, *Ubuntu* must stress group rights; competition v compassion; confrontation v conciliation; and so on.' [129]

However, scholars have strongly argued that Ubuntu is not just another form of collectivism. For example, some scholars note that invoking Ubuntu does not imply 'doing whatever a majority of people in society want or conforming to the norms of one's group'.[130] Bennett, for example, explains that Ubuntu avoids the binary created by this criticism. He notes that Ubuntu 'sees the individual as *embedded in a community*'.[131] Instead, Ubuntu can be more attractively and accurately interpreted as conceiving of communal relationships as an objectively-desirable kind of interaction.[132] It is this interaction that should find what majorities want, and which norms become dominant.[133] In answer to Oyowe, Metz argues that human rights need not be conceived in the liberalist tradition. Instead, he contends that human rights can be defined as ways of treating people as special by virtue of their capacity to commune.[134] Cornell & Muvangua similarly note that it is a 'profound misunderstanding' of Ubuntu to confuse it with collectivism. This is because Ubuntu implies that

> 'it is only through the engagement and support of others that we are able to realise a true individuality and rise above our biological distinctiveness into a fully developed person whose uniqueness is inseparable from the journey to moral and ethical development.'[135]

Scholars thus point out that Ubuntu does not require that individual identity and freedom be subsumed entirely within the group.[136] In this way, Ubuntu recognises that individual freedom is important, but such freedom cannot be enjoyed in isolation; it must simultaneously be

[128] Metz 2011 *AHRLJ* 533.
[129] Kroeze 2002 *Stell LR* 261.
[130] Metz 2011 *AHRLJ* 538.
[131] Bennett 2011 *PELJ* 48. My emphasis.
[132] Metz 2011 *AHRLJ* 538.
[133] Ibid.
[134] Ibid.
[135] Cornell & Muvangua *Ubuntu and the Law* 3.
[136] Du Plessis in Donlan & Mair *Comparative Law* 49; Mokgoro in Diedrich (ed) *Ubuntu, Good Faith and Equity* 2; Cornell & Muvangua *Ubuntu and the Law* 5.

accorded to other members of the group.[137] One is thus required to understand Ubuntu in terms of communalism that is inclusive of individual rights and autonomy.[138] At the same time, Ubuntu would prescribe that we should recognise universal human rights in African cultural contexts without abandoning the attributes of Ubuntu like interdependence, dignity, solidarity and responsibility.[139]

### *5.3.3 Ubuntu cannot meet the needs of a modern industrial society*

Scholars argue that Ubuntu fits traditional, small-scale culture and therefore it is inappropriate to attempt to apply it in modern commercial settings.[140] Critics of Ubuntu in this context also point to the problematic hierarchical, patriarchal and spiritual aspects of the pastoral societies in which Ubuntu operated.[141] Given this context, they see Ubuntu as an anachronism that is incompatible with modern day living and even contrary to constitutional ideals of equality, dignity and freedom.[142] In this context, Wallis (writing extra-curially) links his concern for the vagueness of the concept with its application in modern contract law:

> 'Meaningful as [Ubuntu] is in many areas of life, it would help to have an explanation of how humaneness, social justice, group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity, are to be made applicable in the context of the contractual relationships between artificial persons, such as companies created for trading purposes.'[143]

Ubuntu protagonists respond to criticisms of this nature in several ways. First, they consider it wrong to conflate the concept with harmful customary practices or with those practices that were 'formalized and frozen by magistrates, missionaries, and patriarchal male elders in the colonial and apartheid era'.[144] Some scholars go as far as to suggest that some critics

---

[137] *Makwanyane*; *The Citizen 1978 (Pty) Ltd v McBride (Johnstone, Amici Curiae)* 2011 (4) SA 191 (CC) at para 215; and *Barnard* para 174.
[138] Himonga in Kischel & Kirchner *Ideologie und Weltanschauung im Recht* 8.
[139] Ibid 9.
[140] Matolino & Kwindingwi 2013 *South African Journal of Philosophy* 203.
[141] Van der Walt *Law as Sacrifice* 114; Keevy 2009 *JJS* 19. Keevy focuses on the set of strict familial hierarchal and patriarchal practices in the society. See also Kunene quoted by Mokgoro 1998 *PELJ* 15 at 16 where she states: 'Ubuntu is the very quality that guarantees not only separation between men, women, and the beast, but the very fluctuating gradations that determine the relative quality of that essence. It is for that reason that we prefer to call it the potential of being human'. Ramose's early writing focuses on the quasi-religious nature of Ubuntu. He suggests that Ubuntu depends on a metaphysical worldview that relies on the continued presence of ancestors and the living dead. See Ramose in Coetzee & Roux *The African Philosophy Reader* 379.
[142] Ibid.
[143] M Wallis 'Commercial certainty and constitutionalism: Are they compatible?' (2016) 133 *SALJ* 545 at 560.
[144] A Sachs 'Towards the liberation and revitalization of customary law' in Cornell & Muvangua *Ubuntu and the Law* 311.

deliberately conflate philosophy with racial stereotyping and profiling by linking Ubuntu to misconduct, including certain forms of crime.[145]

Notwithstanding this, Metz notes that one must distinguish anthropology from philosophy:[146] in considering the usefulness of Ubuntu, he notes that Ubuntu protagonists are not interested in engaging in an empirical project of 'trying to accurately reflect what a given traditional black people believed'.[147] Instead, protagonists (for the most part) seek to refashion the interpretation of Ubuntu 'so that its characteristic elements are construed in light of our best current understandings of what it morally right'.[148] Pieterse aptly captures these protagonists' responses:

> '[A] return to [Ubuntu's] pre-colonial state is neither practically nor ideologically feasible. Yet, certain of the values underlying pre-colonial thinking still reverberate through contemporary African society. Through engaging with these values, in their contemporary manifestations, a view emerges of law and society that might prove useful.'[149]

Thus, scholars generally look to the contemporary values underpinning the concept of Ubuntu. This is clear from Mohamed CJ's statement in an address to the World Jurist Association Seminar in 1998:

> 'The ageless emotional and cultural maturity of Africa is less dramatic but not less significant or potentially powerful in influencing, in shaping and in formulating the constitutional ethos which must inform and define judicial responses to jurisprudential challenges arising from competing demands in a complex and rapidly changing society. That maturity expresses itself through a collectivist [emotion] of communal caring and humanism, and of reciprocity and caring.'[150]

---

[145] NL Mahao 'Can African juridical principles redeem and legitimise contemporary human rights jurisprudence?' (2016) XLIX *CILSA* 455 at 464. See also Y Mokgoro & S Woolman 'Where dignity ends and uBuntu begins: An amplification of, as well as an identification of a tension in, Drucilla Cornell's thoughts' (2010) 25 *SAPL* 400 at 405.

[146] Metz 2011 *AHRLJ* 535.

[147] Ibid. In this vein, Cornell & Muvangua *Ubuntu and the Law* 10 argue that it would be absurd, for example, to enquire whether Ubuntu demanded access to electricity 500 years ago, since there was no access to electricity at all.

[148] Ibid.

[149] Pieterse in Roederer & Moellendorf *Jurisprudence* 439. Mbigi & Maree writes about Ubuntu in similar terms: 'Africa can never go back completely to its pre-colonial starting point but there may be a case for re-establishing contacts with familiar landmarks of modernisation under indigenous impetus.' See L Mbigi & J Maree *Ubuntu: The Spirit of African Transformation Management* (1995) 1-7.

[150] Quoted in P van der Merwe 'Chief Justice hails new constitutional and African values' *De Rebus* Feb (1997) 78.

In sum, then, protagonists of Ubuntu endorse what Himonga et al have called a teleological approach to the concept. [151] This approach allows scholars to focus on what a particular value seeks to achieve, rather than obsessing over its historical origin. As Du Plessis notes, the meaning of Ubuntu inevitable changes once it is invoked as a constitutional value in the broader context of a heterogeneous society. This is especially true when this society is forged by powerful forces such as colonisation, and more recently, globalisation.[152] However, this change should not undermine the value of Ubuntu as a concept that may influence fairer and more equitable outcomes in the law generally.[153]

### *5.3.4 Ubuntu is just western communitarianism in another garb*[154]

Amidst the politics of Ubuntu is the difficult question: is Ubuntu unique in its content, given that it bears manifest similarities to certain versions of communitarianism and relational ethics, theories already developed in the west?[155] If this is the case, Ubuntu is not really unique nor distinctive, leading to the allegation that the concept is largely superfluous or redundant.[156] Himonga et al asks: 'If the courts can do their job adequately without raising *Ubuntu*, why raise it in the first place?'[157] Sachs (writing extra-curially) notes that, while Ubuntu is an original creation of indigenous African law, the idea that those living in customary communities subscribe to an ethos which requires some concern for others is not unique.[158] Ubuntu can be linked to concepts found outside the African cultural heritage. In this regard, courts have drawn parallels between Ubuntu and counterparts in religious belief systems,[159] all-embracing

[151] Himonga, Taylor & Pope 2013 *PELJ* 375. See also Keep & Midgley in Bruinsma & Nelken *Recht der Werkelijkheid* 48.
[152] Du Plessis in Donlan & Mair *Comparative Law* 51. See also
[153] Ibid. See also Cornell and Muvangua *Ubuntu and the Law* 24-5.
[154] I have adapted Prinsloo's characterisation of the 'worry' that Ubuntu is just a universal concept 'in local garb'. See Prinsloo *Prolegomena* 11. He also characterises this issue as the 'problem of collapsibility'. Ibid.
[155] For eg, see P Selznick *The Communitarian Persuasion* (2002) in which he asserts (at 39): 'Communities have this remarkable feature: they build upon and are nourished by other unities, which are persons, groups, practices, and institutions. What we prize in community is not unity of any sort at any price, but unity that *preserves the integrity of the parts*' (my emphasis). Communitarians can be said to be on a continuum in the importance they place on autonomy. For eg, Nedelsky's critique of MacIntyre is an illustration of this point: She criticises MacIntyre for understating 'the nature of our dependence and interdependence' claiming that relationship are *part* of autonomy, rather than providing the *condition* for autonomy. See J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy, and Law* (2011) chap 3.
[156] Van der Walt *Law as Sacrifice* 111.
[157] Himonga, Taylor & Pope 2013 *PELJ* 389.
[158] See Sachs in Cornell & Muvangua *Ubuntu and the Law* 310.
[159] Mogoeng CJ has for example linked *Ubuntu* to the biblical injunction that 'one should do unto others as he or she would have them do unto him or her' in *The Citizen 1978 (Pty) Ltd* case at para 216.

concepts of 'humanity' and 'menswaardigheid',[160] and even the ideas of the Eastern Roman Emperor Justinian.[161] I have argued elsewhere (together with Midgley) that similarities should be celebrated rather than viewed with suspicion. Specifically, we maintained that '[a] break from past domination of one school of thought over another must be emphasised and the notion of inclusivity that is inherent in *Ubuntu-botho* makes it an ideal overarching vehicle for expressing shared values'.[162]

However, it is worth considering that although ideas around communitarianism have been developed in the west, the dominance of the liberal tradition in these jurisdictions does create the strong distinction between 'western' and 'other' legal orders, even if this distinction is overstated. Thus, while there are valuable communitarian critiques in western jurisdictions with which Ubuntu has similarities, such critiques are not mainstream or regarded as 'typical' or characteristic of that system. So even if we should be careful of overstating the issue, there may be merit in distinguishing Ubuntu from *typical* Western values. Bohler-Muller, for example, suggests that this is where Ubuntu's real transformative power lies:

> '[*U*]*buntu* could be utilised to promote a different set of ideals for interpreting the Bill of Rights – ideals *not* rooted in Eurocentric thinking around atomistic individualism.'[163]

Similarly, Van Niekerk differentiates between typical 'western legal orders' and 'indigenous African legal orders':

> 'Because of the weak position of "we", as opposed to the strong position of "I" in western cultures, western legal orders are characterised by analysis, discrimination, differentiation, individualism, intellectualism, objectivism, inductive reasoning, scientific thought, generalisation, conceptualism, legalism, organisation, self-assertion, and impersonality. By contrast, indigenous Japanese and indigenous African legal orders, because of a well developed we-consciousness, are characterised as synthetic, totalising, integrative, non-discriminative,

[160] *Makwanyane* para 308. See L Praeg *A Report on Ubuntu* (2014) 193. In fact, Chaskalson P in *Makwanyane* para 131 quoted the US Supreme Court in *Furman v Georgia* 408 U.S. 238 (1972), saying that, to embody the value of *Ubuntu*, South African society needed to live up to Justice Brennan's call for a society that 'wishes to prevent crime ... [not] to kill criminals simply to get even with them'.

[161] In *Bophuthatswana Broadcasting Corporation v Ramosa* 1997 HOL 283 (B) 4-5 Khumalo J refers to Justinian: 'the precepts of the law are these: to hurt no one, to give everyone his due.' He also draws parallels between Ubuntu and two maxims from Confucius and St Matthew's version of the Gospel respectively (Confucius says: Do not do unto others what you would not want others to do unto you', while St Matthew writes that which you would like others to do to you, you should do for them).

[162] Keep & Midgley in Bruinsma & Nelken *Recht der werkelijkheid* 48. See also Himonga, Taylor & Pope 2013 *PELJ* 370.

[163] N Bohler-Muller 'The story of an African value: Ten years after *Makwanyane'* (2005) 20 *SAPL* 268. See also Kroeze 2002 *Stell LR* 260-1. My emphasis.

> non-systematic, dogmatic, intuitive, non-discursive, subjective, communalistic and spiritually individualistic.'[164]

On a general level, I agree that a strong distinction between 'western' and 'other' legal orders is probably overstated. One problem is actually identifying which legal systems are 'western' and which are not. But, apart from that, given the wide variety of legal systems that form part of the western tradition, it is unlikely that they can be regarded as homogenous systems that all share these characteristics in the same way. That kind of 'branding' would negate the cultural and hermeneutic differences as well as critical voices that shape these legal systems.

Despite this negation, Sigonyela argues that the presence of Ubuntu as a guiding norm in the interpretation of our basic law (and by extrapolation: in our approach to lawyering) is essential in the minds of ordinary people for the legitimisation of our legal system.[165] Bennett similarly suggests that Ubuntu functions in a way that domesticates the Constitution by giving it 'cultural legitimacy'.[166] Tabensky characterises this function as a 'non-epistemic' reason or strategy to explore Ubuntu.[167] Tabensky (and others) argue that Ubuntu can be used in a positive way to 'rehabilitate' African pride, and respond substantively to a legacy of colonial and postcolonial degenerations of Africans and their cultural resources.[168] This response is to assert that African cultures are capable of producing sophisticated frameworks independently of those imported by colonialism. While this approach risks romanticising Ubuntu, it is arguable that it is important to ground, if possible, any lawyering approach in the lived experience of the majority of South Africans. This is so because of the extreme alienation that the majority of persons affected by apartheid felt, as set out in the first chapter. So, for instance, Mokgoro & Woolman state that

> 'though Ubuntu may shadow Western notions of dignity (drawn from the work of Kant) or communitarianism (drawn from the work of Rousseau or Marx), it provides a distinctly Southern African lens through which judges, advocates, attorneys and academics ought to determine the extension of the actual provisions of the basic law [the Constitution], with the caveat that as long as doing so does no violence to the text of the Constitution.'[169]

---

[164] Van Niekerk 1998 *CILSA* 171.
[165] Singonyela quoted in Mokgoro & Woolman 2010 *SAPL* 403.
[166] Bennett *Ubuntu* 97.
[167] Tabensky quoted in Van Niekerk *Ubuntu and Moral Value* 23-24.
[168] Ibid.
[169] Mokgoro & Woolman 2010 *SAPL* 402.

In similar terms, Sachs J asserts:

> '[Relying on Ubuntu] means giving long overdue recognition to African law and legal thinking as a source of legal ideas, values, and practice. We cannot, unfortunately, extend the equality principle backwards in time to remove the humilities and indignities suffered by past generations, but we can restore dignity to ideas and values that have long been suppressed or marginalised.'[170]

Following Sachs's 'call to arms' above, I believe that the objections to Ubuntu's use in our legal system can be dispensed with, or are capable of being overcome. I have argued that there are ample epistemic and non-epistemic reasons to harness the characteristic features of Ubuntu in our legal system. In what follows then, I try to capture certain features of Ubuntu that SA legal practitioners might call on in making ethical decisions regarding their conduct and representative work.

## 5.4 FEATURES OF UBUNTU INFLUENCING THE LAWYER'S ROLE IN SOUTH AFRICA

### *5.4.1 Procedural: Its operation as a principle or value rather than a rule in the legal system*

In the sections above, I set out how Ubuntu had been accepted as a legal norm through first, the epilogue to the interim Constitution, then through the jurisprudence of the courts. However, it is only through surveying the case law that one is able to ascertain its evolving nature. In the case law, courts variously refer to Ubuntu as a 'motif',[171] a 'declaration',[172] a 'tradition',[173] an 'idea',[174] a 'principle',[175] a 'value',[176] a 'spirit'[177] and a 'concept'.[178] In turn, scholars have likened its application to that of the common-law principles of good faith, fairness, and even the English concept of equity.[179] Critics see the different terminology used to describe Ubuntu as indicative of its unsuitability for application in a legal system.[180] However, it is more likely

[170] *Makwanyane* paras 365-6.
[171] *PE Occupiers* para 37.
[172] Ibid
[173] *Bhe* para 45.
[174] *Barnard* para 174.
[175] *Mogami* para 22*; Mohamed Leisure* para 1.
[176] *Everfresh* para 71-2; *Arun Holdings; The Citizen 1978 (Pty) Ltd & others v McBride* 2011 (4) SA 191 (CC) at paras 217 & 243; *Dikoko* paras 116 & 118.
[177] *Mohamed Leisure* para 16.
[178] *Barkhuizen* para 51*; Mohamed Leisure* para 8; *Shibi v Sithole & others* 2005 (1) SA 580 (CC) para 163.
[179] Bennett *Ubuntu* ch 5 and Bennett 2011 *PELJ* 30.
[180] See previous discussion on vagueness.

the case that the courts' different terminology is indicative of the 'difficult period of adjustment' that Bennett notes necessarily follows when there is a transplant of a norm from an oral system of customary law to a highly literate and structured legal system.[181] Inevitably in the early years, judges and lawyers – educated and used to black letter law – would struggle to use the concept as a legal norm. But, by 2007, I argued (together with Midgley) that courts, lawyers and scholars had successfully begun to use Ubuntu in certain meaningful ways. We argued then that Bohannan's reinstitutionalisation theory was useful in demonstrating how a custom such as Ubuntu can become a legal norm.[182] We found that Bohannan's ideas mapped Ubuntu's reception in the South African legal system. In developing his reinstitutionalisation theory, Bohannan asserted that customs which become legal norms 'have their material origins (either overtly or covertly) in the customs of nonlegal institutions [which have been] overtly restated for the specific purpose of enabling the legal institutions to perform their task'.[183] Then we argued that one of Bohannan's assertions was particularly relevant in South Africa:

> 'Social catastrophe and social indignation are sources of much law and resultant changes in custom. With technical and moral change, new situations appear that must be "legalized"'[184]

Bohannan's 'catastrophe-change-legalisation' process is thus a good example of Ubuntu's reception. However, at that stage we did not identify the species of legal norm that Ubuntu had or would take on. Since then, Bennett has considered the question of Ubuntu's nature recently, and answered it with the following comments:

> 'Given the lack of agreement about terminology [used to describe Ubuntu], or indeed any special interest in the issue, we may well ask whether description as a principle, value or philosophy really matters. Doubtless, the precise use of terms helps to specify their functions but, as far as Ubuntu is concerned, exact definition is not essential. It is sufficient to think of the concept simply as a metanorm, one in an early stage of development with a flexible (and hence indeterminate) form and meaning.'[185]

---

[181] Bennett *Ubuntu* 161.
[182] H Keep [maiden name] & R Midgley 'The emerging role of *Ubuntu-botho* in developing a consensual South African legal culture' in F Bruinsma & D Nelken (eds) *Recht der Werkelijkheid* (2007) 29. We relied on two specific works, being P Bohannan *Justice and Judgment among the Tiv* (1957) and P Bohannan 'The differing realms of the law' (1965) *American Anthropologist* 33.
[183] Keep & Midgley in Bruinsma & Nelken *Recht der Werkelijkheid* 35, quoting Bohannan.
[184] Ibid 36.
[185] Bennett *Ubuntu* 94.

While Bennett is correct not to obsess over form, identifying the form of a legal norm (as he himself implies) can assist in how best to operationalise its essential features in specific contexts. In the context of legal representation, a finding that Ubuntu operates as a principle, rather than a rule, indicates immediately that Ubuntu could be a meaningful resource within, for example, Simon's approach. This is because Simon's approach relies on exactly the operation of this distinction (ie between rules and principles) in a legal system.[186] Before investigating the link with Simon's approach further, I set out what I mean by a principle in this setting (using Dworkin's description of such distinction) and then consider the cases where Ubuntu has operated as a principle in SA jurisprudence.

Dworkin sees rules as 'applicable in an all-or-nothing fashion' especially when crafted to include all of their exceptions:

> 'If the facts a rule stipulates are given, then either the rule is valid, in which case the answer it supplies must be asserted, or it is not, in which case it contributes nothing to the decision.'[187]

Dworkin's distinction between rules and principles does not turn on the manner of enforcement or specificity of the norm. Rather, it turns on the nature of the judgement for which that norm calls.[188] As indicated in the quote above, rules are those that dictate specific action in the presence of a limited and explicit list of contingencies.[189] In other words, '[i]f the facts a rule stipulates are given', then the outcome is determined by the rule.[190] Principles, on the other hand, take into account values or reasons that weigh in favour or against a particular outcome, but do not determine it.[191] The fact that principles are less specific suggests that principles can

[186] As set out in chap 4, section x, Simon relies on Dworkin's work in *Taking Rights Seriously.* However, it is important to point out that not all lawyers agree on this distinction. For example, B Sampson 'The common law and legal theory' in WL Twining (ed) *Legal Theory and Common Law* (1986) 10 suggests that Dworkin's notion of a rule is 'idiosyncratic' and that many lawyers (including himself) see the common law as consisting of a system of rules which '[t]hey mean to include his principles [as rules], thought of merely as propositions of high generality. Goodin adopts a similar conception of rules that collapses the distinction between principles and rules. For Goodin, rules and principles define opposite ends of a continuum: He suggests that 'principle' is to 'rule' as 'plan' is to 'blueprint', the latter being merely a more detailed form of the former in each case.' See RE Goodin *Political Theory and Public Policy* (1982) at 67.
[187] R Dworkin 'The model of rules' (1967) 35 *University of Chicago Law Review* 25.
[188] WH Simon 'Legal ethics should be primarily a matter of principles, not rules' (2010) 13 *Legal Ethics* 200 at 200.
[189] Ibid.
[190] Braithwaite 2002 *Australian Journal of Legal Philosophy* 50.
[191] D Bilchitz 'How should judges adjudicate in a constitutional democracy' in Bilchitz et al *Jurisprudence* 79. Cf. Mureinik who suggests that '[f]or Dworkin, a principle *is* a value…' (my emphasis). See E Mureinik 'Dworkin and apartheid' in H Corder (ed) *Essays on Law and Social Practice in South Africa* (1998) 181 at 191.

accord more weight to certain values or reasons than others, depending on the conflict.[192] As Simon notes:

> 'A principle sets out a value to be vindicated in the circumstances in which the decision maker finds herself. It weighs in favour of certain actions, but this presumption can be outweighed by competing values.'[193]

Simon considers it problematic that some legal ethics approaches commit themselves to rule-type answers to any ethical dilemma.[194] Instead, he sees principles as highly relevant, and a better resource, than rules in the resolution of ethical dilemmas. This is because of the dimensioned nature of ethical dilemmas faced by legal practitioners: few true dilemmas are clearly set out, and have one value that should be clearly vindicated.[195] Usually, these dilemmas involve the resolution of an issue which presents competing values within a particular context that need to be balanced out.[196] I argue then that the benefit of relying on principles (such as Ubuntu) in legal representation is that it allows for context to be taken into consideration, and resolves Simon's criticism that mainstream approaches are too categorical. Mureinik's statement here is apposite (although it was made generally, rather than in the context of legal representation):

> 'If a decision contradicts a rule, either the decision is incorrect or the rule is false – false, that is, as a proposition of law; it is not a valid rule of law… A principle [unlike a rule] survives rejection, and retains its capacity to justify other decisions and other rules. What a principle

[192] Braithwaite 2002 *Australian Journal of Legal Philosophy* 50. Dworkin sets this out as follows: '[I]t is an integral part of the concept of a principle that it has this dimension, that it makes sense to ask how important or how weighty it is'. See Dworkin 1967 *University of Chicago Law Review* 27.
[193] Simon 2010 *Legal Ethics* 200.
[194] Ibid 201.
[195] Of course, it depends on the nature of the dilemma. However, by inserting the word 'true' before 'dilemma', I intend to show that I am not contemplating a situation where there is a clear value to be vindicated. For example, I do not regard theft of trust money to be an ethical dilemma even where the legal practitioner's livelihood (or those of his/her employees) depend on the use of trust money for wages or rent. For an example of such conduct, see *Law Society of the Cape of Good Hope v Peter* 2009 (2) SA 18 (SCA).
[196] Braithwaite's discussion of rules and principles in regulatory contexts provides a good analogy to Simon's claim. Braithwaite argues that precise rules better regulate simple phenomena than principles. However, as the regulated phenomena become more complex, principles deliver more consistency than rules. See Braithwaite 2002 *Australian Journal of Legal Philosophy* 47 at 47, 52-55. It is worth repeating an example he gives of how his assertion can play out (at 56-7): 'Broad proscriptions against a phenomenon like insider trading can engender more certainty than a patchwork of specific rules that define A, B, C, D, E and F all as forms of insider trading. The rulish form of such an insider trading statute nurtures the plausibility of a legal argument that another form of insider trading - G - must be legal because the clear intent of the legislature was only to proscribe A to F, when in fact the legislature had never thought of G.'

> may suffer from rejection is not destruction but a diminution in its cogency; for a principle is an argument, and the more often it fails to persuade, the less its power to convince.'[197]

When one considers the more recent jurisprudence of the courts, it appears that Ubuntu operates in the sense described above – that is, as a principle which can influence a decision in a particular context, but can be rejected in favour of other principles.[198] This balancing exercise can be found in a variety of dispute contexts. However, I believe it is the balancing exercise implicating Ubuntu in recent contract jurisprudence that is particularly interesting and worth exploring for the purposes of this thesis. In this regard, SA contract law, to take one example, has seen, more and more, the weighing of certain competing values in the resolution of contractual disputes.[199] Freedom of contract, as is the case in many other jurisdictions, has always played an important role in SA contract law, affirming the idea of individual autonomy. The idea of freedom of contract has survived and been affirmed in SA's constitutional context.[200] However, as has been discussed throughout this thesis, SA society is characterised by major power imbalances and inequality and these characteristics feature in private and commercial dealings. In this local context, as well as within a more global movement, contract scholars have argued that public interest requires that freedom and sanctity of contract needs to be balanced against the public interest in the 'preservation of contractual relations; and the unreasonable and one-sided promotion of one's interest at the expense of another'.[201]

In order to do this, scholars and practitioners in SA have looked at various concepts in existing common-law structures, together with Ubuntu, to recalibrate the balancing exercise between collective and individual interests.[202] They have done this in the light of their duty to develop the common law in line with constitutional imperatives.[203] Through Ubuntu, courts have attempted to adjust the emphasis of certain values in the resolution of contractual disputes. In other words, courts will not simply accept one principle by fiat (for example *pacta sunt*

---

[197] Mureinik in Corder *Essays on Law and Social Practice in South Africa* (1988) 191.
[198] *Beadica CC* paras 72-73.
[199] This evolving nature of contract jurisprudence is not limited to the SA jurisdiction.
[200] For example, in *Barkhuizen,* the court affirmed the vitality of the principle in enhancing the constitutional values of freedom and dignity. *Barkhuizen* para 57; see also Brand JA in *Afrox Healthcare Bpk v Strydom* 2002 6 SA 21 (SCA) para 23; and *Botha* para 23 and fn 38.
[201] Hutchison and Pretorius (eds) *The Law of Contract* 29. See Davis J in *Mort v Henry Shields-Chiat* 2001 1 SA 404 (C) 475A-E.
[202] While it is beyond the parameters of this thesis, it should be noted that the *exceptio doli generalis* used to be invoked as a defence in matters where these interests clashed (viz as a defence to the enforcement of unfair or unconscionable terms in contracts). However, in *Bank of Lisbon v De Ornelas* 1988 (3) SA 580 (A) 607, the former Appellate Division decided that the defence did not form part of SA law.
[203] Section 39(2) of the Constitution.

*servanda* and the values it encompasses: legal certainty,[204] freedom and dignity[205]) but will balance it inter alia against the principle of Ubuntu (with its values of fairness and reasonableness[206]) to come to a just decision.[207]

How Ubuntu could be operationalised as a principle in lawyering is discussed in the next chapter. Before that, it is necessary to explore how Ubuntu manifests in a substantive form – that is, how courts have required that a party (and their legal representative) may have to assume responsibility for substantive outcomes in specific contexts.

### *5.4.2 Assuming responsibility for substantive outcomes in specific contexts*

A survey of the case law shows that Ubuntu may mean that one of the parties in a dispute needs to assume greater responsibility for substantive outcomes in specific contexts. However, what does 'assume responsibility' and 'substantive outcomes' mean, and to what 'specific contexts' does this apply? The final question is more easily answered than the first two: through a variety of case law dealing with evictions, family law, contractual issues and administrative law, 'specific contexts' will typically entail a situation where a more powerful party exerts power in an unfair way, or subordinates a weaker party. These contexts have been pleaded particularly in the contract cases. However, as I will show below, while courts recognise Ubuntu's potential, not all courts believe there is sufficient evidence of unfairness or subordination to invoke Ubuntu.

In relation to one party needing to 'assume responsibility', this has depended on the type of case, and the relative power of each party. The courts have been particularly adamant that where one party exercises government power typically concerning vulnerable parties, that government party needs to be responsible for an outcome that is equitable and not based on procedural technicalities.[208] This theme is apparent in one of the early CC cases, namely *PE Municipality v Various Occupiers*.[209] The case considered how a court had to balance a

[204] *Beadica CC* paras 84-5.
[205] *Barkhuizen* para 57.
[206] *Everfresh* para 71 and *Beadica CC* paras 17 & 72-3.
[207] See for example, Barnard-Naudé 2008 *CCR* 175ff, 185 and the analysis of the judgment of Davis J in *Mort NO v Henry Shields-Chiat* 2001 (1) SA 464 (C); Louw 2013 *PELJ* 44; Bhana & Pieterse 2005 *SALJ* 891–2; Du Plessis in Donlan & Mair *Comparative Law* 58. See also *Beadica 231 CC & others v Trustees for the time being of the Oregon Trust (IT 728/1995) & others* 2018 (1) SA 549 (WCC) paras 7-8.
[208] Bennett characterises this application of Ubuntu as 'requiring fairer and more efficient service procedures'. See Bennett *Ubuntu* 84. While I agree with his characterisation, I argue that the responsibility is cast more widely to not only cover government services but any party that uses power differentials to deliberately subordinate another party. This appears to be the case in relation to the contract cases discussed below.
[209] *PE Municipality v Various Occupiers* 2005 1 SA 217 (CC).

landowner's right to private property (being the local municipality) with occupiers' rights not to be unlawfully evicted and their right to access to adequate housing (ss 25 and 26 of the Constitution respectively).[210] The Court found that any balancing of these rights had to promote 'the constitutional vision of a caring society based on good neighbourliness and shared concern.'[211] Importantly, the majority noted:

> 'The Constitution and PIE[212] confirm that we are not islands unto ourselves. The spirit of Ubuntu, part of the deep cultural heritage of the majority of the population, suffuses the whole constitutional order. It combines individual rights with a communitarian philosophy. It is a unifying motif of the Bill of Rights, which is nothing if not a structured, institutionalised and operational declaration in our evolving new society of the need for human interdependence, respect and concern.'[213]

As a result of this approach, the court held that while the municipality seeking to evict the occupiers had technically complied with the requirements of the eviction legislation, the municipality had to assume greater or substantive responsibility for the outcome given the principle of Ubuntu. The court held that no eviction could take place until there was bona fide engagement between the parties to find mutually acceptable solutions to the dispute.[214] The court reasoned that this should take place since the state could no longer regard people as 'faceless and anonymous squatters' that should 'automatically … be expelled as obnoxious social nuisances.'[215] Instead, the court used Ubuntu to justify it requiring the municipality to engage in mediation, dialogue, and compromise with the community, leading to their reintegration with the rest of the community.[216]

In *Union of Refugee Women v Director: Private Security Industry Regulatory Authority*,[217] this theme also took prominence. In this matter, the court chastised the regulatory authority's conduct in unilaterally withdrawing foreigners' registrations to practise as security service

[210] Himonga, Taylor & Pope 2013 *PELJ* 397.
[211] *PE Municipality* para 37.
[212] PIE is an abbreviation for the Prevention of Illegal Eviction and Unlawful Occupation of Land Act 19 of 1998.
[213] *PE Municipality* para 37.
[214] Ibid para 39. In the much later case of *Resnick v Government of Republic of South Africa* 2014 (2) SA 337 (WCC), the court refused to grant the South African Police Services (a government party) an eviction order against a widow who had been in long-term occupation of her land. The court suggested that Ubuntu guided the enquiry as to what the 'just and equitable' requirements of s 4 of PIE meant. The court held (at 343G-H) that s 4 required that it recognise the 'spirit of Ubuntu [which] promotes a normative notion of humanity, of human beings who recognise "the other", of values of solidarity, compassion and respect for human dignity.'
[215] Ibid para 51.
[216] A Skelton 'Face to face: Sachs on restorative justice' (2010) 25 *SAPL* 94 at 95.
[217] 2007 (4) SA 395 (CC).

providers in SA. While the regulatory authority sought to justify its conduct on the technical requirements of the governing legislation, [218] the court found that it could not do so without proactively drawing the applicants' attention to the possibility of an exemption to the application of the rule it sought to enforce.[219] The court chastised the regulatory authority for failing to do so, and suggested that the statements on Ubuntu in the *PE Municipality* matter had equal application in the context under review.[220]

However, Ubuntu is not just applicable where the state is one of the parties. In the context of contract law jurisprudence, courts have called on Ubuntu to require the more powerful party in a dispute to assume greater responsibility for its conduct where unfair subordination of one party by another party exists due to power differentials.[221] There are also indications in the court's jurisprudence that Ubuntu can be invoked where constitutional values are implicated in a contractual dispute.[222] It is in these circumstances that Ubuntu has generally operated as a value or principle that a court takes into account amongst a host of policy considerations,

[218] In terms of s 23 of the Private Security Industry Regulation Act 56 of 2001. The section did provide an exemption clause which provided a wide discretion when 'good cause' shown.
[219] *Union of Refugee Women* ibid para 194.
[220] Ibid para 145. In the case, Sachs J noted that this was in line with 'the concept of human interdependence and burden-sharing in relation to catastrophe', which 'is associated with the spirit of Ubuntu-botho'. See also Himonga, Taylor & Pope's discussion of this case in 2013 *PELJ* 414. While obiter dicta, other decisions involving government actors have used Ubuntu to chastise their conduct. See *Masethla v President of the Republic of South Africa* 2008 (1) SA 566 (CC) at para 238 and *Koyabe v Minister of Home Affairs (Lawyers for Human Rights as Amicus Curiae)* 2010 (4) SA 327 (CC) at para 62.
[221] In the local context, as well as within a more global movement, contract scholars have argued that public interest requires that freedom and sanctity of contract needs to be balanced against the public interest in the 'preservation of contractual relations; and the unreasonable and one-sided promotion of one's interest at the expense of another' (Hutchison and Pretorius (eds) *The Law of Contract* 29. See Davis J in *Mort v Henry Shields-Chiat* 2001 1 SA 404 (C) 475A-E). In order to do this, scholars and practitioners in SA have looked at various concepts in existing common law structures, together with Ubuntu, to recalibrate the balancing exercise between collective and individual interests. They have done this in the light of their duty to develop the common law in line with constitutional imperatives (s 39(2) of the Constitution). As a result, a growing number of cases have centred around discussion of the development of a more robust good faith doctrine in the South African law of contract based on Ubuntu and fairness within the context of the Constitutional dispensation. For a comprehensive discussion of this development, see Du Plessis *The Harmonisation of Good Faith and Ubuntu in the South African Common Law of Contract.* See also Barnard-Naudé 2008 *CCR* 175ff, 185 and the analysis of the judgment of Davis J in *Mort NO v Henry Shields-Chiat* 2001 (1) SA 464 (C); Louw 2013 *PELJ* 44; Bhana & Pieterse 2005 *SALJ* 891–2; and Du Plessis in Donlan & Mair *Comparative Law* 59.
[222] In recent academic commentary and a recent judgment by the CC, the CC's decision in *Botha and Another v Rich NO & others* 2014 (4) SA 124 (CC) has been characterised in this manner. In *Beadica 231 CC & others v Trustees for the time being of the Oregon Trust & others* 2020 (5) SA 247 (CC) at para 59, Theron J set out that the CC's decision in *Botha v Rich* did not enforce the contractual provision in issue since it was unfair and disproportionate *in the context of the statutory scheme in question*, which sought to give effect to the property right in the Constitution. See L Boonzaaier 'Reading *Botha v Rich*' (2020) 137 *SALJ* 1 at 6. This type of reasoning is evident in *Atlantis Property Holdings CC v Atlantis Excel Service Station CC* 2019 (5) SA 443 (GP) paras 40-5 and, then after *Beadica, AB & another v Pridwin Preparatory School & others* 2020 (5) SA 327 (CC) where the CC found that the context of the contract at issue involved constitutional rights (viz the fundamental children's rights to education).

interests and values under the public policy doctrine.[223] The idea that public policy may require a more powerful party assuming responsibility for fairness in specific contexts is condoned in *Barkhuizen v Napier.*[224] In this matter, the CC considered the short-term insurance industry's practice of imposing time-limitation clauses in policies. Unfortunately, the parties agreed to a stated case, meaning that the court could not explore the particular circumstances of the individual subject to the time-limitation.[225] Thus, while the court eventually upheld the time-limited contractual clause in question as valid, it made some important obiter statements regarding the role of Ubuntu in the course of its judgment.[226] In this regard, the CC affirmed that:

> 'Broadly speaking the test … is whether a provision affords a claimant an adequate and fair opportunity to seek judicial redress. Notions of fairness, justice and equity, and reasonableness cannot be separated from public policy. *Public policy takes into account the necessity to do simple justice between individuals. Public policy is informed by the concept of ubuntu.* It would be contrary to public policy to enforce a time-limitation clause that does not afford the person bound by it an adequate and fair opportunity to seek judicial redress.'[227]

In this way, the court found that Ubuntu could give meaning to common-law contractual principles in ensuring substantively fair outcomes. In *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd*[228] the CC again referenced Ubuntu. In this matter, the court was faced with the question whether parties had a duty to negotiate a new contract in terms of an option to renew in an old contract that required the parties to renegotiate the rental 'in good faith'. The appellant argued that the SA common law of contract should be developed so as to require parties who undertake to negotiate to do so reasonably and in good faith, in accordance with the provision in the original contract requiring this. Given that this argument was not canvassed in the courts below (being the High Court and the SCA), the CC refused to consider this argument. However, all the judges agreed that the law of contract could be developed[229] but disagreed about whether it could be developed in this particular case (given that the

[223] Hutchison AJ 2019 57.
[224] *Barkhuizen v Napier* 2007 (5) SA 323 (CC).
[225] *Barkhuizen* para 7. This fact is commented on by the CC later in *Beadica* 2020 para 33.
[226] Unfortunately, there was no evidence as to why Barkhuizen had not complied with the time-limitation clause. Without those facts, the court found it impossible to say whether the enforcement of the clause against him would be unfair and thus contrary to public policy. See *Barkhuizen* para 84.
[227] *Barkhuizen* ibid para 51. My emphasis.
[228] *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 1 SA 256 (CC).
[229] In terms of s 39(2) of the Constitution.

argument was made at this late stage) and in the absence of a deadlock-breaking mechanism.[230] The majority found that, if properly pleaded, Ubuntu, together with the common-law principle of good faith, could tilt an argument in favour of a party in a weak bargaining position wanting to enforce a provision to negotiate in good faith.[231]

*Everfresh* contains an interesting obiter dictum by Yacoob J that has been implicitly approved in subsequent cases that are discussed below. In this obiter, Yacoob J merely flipped the statements in *Barkhuizen*. Here, instead of saying that Ubuntu was relevant in cases where power differentials materially affected the more vulnerable party, he suggested that Ubuntu would be *less* relevant where a contract was between two contracting parties with equal power.[232] Yacoob J's statement underlines features that are potentially relevant to a lawyer's practice. First, following the point made under procedure: context matters in whether a weighing up of principles is necessary. Secondly, Yacoob J noted that Ubuntu would be especially relevant where 'vulnerable people contract with well-resourced companies'[233] and in cases where there is clear inequality in bargaining power.

These very issues were at stake in *Beadica 231 CC & others v Trustees for the time being of the Oregon Trust & others*.[234] In the court a quo,[235] the court found that a lease renewal dispute occurred in the context of a black economic empowerment initiative.[236] Given that the applicants (viz Beadica) were 'historically disadvantaged individuals'[237] the court held that it could, in effect, *automatically* infer that power differentials existed between the contracting parties. The question was whether the court could enforce a time-renewal clause that the applicants had failed to comply with, leading to the automatic termination of the contract by effluxion of time. In considering the matter, the court found for Beadica, and refused to enforce the time renewal provision against them, given their vulnerable position, being the lessees in a black empowerment context.[238] The court sought to do this by balancing the principles of *pacta sunt servanda* and fairness (implicated by Ubuntu) and finding the latter value to take

[230] SA contract law has generally held that such a clause is too vague to be enforceable, unless there is a deadlock-breaking mechanism to allow someone to step in and make a determination if the parties cannot.
[231] *Everfresh* paras 71-2.
[232] *Everfresh* para 24.
[233] *Everfresh* para 24.
[234] 2020 (5) SA 247 (CC).
[235] *Beadica 231 CC & others v Trustees for the time being of the Oregon Trust (IT 728/1995) & others* 2018 (1) SA 549 (WCC).
[236] *Beadica WCC* para 1.
[237] Ibid para 44.
[238] Ibid paras 9-10 (on the balancing exercise) and paras 42-44.

precedence in the context. However, on appeal to the SCA[239] and the CC, both courts disagreed with the court a quo's finding and found for the leasing company (Oregan Trust). The courts did not quarrel with the balancing exercise adopted by the court, but with the court's factual findings. The SCA found no evidence of power differentials. The SCA found that the lessees' mere assertions of not being 'sophisticated business people' and not being 'fully apprised of their rights and obligations regarding their options to renew the leases' was not borne out by the evidence.[240] Similarly, the CC found that the lessees had advanced no circumstances that would favour the non-enforcement of the provision, and that the lessees' situation was not one based on constitutional rights or power differentials but on 'simple neglect' on their part.[241]

It is perhaps disappointing that the particular facts of matters coming before the highest courts have not allowed for precedent-setting statements on Ubuntu's effect and role in adjudication, and in particular, circumstances where Ubuntu actually tilts a public policy consideration in favour of a particular party.[242] However, both the CC and the SCA have not been shy to commit to obiter dicta favouring the use of Ubuntu if a particular context can be shown. So, where power differentials are limited,[243] the relationships roughly equal,[244] and the chance for subordination minimal, the principle of Ubuntu is likely to be outweighed by other important principles in SA law, for example *pacta sunt servanda.*

One case where the circumstances called for the balanced to be tipped in favour of Ubuntu, was in the High Court decision of *Combined Developers v Arun Holdings.*[245] Here, the court very clearly found that, where enforcing the provisions in a contract would result in consequences 'so startlingly draconian and unfair' to a party, it would find such provisions to

[239] *Trustees for the time being of Oregon Trust v Beadica 231 CC & others* 2019 (4) SA 517 (SCA).
[240] The SCA found that (at para 39) 'the representatives of the lessees had all operated franchises, and had previously been store or regional managers. They were not ignorant individuals. They may not have fully appreciated the niceties of the law, but they knew that they had to give notice – they attempted to do so after the notice period had elapsed.'
[241] *Beadica CC* para 95.
[242] While not part of the ratio of the case in *Pridwin CC*, one can read into the CC's findings that Ubuntu influenced the court's decision, but in this case as a value encompassed under the principle of public policy (at para 61) and as one of the 'obligations that arise from constitutional … instruments' (at para 248).
[243] In *Trustees for the time being of Oregon Trust v Beadica CC* 2019 (4) SA 517 (SCA) paras 41 and 44; and *Beadica* para 95.
[244] For example, in *Mohamed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd* 2018 (2) SA 314 (SCA), the court found that (at paras 28-30) 'the relative position of the parties was one of bargaining equality'. Thus, the court found that the mere fact that a term in a contract is unfair or may operate harshly does not, by itself, lead to the conclusion that Ubuntu must be invoked in favour of one of the parties. The SCA found that, given that there was no evidence of unequal bargaining power, or the chance for subordination; the landlord was free to enforce the cancellation clause. Ibid.
[245] 2015 (3) SA 215 (WCC).

be in breach of public policy (again, with Ubuntu being one of values encompassed by public policy).[246] In weighing out contractual autonomy and certainty versus the value of the law protecting vulnerable parties, the court found that Ubuntu tilted the argument in favour of protecting the borrower against the enforcement of an acceleration clause that resulted in overly severe consequences for the borrower.[247] While it may be said that the court could have found for the borrower without the use of Ubuntu,[248] it is important that the high court explicitly referenced Ubuntu as follows:

> 'the maxim of contractual doctrine that agreements seriously entered into should be enforced, and the value of *Ubuntu* which inspires much of our constitutional compact may tilt the argument in its favour'.

In this way, and under the public policy enquiry, Ubuntu pushed the court in the direction of fairness and proportionality rather than the legal certainty concerns that form part of the *pacta sunt servanda* principle.

The contract case law discussed above has been useful in establishing how Ubuntu can be called upon, in what circumstances, and to what effect. In recent times, case law dealing with a variety of other disputes has done the same.[249] There are four cases worth exploring given

---

[246] *Arun Holdings* para 42.

[247] The matter dealt with an acceleration clause in a loan agreement. It provided that where the borrower failed to pay the lender any amount when due together with mora interest (that is, interest as a result of the delay), then – upon demand – the lender would be entitled to recover all amounts owing under the agreement from the borrower. The borrower had faithfully paid the monthly amount for some time, but failed on one particular occasion due to a technical issue. The lender sent an email to the borrower informing it of this failure. The borrower paid the amount as soon as it was notified (the same day that it was notified), but failed to pay the mora interest, a mere R86.57 (+- 6 dollars). The lender argued that the borrower's failure to pay the mora interest triggered the acceleration clause, which entitled the lender to claim from the borrower payment of the full outstanding loan amount being R6.7 million. The court considered whether the enforcement of the acceleration clause in these circumstances was against public policy by engaging a proportionality enquiry looking at contractual autonomy versus public policy as influenced by Ubuntu. Because of the severe consequences the enforcement would have for the borrower, the court found in the borrower's favour. The court found that, despite *pacta sunt servanda* being a key principle in our law, it was still required to test the contents of the agreement against public policy. In turn, public policy had to be determined in the light of the values of the Constitution, one of them being Ubuntu.

[248] Du Plessis in Donlan & Mair *Comparative Law* 58 suggests that this is usually the response of 'traditionalists' who see no point to Ubuntu other than to 'legitimise' the common law. Du Plessis rejects this contention and suggests that it has the potential to influence and develop the law.

[249] For eg, in *Petropulos & another v Dias* 2020 (5) SA 63 (SCA) paras 21-22, the court decided not to adopt the English neighbour law principle of lateral support since it was deemed inimical to SA's constitutional context where it suggested, quoting *Makwanyane,* that 'the principle of lateral support must find expression in the constitutional value of Ubuntu, which "carries in it the ideas of humaneness, social justice and fairness". The English law principle of lateral support in all its rigidity may well be inimical to all these'. In the unusual circumstances of 2020, courts have noted that '[h]aving regard to the context in which the Lockdown Regulations have been imposed, it is important that the value and ideals of *Ubuntu* be considered'. Courts have used Ubuntu as one of the reasons for refusing applications for exceptions to the regulations restricting movement as it pertains to higher education, and religion. See for example, *Moela & another v Habib & another* [2020] ZAGPJHC 69 para 60, and *Mohamed & others v President of the Republic of South Africa & others* 2020 (5) SA 553 (GP) para

their attention to context. These cases concerned matters in the labour, family, and legal practice contexts respectively.

First, in *National Union of Metalworkers of South Africa obo Nganezi & others v Dunlop Mixing and Technical Services (Pty) Ltd & others* (*Numsa*)[250] the CC expressed the idea I have developed above, namely that it is only in specific contexts that Ubuntu is triggered:

> 'This Court's development of good faith and ubuntu in contractual relationships is intended to infuse good faith into unequal contractual relationships, or more equality into hierarchical relationships precisely where the hierarchy leads to the exertion of unfair power over the subordinated party. This is especially so in commercial contracts where the power of one party enables hierarchical exertions over the subordinated other.'[251]

Thus Ubuntu is not a concept for all seasons, and for all uses. In this same case, the CC implicitly condoned Yacoob J's obiter statements in *Everfresh* in the sense that the Court suggested that Ubuntu could not be utilised in *any* context and by *any* of the parties – there had to be power differentials, and/or subordination must be said to have existed. In this matter, an employee (a large tyre-making company) dismissed *all* its employees for committing acts of violence during a protected strike.[252] This was despite it being common cause that only certain employees had acted violently during the strike. The issue before the court was whether it was lawful for the employer to dismiss those employees who were not positively and individually identified as being present when violence was being committed.[253] When the matter reached the CC, counsel for the employer attempted to invoke Ubuntu in an unique manner. The company's counsel specifically argued that the dismissal of the non-identified employees was fair because Ubuntu required that, even if they had not been violent, those employees had a

---

75 respectively. It is worth repeating the latter court's comments in relation to refusing an exception for worship: 'In my view, in South Africa right now, every citizen is called upon to make sacrifices to their fundamental rights entrenched in the Constitution. They are called upon to do so in the name of "the greater good", the spirit of *"ubuntu"* and they are called upon to do so in ways that impact on their livelihoods, their way of life and their economic security and freedom. Every citizen of this country needs to play his/her part in stemming the tide of what can only be regarded as an insidious and relentless pandemic.'

[250] 2019 (5) SA 354 (CC).

[251] Ibid para 66.

[252] This is allowed in terms of s 67(5) of the Labour Relations Act 66 of 1995.

[253] The case was preceded by an arbitration where the arbitrator distinguished between three categories of employees: (a) those that were positively identified as committing violence; (b) those that were identified as present when violence took place but who did not physically participate; and (c) those employees who were not positively and individually identified as being present when violence was being committed. The arbitrator found in favour of the employer in respect of the first two categories, but not the third category – hence the appeal. The employer successfully took the award in respect of the third category of employees on review to the Labour Court where it was set aside. The union Numsa (on behalf of the employees) appealed to the Labour Appeal Court, but the appeal was dismissed by the majority in that court. See *Numsa* ibid para 5.

fiduciary duty to report their co-employees acts of violence to their employers. Their failure to do so constituted derivative misconduct that justified their dismissals. Essentially, counsel's argument was that Ubuntu's influence on an employment relationship meant that employees had an obligation to report violence during a protected strike to employers.[254]

The court found the argument unsustainable – especially counsel's attempt to use Ubuntu *against* the employees in a one-sided, unilateral fashion.[255] The court chastised counsel in suggesting that '[t]he whole point of the employment relationship is that it generally entails hierarchical relationships, subordinating workers in submission to lines of authority'.[256] The court went on to say:

> 'If the ubuntu analogy were appropriately applied here, it would be in relation not to the subordinated employee but to the employer. The analogy would therefore not do the work that [the employer] sought.'[257]

While the court did not discount the possibility that employees had a duty to disclose information in certain contexts, it held that the employer had to have contemplated some type of reciprocity (by, for example, ensuring safe disclosure of information as a prerequisite for the imposition of the obligation).[258] By dismissing counsel's argument, the court suggested that, in general, Ubuntu should be invoked only by a clearly subordinated party,[259] not by the 'subordinator' (ie the more powerful party). The CC did add a caveat. It said that there may be times when employers could constitute the subordinated party, but this instance was not one of them.[260]

The second case that considers context carefully is that of *South African Police Service v Solidarity obo Barnard.*[261] While Ubuntu only featured in the separate but concurring judgment

[254] Ibid para 66.
[255] Ibid paras 62, 67, 73 and 76.
[256] Ibid para 66.
[257] Ibid para 67.
[258] Ibid para 74: 'The duty to disclose must be accompanied by a reciprocal, concomitant duty on the part of the employer to protect the employee's individual rights, including the fair labour practice right to effective collective bargaining. In the context of a strike, an employer's reciprocal duty of good faith would require, at the very least, that employees' safety should be guaranteed before expecting them to come forward and disclose information or exonerate themselves. Circumstances would truly have to be exceptional for this reciprocal duty of good faith to be jettisoned in favour of only a unilateral duty on the employee to disclose information.'
[259] Ibid para 66.
[260] For example, the court noted at para 68 that there may be instances where there is reciprocity in promoting the employer's interests. One instance may be an obligation to disclose in order to save the shared enterprise for the enterprise's salvation. Thus, continued existence may be a shared interest of both the employer and the employee, despite the hierarchical ordering.
[261] 2014 (6) SA 123 (CC).

of Van der Westhuizen J, his use of Ubuntu in an equality challenge to tilt an argument (or not) is insightful. The case dealt squarely with the tension between the values of dignity and equality in the application of SA's affirmative action policies.[262] Renaté Barnard, a white woman in the police service, challenged the decision of the National Police Commissioner's decision not to appoint her to a higher rank, despite being identified as the preferred candidate by at least two interview panels. The Commissioner declined to appoint her on the basis that the panel had not paid sufficient attention to racial diversity. Ms Barnard claimed that this decision unfairly discriminated against her on the ground of race and thus contravened s 9 of the Constitution[263] and s 6 of the Employment Equity Act.[264] The matter went through the various courts, eventually reaching the CC on appeal. Here, the CC held that the alleged discrimination against Ms Barnard was justified. The court found this to be the case since the Commissioner's decision qualified as a restitutionary measure to further s 9(2) of the Constitution (the equality provision). The court found that such measure was further in line with the Employment Equity Act. In a separate concurring judgment, Van der Westhuizen J used a proportionality analysis to balance the competing interests in the case and to weigh up the importance of the affirmative action measures against the impact on individual rights. In finding the police commissioner's decision was justified, Van der Westhuizen J commented as follows:

> 'An atomistic approach to individuals, self-worth and identity is not appropriate. This Court has recognised that we are not islands unto ourselves. The individual, as the bearer of the right to dignity, should not be understood as an isolated and unencumbered being. Dignity contains individualistic as well as collective impulses. Its collectivist attributes, including that we are "social beings whose humanity is expressed through ... relationships with others", find resonance in the South African idea of *Ubuntu*, which foregrounds "interdependence of the members of a community".'[265]

Using Ubuntu, Van der Westhuizen J's point here appears to be that the law required that Barnard see her own well-being as dependent on the well-being of others.[266] Given the facts of the matter, this required Barnard to think of herself as part of the nation: 'a citizen amongst

[262] Fredman usefully defines affirmative action broadly 'as an express use of a protected characteristic (such as race, gender or disability) to distribute benefits, with the aim of advancing substantive equality'. See S Fredman 'Reimagining power relations: Hierarchies of disadvantage and affirmative action' 2017 *Acta Juridica* 124 at 126.
[263] According to s 9(2), '[e]quality 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.'
[264] Act 55 of 1998.
[265] *Barnard* para 174. Footnotes omitted.
[266] Vice 2015 *CCR* 159.

others with whom [she is] in mutual relations of dependency, trust and neighbourliness'.[267] In this way, Barnard had to view the situation from the standpoint of the 'Other'.[268] Vice suggests that in the context of the *Barnard* case, Ubuntu provides a way for litigants to 'acknowledge basic moral solidarity with the victims of apartheid'.[269] Approaching the matter in this way, while (white) litigants have reasonable concerns about their own well-being and aspirations in affirmative action challenges,[270] in Vice's words, they will have to 'make a sacrifice'. Van der Westhuizen alludes to this when he maintains that substantive equality measures 'can enhance the dignity of individuals, even those who may be adversely affected by them'[271] (as was the case for Barnard). As Vice notes, even when its rationale is appreciated and accepted, affirmative action may still amount to something of a sacrifice for each person. She suggests that 'this does not mean that [affirmative action] cannot be justified, only that such justification might be difficult to see if you do not already accept the goal'.[272] Van der Westhuizen J said as much when he commented that:

> '[Ms Barnard's] race was the determinative factor in the National Commissioner's decision not to promote her. Her attributes, experience and attitude were eclipsed by considerations of race. Her value as a human being in an employment environment was, to some extent, undermined.'[273]

Van der Westhuizen J's use of Ubuntu in this matter, and Vice's analysis of this use,[274] links to Cornell's vision that Ubuntu could enrich SA's jurisprudence by allowing us to cope better with the inevitable contradictions in the law. Cornell terms this the 'both-and' attitude. This

---

[267] Ibid.

[268] In this context, it appears that Ubuntu operates in much the same fashion as Bauman's ideas around reciprocity as ethical responsibility, that is, a need to view the situation from the standpoint of the Other. See Z Bauman *Postmodern Ethics* (1983) 13. Kupfer has commented that in the context of legal representation, this 'Other' may be the client or, at times, the opponent, a colleague or a third party. The responsibility toward the Other, she notes, translates into the type of reciprocity contemplate by Bauman. See SG Kupfer, 'Authentic Legal Practices' (1996) 10 *Georgetown Journal of Legal Ethics* 33 at 65. There are a number of cases using the word 'reciprocity' to explain Ubuntu, but it is only in *Numsa* and *Barnard* that the Court does not use the word in a list of adjectives without a specific explanation. For other cases, see *Makwanyane* para 262; *City of Johannesburg v Rand Properties (Pty) Ltd* 2007 1 SA 78 (W) para 63; and *Tshabalala-Msimang v Makhanya* 2008 (6) SA 102 (W) para 1. One exception to the 'list' approach, is in *Shibi v Sithole* 2005 (1) SA 580 (CC) where the Court canvassed the historical reciprocal obligations inherent in Ubuntu. See paras 163-4 & 188.

[269] Vice 2015 *CCR* 159.

[270] Ibid.

[271] *Barnard* para 175.

[272] Vice 2015 *CCR* 160.

[273] *Barnard* para 107.

[274] See also Du Plessis's analysis of the case which bears similarities to Vice's analysis, but where she focuses on a reading of dignity as autonomy and constraint in H du Plessis 'Human dignity in the common law of contract: Making sense of the *Barkhuizen, Bredenkamp* and *Botha* trilogy' 2019 *CCR* 1 at 22. She notes: 'It can be argued that the court is developing a constitutional value of human dignity to include a duty on the individual to assist in the creation of the necessary conditions for the realisation of human dignity of other community members.'

'both-and' descriptor is meant to describe the situation that arises when two opposing registers come into conflict that cannot (or should not) be brought to a coherent whole. Cornell uses two examples. First, she considers that one may simultaneously hold beliefs in both ancestor worship and the Constitution.[275] Secondly, she suggests that the 'both-and' aspect of Ubuntu allows us to better cope with the unsatisfactory status of, for example, socio-economic rights in SA which are simultaneously guaranteed and unrealisable due to economic constraints – another example of that which is both tragic and just.[276] In transposing Cornell's analysis to *Barnard* in respect of civil rights, the use of Ubuntu allows us to see the decision as both disappointing for the individual but 'just' for the community. In this way, the 'both-and' nature of Ubuntu allows us to better deal with the unsatisfactory status of inequality in South Africa.[277] It also allows us to understand that Ubuntu may be invoked and tilt an argument in favour of a vulnerable party in one context, and in another context, Ubuntu may not be invoked or may be outweighed by countervailing values or principles.

In the two cases above, the CC reiterated that context was important in deciding on whether Ubuntu should apply. Earlier, in *Mayelane v Ngwenyama*,[278] the CC reiterated this context-laden approach in a family law matter. The matter concerned the recognition of a second customary marriage, where the first wife had not been notified of such marriage. The court found that customary law (of which Ubuntu is a part) was 'one of the primary sources of law under the Constitution'.[279] According to the court, this means recognising the customary law route of seeking consensus in 'the prevention and resolution in family and clan meetings, of disputes and disagreements'. The court went further to say that 'these aspects provide a setting which contributes to the unity of family structures and the fostering of cooperation, a sense of responsibility and belonging in its members, as well as the nurturing of healthy communitarian traditions like ubuntu'.[280]

[275] Cornell 2004 *SAPL* 673.
[276] Cornell 2004 *SAPL* 674. She uses the case of *Soobramoney v Minister of Health, Kwa-Zulu Natal* 1998 1 SA 765 (CC) as her example of how both-and plays out. The case concerned Soobramoney's application for state-funded dialysis. The court rejected this application because of limited resources: he had too many additional complicating health problems to qualify for the transplant list; and dialysis was prioritised for patients awaiting transplants. Cornell finds the judgment both tragic and just suggesting that '[w]e can cope with the result only because Ubuntu allows both for the sacrifice of the individual for the greater good and for our society to be diminished by the loss of one of its members'.
[277] Cornell references the reality of economic constraints in SA vis-à-vis socio-economic rights. See Cornell 2004 *SAPL* 674.
[278] *Mayelane v Ngwenyama* 2013 (4) SA 415 (CC).
[279] Ibid para 24.
[280] Ibid.

Ironically, using Ubuntu in the *Mayelane* case meant developing the actual customary practice from simply notifying the first wife, to requiring her consent.[281] Thus, customary law was the source of the problem and its solution, again reminding us of Cornell's characterisation of Ubuntu as entailing a 'both-and' attitude, where two opposing registers have to weighed and decided upon depending on context.

Finally, in the only decision where the court has invoked Ubuntu vis-à-vis lawyer conduct, the SCA suspended an attorney from practice after suggesting that the attorney had failed to observe Ubuntu.[282] In this case (*Law Society of the Northern Provinces v Mogami*)[283] the relevant provincial law society sought to remove two attorneys from the roll. The matter concerned various instances where the attorneys had allegedly failed to account to their clients, to respond to correspondence, and to hold a valid fidelity fund certificate – a requirement for practice in South Africa.[284] One of the many complaints against one of the attorneys related to the failure to correspond with clients and, apparently, relevant third parties. The complainant's minor niece was involved in a motor vehicle accident and the mother instructed Mogami's firm to handle her claim against the Road Accident Fund (RAF).[285] The mother died and the complainant took her sister's children under her care. The RAF paid the claim and the attorney duly paid the money into the Guardian's Fund.[286] However, when the complainant attempted to ascertain the status of the matter, the attorney 'did not deign to inform her'. .[287] The court held as follows:

[281] For a critical analysis of this case, see H Kruuse & J Sloth-Nielsen 'Sailing between Scylla and Charybdis: *Mayelane v Ngwenyama*' (2014) 17 *PELJ* 1710.
[282] It appears that there is also only one case each dealing with a judge's and an arbitrator's lack of Ubuntu in carrying out their work. In *Pharmaceutical Society of South Africa v Tshabala-Msimang NNO, New Clicks South Africa (Pty) Ltd v Minister of Health* 2005 (3) SA 238 (SCA) the court suggested that the lower court's undue delay in giving judgment on a leave to appeal judgment was contrary to 'the spirit of ubuntu' (para 39). In *National Union of Metalworkers of SA v Wainwright NO* (2015) 36 ILJ 2097 (LC) the Labour Court reviewed the actions of an arbitrator and found that the arbitrator had ignored the overriding principles of fairness and social justice, which in the SA context could be summed up as Ubuntu (paras 41-43).
[283] [2009] ZASCA 107.
[284] In terms of s 41(1) and 83(10) of the Attorney's Act 53 of 1979 (now replaced by chap 7 of the Legal Practice Act 28 of 2014), the failure to hold a valid fidelity fund certificate is a criminal offence. See for example, *Law Society of the Northern Provinces v Mamatho* 2003 (6) SA 467 (SCA).
[285] The Road Accident Fund (RAF) was set up by the Road Accident Fund Act 56 of 1996. It is a statutory fund that provides compulsory insurance to all users of South African roads against injuries sustained or deaths arising from accidents involving motor vehicles.
[286] The Guardian's Fund is a statutory fund set up to receive and manage money on behalf of persons who are legally incapable or do not have the capacity to manage their own affairs. This includes minors, unborn heirs, and missing or absent persons.
[287] *Mogami* para 22.

> '[Mogami] has many justifications [as to why he did not respond] and although on his version he may not have breached any written rule of ethics *I believe that the application of the basic principles of ubuntu placed an ethical duty on him to respond to her queries*.'[288]

While this is the only reference to Ubuntu in the judgment, it is significant that the SCA appears to accept that (1) the written rules are not constitutive of the ethical obligations of legal practitioners; and (2) that principles in the law – Ubuntu in this case – are capable of imposing duties on practitioners in particular circumstances. It was common cause that the attorney did not *technically* breach the written and common-law rule of keeping the *client* informed since the complainant was not officially the guardian of the child, and therefore could be seen as a 'third party'. However, the court suggested that the attorney could not hide behind technical compliance, and suggested that Ubuntu required that the attorney be responsible for a substantive outcome: one which recognised the family's interest and concern while the appointment of a guardian was under way.[289]

## 5.5 REFLECTIONS ON THE COURTS' TREATMENT AND USE OF UBUNTU

From the variety of cases discussed above, it is clear that the potential exists for Ubuntu to influence the application and development of law generally, and in relation to the legal practitioner/client relationship in particular. However, this brief case survey shows that where courts have used Ubuntu, they have not used it as independent rule, but rather as an underlying principle or value that finds expression through the existing doctrines and rules of SA's legal system,[290] or so that it can tilt an equality challenge or dispute in the favour of a less powerful party.[291] This application makes sense given the nature of Ubuntu as discussed in this chapter.

It also accords with established case law as to how principles and values in general are (or should be) employed by the courts.[292] It also confirms my characterisation of Ubuntu as a principle in the Dworkinian sense. Given the new constitutional dispensation, its use by courts

---

[288] Ibid.
[289] The decision does not set out this amount of detail, but this is clear from the affidavits submitted to the court. I corresponded with researchers at the SCA on 2 January 2020 who provided me with the court file contents. Correspondence on file with author.
[290] Du Plessis makes this point in relation to contract law in particular. See Du Plessis 2019 *PELJ* 5.
[291] As in *Barnard*, *Numsa* and *Mogami.*
[292] See for example, the comments in *South African Forestry Co Ltd v York Timbers Ltd* [2004] 4 All SA 168 (SCA) para 27 where the court noted that, '[a]lthough abstract values such as good faith, reasonableness and fairness are fundamental to our law of contract, they do not constitute independent substantive rules that courts can employ to intervene in contractual relationships. These abstract values perform creative, informative and controlling functions through established rules of the law of contract. They cannot be acted upon by the courts directly'.

to deal with the changing environment seems appropriate.[293] It also follows in the tradition of legal systems adapting to changing conditions, even if slowly and reluctantly at times.[294] In relation to contract law in particular, Du Plessis notes that Ubuntu's role could be to focus the courts' attention 'in a variety of new contexts … on whether enforcement would undermine the value of displaying sufficient concern or respect for the other party'.[295] This idea has the potential to be transplanted into the lawyer's role. But questions remain. If Ubuntu requires lawyers to display concern and respect to other parties, does this concern and respect extend only to the parties to the dispute (viz opponents in litigation and other parties in a transaction), or is it possible to extend this concern and respect to third parties and/or those affected by the litigation and/or transaction? These questions are discussed in the next chapter.

Further, does Ubuntu require lawyers to display concern and respect to parties in *all* contexts, or only in particular contexts? Certainly, the CC and the SCA have been consistent in their views that Ubuntu will not be invoked where there is no evidence for its need. This is particularly true in the contract cases, but not exclusively so. It will be recalled that, in many of the contract cases, the courts bemoaned the lack of evidence of, for example, unequal power relations and/or the potential for subordination of one party. In these cases the courts expressed a willingness to invoke Ubuntu to ameliorate the harsh consequences of a contractual clause, but could not do so in the circumstances of the cases put before them. In general, inequality and power differentials have been present where Ubuntu has been invoked. In *PE Municipality*, the court placed special emphasis on the weaker position of the unlawful occupiers in the legal system,[296] and their poverty and homelessness vis-à-vis the landowners.[297] In *Mogami*, the court's characterisation of the attorney's action in that matter: 'Mogami did not *deign* to inform

[293] For a fascinating comparison between the development of the Roman law of contract and the emerging role of Ubuntu in the SA common law of contract, see Du Plessis 2019 *PELJ* 2.
[294] See in general, J Morison 'How to change things with rules' in S Livingstone and J Morison (eds) *Law, Society and Change* (1990) 5. Morison notes (at 19) that '[w]here law seeks to change society, rather than merely uphold it, it must also act by and through ideology'. See also SLR Anleu *Law and Social Change* (2000) commenting on the challenges inherent in using litigation for social change. For example, she notes (at 123): 'Legal rights claims can be both a resource and a constraint for collective efforts to transform or reconstitute social relationships'.
[295] Du Plessis in Donlan & Mair *Comparative Law* 58.
[296] *PE Municipality* para 38: 'The inherited injustices at the macro level will inevitably make it difficult for the courts to ensure immediate present-day equity at the micro level. The judiciary cannot of itself correct all the systemic unfairness to be found in our society. Yet it can at least soften and minimise the degree of injustice and inequity which the eviction of the weaker parties in conditions of inequality of necessity entails.'
[297] Ibid para 31. It is interesting to note that courts in eviction cases have considered whether unlawful occupiers are indeed the weaker party, or merely opportunistic in an effort to 'jump the queue' on housing lists. See in general, AJ van der Walt, 'The state's duty to protect property owners v the state's duty to provide housing: thoughts on the *Modderklip* case' (2005) 21 *SAJHR* 144. See also UM Assim & AD Kabagambe '"Jumping the queue", waiting lists and other myths: perceptions and practice around housing demand and allocation in South Africa' (2014) 15 *ESR Review* 13.

her'[298] vis-à-vis the minor's guardian, implied that certain power dynamics were at play, particularly the failure to acknowledge the guardian's concern and care for the minor. The court also found that, in addition to this condescending attitude, the attorney engaged in dishonest tactics.[299] In *Numsa* the court went so far as to find that the invocation of Ubuntu by the party who holds the power in a particular relationship is inappropriate. It also found that Ubuntu cannot be invoked to require unilateral action by one party – the concept requires reciprocity.

These case examples show that there is an important qualification to the use of Ubuntu for our purposes: it is not a rule for application in every context. Rather, it is a principle or value that informs settled concepts in our law. Where appropriate, Ubuntu as a value may 'tilt' an argument in favour of a particular finding for a subordinated party. But this is only if the context requires for this to happen (as in the *Arun* matter discussed above). To date, some divisions of the High Court have been willing to accept the say-so of litigants as to unequal power relations, and/or subordination in order to invoke Ubuntu.[300] However, the CC and the SCA have required evidence to be put forward of the existence of an 'Ubuntu-invoking' context. For example, in the *Beadica* matter, the CC found that it was not enough to state that the contract involved an 'empowerment' context.[301] This, on its own, was insufficient.[302] However, in other cases, implicating constitutional rights, a different approach is called for, one that requires being informed by the concept of Ubuntu.

## 5.6 CONCLUSION: UBUNTU AND ITS POTENTIAL USING SIMON'S ETHICAL DISCRETIONARY APPROACH

In the sections set out above, I have attempted to traverse the major debates about the definition of Ubuntu, its use by the courts, and the effect it has had. I have considered the actual content of Ubuntu, and found some similarities with communitarian thinking generally. I found that some of the criticism against its use had some traction, but that whatever negatives to its use

[298] *Mogami* para 22. My emphasis.
[299] Ibid para 26. The court noted as follows: 'Very serious, however, is the respondents' dishonest conduct of the proceedings. Instead of dealing with the issues they launched an unbridled attack on the appellant. It has become a common occurrence for persons accused of a wrongdoing, instead of confronting the allegation, to accuse the accuser and seek to break down the institution involved.'
[300] *Mohamed's Leisure Holdings v Southern Sun Hotel Interests (Pty) Ltd* 2017 (4) SA 243 (GJ) (overturned on appeal to the SCA); and *Beadica 231 CC & others v Trustees for the time being of the Oregon Trust (IT 728/1995) & others* 2018 (1) SA 549 (WCC) (overturned on appeal to the SCA and CC).
[301] Cf the minority judgments of Froneman J at paras 105- 203 and Victor AJ at paras 204-232 where both found that it was enough that the lessees were unsophisticated to invoke Ubuntu and find that the renewal clause on time limits should not be enforced (see paras 196-202 and 225-26 respectively).
[302] *Beadica CC* paras 93-99.

(for example, potential abuse, vagueness and openness) could be resolved by approaches (such as those of Metz, Cornell and Mokgoro) that seek to construct its best possible use and meaning in contemporary SA from its characteristic elements.

Two particular features of Ubuntu require emphasis at this point. The first is the 'individual-embedded-in-community' idea. The second construction is one that Cornell suggests: viz the 'both-and' attitude that is particularly useful in dealing with law's inevitable contradictions. In terms of the former idea, this construction differentiates Ubuntu from a pure communitarian approach. Instead of the individual being subsumed by community needs, Ubuntu still recognises the individual, not because of her inherent right 'to be free', but because of her capacity to commune. In terms of the latter idea, the both-and attitude holds great promise when considering the tension between duties to client, to the court and to the legal system in representation. This will be elaborated on in the next chapter.

While some scholars have criticised Ubuntu an 'open norm' which must, of right, lead to uncertainty, I found that this conclusion is not a necessarily sound one. This is because of the reality that many of our common law concepts are 'open norms', and also because of the way Ubuntu has been used by the courts. Ubuntu has not been used as a rule, but rather as a principle influencing established rules and concepts. This use is premised on the right context being present. The higher courts have only tended to call on Ubuntu where the context of unequal power relations and/or the potential for subordination exists. And then, Ubuntu is only operationalised when the values it encompasses are weighed against other important principles in the law. This balancing exercise does not assume a specific outcome, but requires courts (and as is clear from my argument now, legal practitioners as well) to refrain from generalised application and to exercise discretion.

The power of this last conclusion is that it appears to align closely with how Simon wants lawyers to approach their representation. Simon (as well as many other critical theorists) has consistently argued that lawyers cannot act categorically, but must act according to context.[303] The courts' reluctance to call on Ubuntu in certain contexts further aligns with some of the criteria that Simon sets out for lawyers to consider in deciding how they represent their clients (and even *if* to represent a client).[304] This is especially true when he asks lawyers to consider the extent to which their representation would contribute to the equalisation of access to the

[303] RW Gordon 'The radical conservatism of *The Practice of Justice*' (1999) 51 *Stanford Law Review* 919 at 924.
[304] WH Simon 'Ethical discretion in lawyering' (1987-1988) 101 *Harvard Law Review* 1083 at 1093.

legal system.[305] Simon's other requirements also bear reference. He asks that lawyers consider the extent to which the claims and goals are grounded in the law, and the importance of the interests involved. These requirements, like those considered by courts in whether to apply Ubuntu, are context-driven and discretionary.

In the light of Simon's criteria then, it appears that the whole debate about 'too much pacta and not enough ubuntu'[306] in contract law in particular deals exactly with questions raised in the lawyering context as to what legal practitioners should do or not do, and most importantly, why.

The lesson to be learnt, in line with Simon's approach, is that one cannot act categorically to assume responsibility for 'fair' outcomes. It requires judgement (and evidence) by legal practitioners as to when Ubuntu is appropriately invoked. The following chapter's purpose then is to assess how a Simon-type discretionary approach can be developed for particular scenarios that arise in legal practice, and to consider whether invoking Ubuntu in appropriate contexts may improve how lawyers 'lawyer' in SA.

[305] Ibid 1093.
[306] Davis & Klare 2010 *SAJHR* 479.

# CHAPTER 6: APPLYING UBUNTU IN THE LAWYERING CONTEXT

> 'A truly independent lawyer is a caring human being first, a courageous democrat second, and a lawyer only third. An independent lawyer cannot therefore be concerned with lawyering alone. Ideally, we should all participate in the life of the community, act in every possible way against injustice, oppression, exploitation and government abuse as well as support community efforts aimed at improving the lives of all human beings.'[307]

## 6.1 INTRODUCTION

The previous chapter canvassed the meaning and application of Ubuntu by the courts in a variety of disputes (mostly contractual, but not exclusively so). In this context, I found that the courts have used Ubuntu as a principle rather than a rule, and they have used it in substantive ways by requiring parties to assume responsibility for fair outcomes when the context requires.

This chapter turns to whether lawyers can use Ubuntu in their work in a way that is similar to how the courts have used it in their adjudicative role. This approach aligns with how Simon takes Dworkin's commentary on adjudication and draws it into the lawyering domain.[308] With the insights gained from the previous chapter, this chapter seeks to identify certain factors that SA legal practitioners ought to take into account when exercising their discretion in the resolution of ethical dilemmas. While I have identified that Ubuntu – as a value within a transformative constitutional framework – provides a justification for an adjusted role for the legal practitioner in South Africa, this chapter seeks to unpack what this actually means in terms of the factors a legal practitioner must take into account. The value of the previous chapter for legal practitioners is to recognise that Ubuntu-style reasoning is not just explicit, but is implicit in some judgments and thus can be built upon by legal practitioners.

However, as was discovered in the previous chapter, while Ubuntu is an important value underpinning South Africa's particular legal system, it has to be balanced against other important values in specific contexts when legal practitioners attempt to resolve ethical

---

[307] Former Deputy Chief Justice Zac Yacoob, Keynote address at the SADC Lawyers' Association regional solidarity webinar on independence of the legal profession on 7 October 2020, available at https://www.dailymaverick.co.za/article/2020-10-11-a-truly-independent-lawyer-is-a-caring-human-being-first-a-courageous-democrat-second-and-a-lawyer-only-third/.

[308] Other legal ethics scholars have also adopted this type of analogous reasoning/transplanting of role. For example, Wendel has recently relied on Hart and Fuller's insights about the nature of law to deduce answers to more practical questions concerning the duties of lawyers advising clients. See WB Wendel 'The rule of law and legal-process reasons in attorney advising' (2019) 97 *Boston Law Review* 107. See also Nicolson & Webb's use of Bauman to develop their contextual lawyering approach (see in particular, D Nicolson and J Webb *Professional Legal Ethics: Critical Interrogations* (1999) 44, 49 and 117).

issues.[309] I will argue that the idea inherent in the inclusion of Ubuntu in the lawyering domain is that legal practitioners should be lawyering for justice understood as autonomy-in-relation, *not* as autonomy for client only. This accords with the more nuanced understanding of South Africa's constitutional values as requiring more than a liberal-individualist view of human beings, as discussed in chapter 3.[310] Such an approach recognises that relationships (or people's capacity for them) have fundamental value[311] and that where enhancing a client's freedom affects relationships in the community negatively, then legal practitioners should have good reasons to act despite this potential impairment.

It seems fitting that Gandhi, contemplating his time as a legal practitioner in South Africa, stated that the 'true practice of law' and the 'true function of the lawyer was to unite parties riven asunder'.[312] In this sense, Mokgoro (writing extracurially) notes that Ubuntu may shape the way that we see the law and litigation. Thus she notes:

> 'The original conception of law [in African customs and traditions] was perceived not as a tool for personal defence against an adversary, but as an opportunity given to all to survive under the protection of the order of the communal entity'.[313]

Thus, instead of seeing litigation as adversarial in nature which 'emphasises retribution and seems oppressive',[314] she notes that Ubuntu emphasises 'the conciliatory character of the adjudication process'. Its aim then is not to 'win' but to 'restore peace and harmony between members'.[315] In essence, then, she sees that group solidarity is important in that 'it requires restoration of peace between parties, rather than an all-out victor and an all-out loser.'[316]

However, and contrary to the views of those critical of Ubuntu and the notion of open norms,[317] I will argue that this does not mean a deviation from the essential role of the legal practitioner as the champion of her client's cause,[318] or a disaster for commerce and the economy.[319] As

[309] See chapters 4 & 5.
[310] See in particular section 3.4.3.1 of chapter 3.
[311] N Hoffmann and T Metz 'What can the capabilities approach learn from an Ubuntu ethic? A relational approach to development theory' (2017) 97 *World Development* 153.
[312] MK Gandhi (transl M Desai) *An Autobiography: The Story of my Experiments with Truth* (1957) 134 quoted in Van Niekerk.
[313] Y Mokgoro 'Ubuntu and the law in South Africa' (1998) 1 *PELJ* 1 at 8.
[314] Ibid 8-9.
[315] Ibid.
[316] Ibid.
[317] See 5.3.1.
[318] See 5.3.2.
[319] See 5.3.3.

will be set out in chapter 7, legal practitioners are still duty-bound to the requirements of the contractual relationship between legal practitioner and client, and there are important reasons for this to continue. Instead, the role argued for in this thesis simply means that legal practitioners must be more reflective of how their conduct may further or impede justice in context, and to act on that reflection.[320] Metz, for example, describes how Ubuntu does not preclude 'disavowal of prior discord'.[321] Even though he is discussing Ubuntu specifically in the context of a criminal trial and sentencing, there is no reason why a legal practitioner cannot adopt a zealous approach to representation in matters where an opposing party has superior power or/and has created discord that needs to be disavowed.[322] The point is that the legal practitioner must actively *chose* that method of representation and be able to justify it in the light of Ubuntu and other constitutional values.

In the context of power imbalances in particular, Carle has usefully called the exercise of discretion the 'calibration of ethics to context'.[323] This 'calibration' suggests that where matters involve obvious and substantial power imbalances in disputes, legal practitioners who represent less powerful interests may pursue a zealous and neutral partisan approach, whereas legal practitioners for powerful clients may need to temper their representations, given the need to consider the interests of the less powerful.[324] For those sceptics who doubt legal practitioners' abilities to exercise discretion in these contexts, Simon suggests that '[o]nce it is conceded that judges have the capacity for meaningful discretionary judgment, is it plausible to deny that lawyers have it?'[325] I agree (subject to my views in chapter 8 on the need for legal education

[320] Wasserman suggests that lawyers' 'piety' for the adversary system allows them to take an instrumental view of the law. See D Wasserman 'Should a good lawyer do the right thing? David Luban on the morality of adversary representation' (1990) 49 *Maryland Law Review* 392 at 392. On a dictionary definition of piety, being 'a belief which is accepted with unthinking conventional reverence', this description is apt and should be rejected in favour of legal practitioners taking active responsibility for their decision-making. See https://www.google.com/search?q=piety&rlz=1C1GCEB_enZA860ZA860&oq=piety&aqs=chrome..69i57j46i199i291i433j0i131i433j46i131i433j0j69i60l3.1621j1j7&sourceid=chrome&ie=UTF-8.

[321] See T Metz 'Reconciliation as the aim of a criminal trial: *Ubuntu's* implications for sentencing' (2019) 9 *CCR* 113 at 122.

[322] Ibid.

[323] S Carle 'Power as a factor in lawyers' ethical deliberation' (2006) 35 *Hofstra Law Review* 115 at 117.

[324] Luban has categorised these contexts as 'criminal defence paradigms' and 'civil suit paradigms' respectively. See D Luban *Lawyers and Justice: An Ethical Study* (1988) 63. In the criminal defence paradigm, the idea is that individuals are pitted against powerful institutions (in other words, the state against the individual). However, the criminal defence paradigm may apply in civil contexts where there is equally an individual or entity pitted against a powerful institution (a large company, a state owned enterprise etc). The civil suit paradigm is one where it is assumed that the parties are evenly matched – but this is not necessarily the case.

[325] Simon 1988 *Harvard Law Review* 1122. See also, more recently, WH Simon 'Attorney-client confidentiality: A critical analysis' (2017) 30 *Georgetown Journal of Legal Ethics* 447 at 458 where he suggests: 'Lawyers should not be heard with much sympathy when they resist duties defined in ways that call for complex judgment. The capacity for complex judgment is one of the defining features of professional expertise. Lawyers typically market themselves to prospective clients as able to deal with uncertain situations.'

to develop ethical judgement). In addition, I believe that the type of balancing exercises that have become commonplace in South Africa's constitutional democracy place South African lawyers in a particularly good position to balance values and exercise discretion. Whether it is a s 36 constitutional limitation enquiry, a wrongfulness enquiry in delict, rationality in administrative law, or a public policy determination in contract law, South African lawyers are accustomed to, and are comfortable with, the type of balancing exercises that, for example, UK lawyers may find more challenging.[326]

In what follows, then, I look at contexts where Ubuntu could play a substantial role in the way legal practitioners conduct themselves. Essentially, the chapter shows that Ubuntu requires that legal practitioners cannot hide behind the principle of neutrality, but have to take responsibility and exercise discretion as to when and how to act. The idea that legal practitioners have to debate when and how they should act for clients means that it is much more likely that they will develop a real commitment to the type of constitutional values at play in representation.[327]

I also hope to show that the exercise of such discretion is likely to result in a more nuanced approach to information control (particularly around confidentiality duties) and also stronger discretion in decisions around conduct, particularly on strategy and substance.[328] As with some of the alternative approaches discussed in chapter 4, when and how these duties arise are dependent on context.

I shall also attempt to describe this approach in further detail, and give examples of how and when Ubuntu could influence a lawyer's approach in a matter: both from case examples of what *not* to do and from hypotheticals as to how the approach might work. These examples cover strategies and tactics used by legal practitioners for arguably improper purposes. It covers the issue of confidentiality, as well as various other circumstances where legal practitioners may refuse to act for clients. Importantly, my coverage includes those decisions that are taken

[326] Zeffertt and Paizes *The SA Law of Evidence* 646 suggest that South African courts (and by extension, SA legal practitioners) are accustomed to – and entirely comfortable with – the kind of balancing exercise that the English courts find so daunting. In fact, in *NDPP v Mahomed* 2008 (1) SACR 309 (SCA), the SCA suggested at para 32 that an intrusion upon the right protected by the privilege would be allowed only if the loss caused by the intrusion was outweighed by the benefit that would accrue by allowing it.

[327] Nicolson & Webb make this point in relation to their contextual approach albeit not in the context of constitutional values (see Nicolson & Webb *Professional Ethics* 216).

[328] The consideration of Ubuntu in exercising discretion is also a valuable tool for ethical education, an issue I take up in 8.3.

prior to a formal lawyer-client relationship (for example, in the decision to represent). In these matters, I argue that the context tips the scales in favour of a particular value.

In the final part of this chapter,[329] I deal with two particular contexts that are paradigmatic instances of where Ubuntu can meaningfully address situations where power relations are typically abused. These contexts are in the resolution of family disputes, and transactional and litigation work around Broad-Based Black Economic Empowerment initiatives in South Africa. While these contexts are paradigmatic, I do not presume that Ubuntu will *always* count as the prevailing value in representation, as was seen in the *Beadica* case discussed in chapter 5.[330]

## 6.2 A SOLID FOUNDATION FOR ETHICAL DELIBERATION

As I have argued thus far, Simon's approach of relying on values within the law is a particularly compelling foundation for legal practitioners to use in resolving ethical dilemmas in South Africa. This is because of the nature of South Africa's constitutional democracy as discussed in chapter 3, with its inclusion of the custom of Ubuntu, as discussed in chapter 5. However, how this plays out in everyday decision-making by legal practitioners (when they are faced with ethical dilemmas) still needs to be worked out.

I set out this decision-making process out in the particular contextual scenarios that follow, highlighting factors that need to be considered in particular contexts, particularly related to (1) taking on representation, (2) continuing representation in the manner instructed; or (3) refusing to act in a manner ostensibly allowed by the letter of the law, but which is manifestly unjust. These factors (which I will call outward-looking factors) really encapsulate the type of thinking that Ubuntu promotes, but does not determine such the outcomes of such thinking. In the contexts that follow, it is clear that legal practitioners need to consider:

1) the power imbalances between the parties to the dispute, and – at times – in the community concerned;

2) the setting in which the matter is to be resolved;

3) the competence and capacity of the institution resolving the matter; and

4) the strength of legal practitioner's objection versus the strength of the client's interest.

[329] See 6.4.1.
[330] See 5.4.2.

As chapter 5 indicates, the clearest (but not the only) factor to emerge from an Ubuntu enquiry is that of power imbalances. The legal practitioner must then, as a point of departure, ask whether there are power imbalance and chances for oppression in context: the enquiry may extend its reach beyond just the opposition, and may extend to third parties or the community at large.[331] This consideration draws directly from the courts' use of Ubuntu in the adjudication setting, and is described in more detail below. As will be seen in the examples, this consideration does not mean that legal practitioners have to suddenly 'lawyer for the other side' to the detriment of their clients. It simply means that where power balances are unequal, legal practitioners may have to bear more responsibility for substantive outcomes, and cannot resort to 'on the boundary' tactics and strategies that seek to take undue advantage of that power imbalance.[332] What is immediately clear though is that –the Ubuntu-based approach runs contrary to the classic neutral partisanship approach – even if only in certain circumstances. This is because those adhering to neutral partisanship see the lawyer's role as focusing on enhancing the autonomy of the client by 'doing everything under the sun on their clients' behalf, no matter how ruthless, so long as the law permits it'.[333]

The second factor mentioned (that of setting) highlights the fact that the Ubuntu-based approach does not rely on the 'officer of the court' model that courts often use to describe lawyers' duties across jurisdictions. While this model is important for administration-of-justice concerns, it leaves out the many contexts where legal practitioners face ethical dilemmas outside of litigation.[334] For example, no court exists where legal practitioners are asked to assist

[331] The consideration (that a legal practitioner determines the level of the playing field before deciding how to act) may originate in how courts have found Ubuntu to influence adjudication, but is also in Simon's approach as a factor that may influence the ethical decision-making. So, for example, Simon requires legal practitioners to ask themselves the following question when taking on a case: Is this an appropriate distribution of my limited ability to help those needing assistance? This question may overlap with the question of power imbalances but not necessarily so. See Simon 1988 *Harvard Law Review* 1083 and 1090.

[332] At first glance, it appears that the idea of 'undue advantage' bears some similarities to Wendel's approach discussed in chapter 4 (particularly in his account of how clients' entitlements are different from clients' interests – see at 4.3). However, this is where the similarity ends given that Wendel does not require a legal practitioner to exercise discretion given his ideas around law as nothing more than social ordering and its liberal foundations.

[333] D Luban 'Fiduciary legal ethics, zeal and moral activism' (2020) 33 *Georgetown Journal of Legal Ethics* 275 at 279. Luban tells the following story which illustrates this point (at 279): 'A partner in a major litigation firm once explained to me that the first thing she does when defending a law suit is file a counter-claim – a warning shot letting the other side know they are now in a war. I asked: doesn't there have to be a non-frivolous basis for the counter-claim? She smiled at my naiveté. In her world there is always enough ammo for a counter-claim-that is why they are a major litigation firm'. See also WH Simon 'The ideology of advocacy: procedural justice and professional ethics' (1978) 36-7 *Wisconsin Law Review* 29 at 36. Simon ascribes this to the principle of partisanship which, he argues, justifies deception, obfuscation, or delay by a legal practitioner, where it promotes his/her client's ends.

[334] While SA's common-law and the current code is clear that legal practitioners should act honestly and with candour, the requirement does not appear to extend to parties other than the Court and other legal practitioners, and it certainly does not appear to extend to these parties outside of the litigation context. For example, see the

their clients to take advantage of scrivener's errors, to assist them to evade contractual obligations, draft contracts that legal practitioners know to be against public policy,[335] or to assist clients to make cost-benefit assessments as to whether committing an intentional delict would be worth the risk for profit margins.[336]

The benefit of the discretionary approach advocated here is that whether legal practitioners are engaged in litigation, negotiation or facilitating client's affairs, they may need to take on responsibility for substantive outcomes even where there is no duty to a court. This accords with how scholars have perceived Ubuntu's influence in contract law, albeit between the contracting parties themselves: Hawthorne has seen Ubuntu as a promoting 'a duty to co-operate' in contract law,[337] and Louw sees Ubuntu as requiring the parties to be mutually respectful.[338] However, as Hutchison points out, any duty to take responsibility for substantive outcomes will be context dependent and will not automatically apply in every context. This is because 'the specific business dealings of the immediate parties and their context should be used to define the notional community whose standards must be determinative'.[339]

The failure to take responsibility for substantive outcomes where power balances are unequal may arise in myriad contexts. Common contexts discussed here are first, where court rules are used to delay, frustrate or otherwise 'outlitigate' the opponent; and secondly where legal practitioners control information particularly in the form of attorney-client privilege. In both contexts, I do not rely on the duty to court given its limitations as set out above. While abuse of court process and attorney-client privilege are typically litigation contexts, they are just common examples of situations where legal practitioners are prepared to use questionable tactics and strategies. They are good examples of situations where legal practitioners may not even dispute that they are using the rules in ways that undermine their purpose, but argue that

---

Code of Conduct, para 3.1: Legal practitioners, candidate attorneys and juristic entities shall maintain the highest standards of honesty and integrity. See also *Kekana v Society of Advocates of South Africa* 1998 (4) SA 649 (SCA) at 656A; *Vassen v Law Society of the Cape of Good Hope* 1998 (4) SA 532 (SCA) at 538G and *Hayes v The Bar Council* 1981 (3) SA 1070 (ZAD) at 1081H-1082D.

[335] Wendel provides an excellent discussion of this type of situation, using Dare's example of a client wanting a legal practitioner to include a restraint of trade clauses in employees' contracts of the client that are purposefully overbroad. See WB Wendel *Ethics and Law: An Introduction* (2014) 200.

[336] For example, the Ford Pinto case and the Dalkon Shields litigation. For a further wide variety of negotiation and facilitation work that gives rise to a wide variety of ethical dilemmas, see Nicolson & Webb 230.

[337] L Hawthorne 'Justice Albie Sachs's contribution to the law of contract: Recognition of relational contract theory' 2010 *SAPL* 80 at 90.

[338] AM Louw 'Yet another call for a greater role for good faith in the South African law of contract: Can we banish the law of the jungle, while avoiding the elephant in the room?' (2013) 16 *PELJ* 44 at 66.

[339] A Hutchison 'Good faith in contract: A uniquely South African perspective' (2019) 1 *The Journal of Commonwealth Law* 1.

– on a literal reading of the rules – their tactics are allowed, and compliance with literal terms is all that the law requires.[340] This type of thinking is very much in line with a formalist vision of lawyering; one that holds that only the letter of the law, not the spirit, is binding.[341] As discussed in earlier chapters, legal practitioners will resort to tactics calculated to take advantage of an opponent without qualms, often where resources are at issue.

As will become clearer in the examples and hypotheticals as follow, the power imbalance question and the setting of the dispute are only points of departure. From there, two other factors emerge as fundamental in the SA context. These factors are important given SA's history and context as emerging from a 'wicked' legal system to one dedicated to a transformative imperative.[342] These factors include a consideration of the institutional competence of the adjudicative or oversight body involved, and, finally, a consideration of the strength of legal practitioner's objection versus the strength of the client's interest (translated into constitutional values). These factors emerge not only through insight into the use of Ubuntu in an adjudication setting, but also when considering the overall context of the SA legal system.

## 6.3 ABUSE OF COURT PROCESS AND 'ULTERIOR MOTIVE' TACTICS

The current code provisions[343] in SA are similar to those in other democratic jurisdictions: they require that SA legal practitioners should not 'abuse or permit abuse of the process of court or tribunal and shall act in a manner that shall promote and advance efficacy of the legal process'.[344] Further, legal practitioners should not 'deliberately protract the duration of a case before a court or tribunal'.[345] However, case law and anecdotal evidence suggests the legal practitioners in SA will readily use court process to delay and obfuscate where they ascertain this to be in their clients' interests, for example, by playing for time or draining their opponent's financial resources, making it difficult for the opponent to continue the litigation and in other

[340] WH Simon 'After confidentiality: Rethinking the professional responsibilities of the business lawyer' (2006) 75 *Fordham Law Review* 1453 at 1454.
[341] Ibid.
[342] See the discussion of context of the history and context of SA's legal system in chapter 2, particularly at 2.6.
[343] Code of conduct for all legal practitioners, candidate legal practitioners and juristic entities, published in terms of s 36(1) of the Legal Practice Act 28 of 2014 GN 42337, 29 March 2019. For a discussion of the genesis of this code, see 2.6.
[344] Code provision 60.1. The code provisions basically codifies the common law position where the High Court has an inherent power to prevent abuse of its process by frivolous or vexatious proceedings (see *Western Assurance Co v Caldwell's Trustee* 1918 AD 262; *Corderoy v Union Government* 1918 AD 512 at 517; *Hudson v Hudson* 1927 AD 259 at 267; and *Solomon v Magistrate, Pretoria* 1950 (3) SA 603 (T) at 607F-H).
[345] Code of conduct para 60.2.

tribunal-type proceedings.[346] Judgments and other written discourse bears this out. For example, in 2003 the Organisation for Economic Co-operation and Development (OECD) peer reviewed SA's Competition Law and Policy. Pertinently, peers commented '[p]arties in Tribunal proceedings about interim relief have used every device and every opportunity to gain advantage over each other in what often looks like the scorched-earth motions practice of hard-ball private litigation'.[347] These tactics are not limited to competition issues. For example, in a residential private property dispute (*Harding & another v Maclear*)[348] the court stated that

> '[o]ne sees all too often dilatory tactics and "smart" points of law taken on behalf of parties which do not advance the litigation one jot but only serve to frustrate the opponent from bringing the case to finality.'

The SCA in a divorce matter *ST v CT*[349] commented that the record of the divorce matter in the court a quo was unnecessarily 'replete with numerous interlocutory skirmishes and constant interjections and objections (often without merit)'. In the labour courts, one commentator has noted that 'delaying tactics, squeezing opponents out financially, misrepresentation of facts, … unnecessary information overload, technical point-taking' are the order of the day.[350]

Why do legal practitioners continue in this way, despite the clear mandate in the code of conduct *not* to abuse process, flowing from legal practitioners' duties as officers of the court?[351] I believe legal practitioners have continued in this way because of the officer-of-the-court model encourages a formalist and compliance-based mind-set that sets the bar very low as to what constitutes 'abuse'. Nicolson & Webb point out (in relation to the UK jurisdiction) that, while professional norms prohibit the most blatant forms of lawyer dishonesty such as lying and fabricating evidence,[352] legal practitioners may adopt tactics and strategies that are not

---

[346] See chapter 2 for evidence at various Commissions of Inquiry that point to the practice.
[347] See in general, OECD *Competition Law and Policy in South Africa: A Peer Review* (2003). It appears that this practice has continued, see *Glaxo Wellcome (Pty) Ltd & others v D. Terblanche & others (04/CAC/Oct00)* [2000] ZACAC 2; *Community Healthcare Holdings (Pty) Ltd and another v Competition Tribunal & others* (46/CAC/Mar05) [2006] ZACAC 4 para 15; *Woodlands Dairy (Pty) Ltd and another v Competition Commission* [2009] ZACT 69; and *Competition Commission of South Africa v Standard Bank of South Africa Limited; Competition Commission of South Africa v Standard Bank of South Africa Limited; Competition Commission of South Africa v Waco Africa (Pty) Ltd* 2020 (4) BCLR 429 (CC) para 129.
[348] [2016] ZAWCHC 172 para 34.
[349] 2018 (5) SA 479 (SCA) at para 13.
[350] See P Deale 'No! to no-hope cases: Labour Court on a mission to stop hopeless cases from clogging up the system', available at https://deale.co.za/no-no-hope-cases-labour-court-mission-stop-hopeless-cases-clogging-system/.
[351] Code of conduct para 60.1.
[352] Nicolson & Webb *Professional Legal Ethics* 172-3 & 235-36. However, this is not to say that blatant dishonesty is not a challenge. For example, see the recent allegations of dishonesty (lying under oath) against a high profile (and public) official in South Africa in R Davis 'Public Protector in court on perjury charges that her lawyer

explicitly prohibited, but generally undermine the process of efficient and just dispute resolution or transactional work.[353]

I believe that legal practitioners' use of questionable tactics and strategies (which commentators and courts have come to call 'dirty tricks' and 'sharp practice')[354] is made easier because of a general reluctance by the courts to act against a legal practitioner suspected to be engaging in such conduct.[355] This position is understandable since courts do not want to be seen as impeding clients' access to courts – a right now protected by the Constitution.[356] However, it is submitted that such reluctance can act to the detriment of the opposing parties

---

describes as "frivolous"' *Daily Maverick* 21 January 2021, available at https://www.dailymaverick.co.za/article/2021-01-21-public-protector-in-court-on-three-counts-of-perjury-charges-that-her-lawyer-describes-as-frivolous/#:~:text=In%20particular%2C%20Mkhwebane%20is%20accused,the%20purpose%20of%20those%20meetings.

[353] Commentators have called these tactics and strategies 'dirty tricks', see for example, RH Underwood 'Adversary ethics: More dirty tricks' (1982) 6 *American Journal of Trial Advocacy* 265; D Luban 'Are criminal defenders different?' (1993) 91 *Michigan Law Review* 1729 at 1761 and D Webb 'A review of T Dare, *The Counsel of Rogues? A Defence of the Standard Conception of the Lawyer's Role*' (2009) 12 *Legal Ethics* 249 at 251.

[354]There is very little reference to 'sharp practice' in our jurisprudence, although somewhat surprising, Lewis (who wrote SA's first legal ethics textbook) has linked the SA legal practitioner's duty of good faith with the need to avoid 'sharp practice'. One reason for Lewis's explicit reference may be that he obviously had knowledge of the Canadian system and used it as a comparative source, see Lewis *Legal Ethics* 123, fn 60. Canadian jurisprudence is replete with the phrase and it is even referenced in some of their codes. For example, see para 2.4.2 of the British Columbia Code of Conduct (quoted in Mcleod (Re), 2019 LSBC 33). In the Canadian matter of *Saleh v Nebel* 2015 ONSC 3680, the court usefully defined sharp practice at para 106 as the following: 'Playing uncivil, tactical, inappropriate, old-school, trial by ambush games like: threatening to require proof of obviously valid records, holding back important documents until the last second, failing to fulfil undertakings until the eve of trial, delivering new expert's reports during the trial, saying untrue things to counsel opposite (whether knowingly or not), failing to prepare examinations in advance to "wing it" at trial, refusing to agree to the admissibility of relevant documents while requiring changes to be made to irrelevant ones, refusing to share costs of joint expenses, refusing to cooperate on court ordered process matters, are all wrongful. Most of these things have been considered unprofessional sharp practice …'. The only other references I could find to 'sharp practice' in relation to legal practitioners in South Africa was a judgment dealing with a striking off where Baqwa AJ (as he then was) quoted Lewis with approval in *Ncongwane v Tarcia NO & others* [2012] ZAGPPHC 32 para 14. Other judgments raising 'sharp practice' refer to it strictly in reference to legal practitioners attempting to inflate costs in taxing matters. See for eg, *Basson v Standard Bank of South Africa Ltd* [2011] ZAFSHC 22 paras 16, 65-6 and *Mcdonald Inc and another v Rudolph and another* 1997 (4) SA 252 (T) at 256H–J.

[355] For example, see *Hudson* at 268: 'Where the Court finds an attempt made to use for ulterior purposes machinery devised for the better administration of justice it is the Court's duty to prevent such abuse. This power, however, is to be exercised with *great caution and only in a clear case*.' My emphasis. A good example of this caution can be found in *De Lacy and another v South African Post Office* 2011 (9) BCLR 905 (CC). Here the CC declined to grant a costs order against the legal practitioners despite accepting that their conduct in pursuing their client's case was problematic (at paras 115-23). Instead, the court referred the judgment to the relevant regulatory body for their attention and consideration.

[356] Section 34 of the Constitution. It is useful to compare the court's reluctance in this context, with the court's reluctance to allow procedural obstacles to prevent scrutiny of challenges in the exercise of public power in administrative law (known now as the *Gijima* principle, after the decision in *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd* 2018 (2) 23 (CC)). There are certain overlaps with the rationale. While courts do not want to undermine the valuable rationale behind the rules on delay, and do not want parties to forego the promotion and maintenance of a high standard of professional ethics and accountability, they also want justice to be done. For a discussion of this issue, see *Central Energy Fund SOC Ltd v Venus Rays Trade (Pty) Ltd* ZAWCHC 164.

to the litigation, who bear the brunt of such conduct financially, and at times, emotionally.[357] While courts regularly chastise legal practitioners for such tactics, they only ever act against the practitioners[358] in the clearest of cases; a risk that I suspect legal practitioners believe is worth the benefits.[359] This strategy has been colloquially termed 'Stalingrad' tactics in South Africa, made famous in an exchange between court and counsel discussed in chapter 2.[360] Both the CC and the SCA have gone as far as to suggest that such tactics are often used by 'well-resourced, powerful entities'[361] and hold 'particular benefit to those who are well-resourced and able to secure the services of the best lawyers',[362] implying that these tactics occur where power relations are unequal between litigants.[363]

The question, then, is whether and how Ubuntu requires legal practitioners to refrain from such tactics, while still defending their client's interests? There are many contemporary examples of situations in SA where legal practitioners should have tempered their conduct because of the

[357] One should not discount emotional abuse in litigation. It is one thing to attempt to outlitigate another corporate entity or delay a merger, it is quite another to attempt to outlitigate a former spouse in divorce and / or care and contact proceedings for children.

[358] This usually takes the form of a costs order against the attorney him or herself – known in South Africa as *costs de boniis propriis.* For examples of where *costs de bonis propriis* were awarded against an attorney in the office of the State Attorney see *Tasima (Pty) Ltd v Department of Transport & others* 2013 (4) SA 134 (GNP).

[359] *Hudson* 269. For example, anecdotally certain practitioners are regularly chastised for dilatory tactics, but continue to pursue them in other matters, since the benefit to their client (or – more ominously - to themselves) outweighs a few harsh words by a judge. See discussion of self-interest in 6.3.3 below. In the US, O'Connell (quoted in Underwood) suggests that the risk might be worth the benefit for client in slightly different circumstances: 'It is true that … the illicit conduct of the lawyers resulted in a reversal of the trial court's decision in his favor. But to the extent that the trickery helped gain a verdict in the first place - with the realization that it might or might not be appealed and with the certainty that any verdict can be used as a lever in bargaining over settlement pending appeal - a lawyer could well conclude that such tricks are worth a try'. O'Connell quoted by Underwood 1982 *American Journal of Trial Advocacy* 266 fn 7.

[360] The incident is recorded by Meyer J in *Democratic Alliance v President of the Republic of South Africa; Economic Freedom Fighters v State Attorney* [2019] 1 All SA 681 (GP) at para 11. See also Wallis JA in *Moyo v Minister of Justice and Constitutional Development; Sonti v Minister of Justice and Correctional Services* 2018 (2) SACR 313 (SCA) para 169.

[361] *Competition Commission of South Africa v Standard Bank of South Africa Limited; Competition Commission of South Africa v Standard Bank of South Africa Limited; Competition Commission of South Africa v Waco Africa (Pty) Ltd* 2020 (4) BCLR 429 (CC) para 129.

[362] *Moyo* para 169.

[363] Recently, Roux has noted, on the issue of political accountability, how corrupt state officials appear to evade accountability with seeming ease in the courts (and often at public expense) by 'delaying cases, either by taking procedural points or through endless appealing'. Similarly, he notes the concern by commentators about the extent to which 'powerful individuals with deep pockets have been able to use not just legal proceedings, but law more generally, to achieve victories that they would not be able to achieve through ordinary democratic means'. See T Roux 'The Constitutional Court's 2018 term: Lawfare or window on the struggle for democratic social transformation?' (2020) *CCR* 1 at 4-5. Roux's purpose is not to consider the role of legal practitioners, but these reflections are apt here. See also H Corder & C Hoexter '"Lawfare" in South Africa and its effects on the judiciary' (2017) 10 *African Journal of Legal Studies* 105 at 114-16 (discussing the former president (Jacob Zuma)'s use of 'Stalingrad' tactics).

power imbalances between the parties, but I prefer to use a rather ordinary case to illustrate the problem with power imbalances and the abuse of court process.

The case of *Mbita Consulting Services CC v Passenger Rail Agency of South Africa (Pty) Ltd t/a PRASA Real Estate Solutions*[364] dealt with an application for rescission of a summary judgment. Mbita CC, a cleaning close corporation, had successfully obtained a summary judgment against Prasa (a powerful state-owned entity) for failure to pay its cleaning contracts. Prasa's legal representatives sought to rescind the summary judgment on the basis that, inter alia, the process was not properly served. This was done despite Prasa having acknowledged receiving the process, and admitting the debt (although it was contesting whether it had been discharged).[365] Prasa's representatives were chastised by the court for failing to deal fairly with their opponents or with the court by attempting to use a technical flaw in the service of court process to have the application rescinded.[366] The court found that this was an 'unacceptable excuse' and that Prasa could not 'sit back and rely on a court to find some procedural flaw even if it existed', especially where proof existed that process had come to the knowledge of the client timeously.[367] In addition, while the court never made a finding on the issue, it noted Mbita CC's argument that Prasa's representatives' were trying to 'outlitigate' its opponents. This was particularly so given that Mbita CC did not have equal resources to continue with the litigation.[368]

While the court used the officer-of-the-court model to chastise Prasa's legal practitioners,[369] I believe that the Ubuntu-inspired model would have prevented the legal practitioners from using their more powerful position to create unnecessary litigation in the first place. If the question was that of quantum, that question could have been resolved without the unnecessary litigation. 'The risk of being financially out-litigated' as another court notes, 'cannot be in the interests of justice.' [370] In these circumstances, then, often the officer-of-the-court model may be too

[364] [2019] ZAGPJHC 385.
[365] *Mbita* para 66ff.
[366] *Mbita* para 71. The court expressed its displeasure at the method of litigating, stating: 'Whereas litigation sometimes is a matter of one party blinking first, courts are not challenged in this way. Courts do not blink. They apply the law. The law is clear. If the defence is payment then it must be demonstrated. Despite giving PRASA a further extension to produce such payment it expressly refused to do so … .'
[367] *Mbita* para 27.
[368] *Mbita* para 52.
[369] The judge in *Mbita* commented at para 74 under the heading 'Conduct of litigation before court': 'I consider the conduct of the attorney most inappropriate. Whatever instructions a client may give, an attorney is expected to temper the manner in which he deals with them in conformity with his duty as an officer of court'.
[370] *Geldenhuys* para 15.

little, too late.[371] The discretionary approach avoids this delay and potential injustice by making legal representatives consider ethical issues from the point of deciding on representation through to all decisions taken towards the finalisation of a matter, whether it results in litigation or not.

In considering the *Mbita* matter and conduct concerns, the message for legal practitioners continues to be that procedure matters. If legal practitioners do not comply with the technical requirements of rules, they should not rely on an 'interests of justice' imperative to get them out of trouble. Procedural justice plays an important role in the legal system, and opponents should be able to take issue with those legal practitioners who flout the technical requirements of the rules.[372] But this is quite a different scenario to a legal practitioner abusing the rule, or taking advantage of a rule for an ulterior motive, as was the case in *Mbita* above.

So, how should a legal representative have tackled the matter in terms of the approach advocated in this thesis? First, the legal representative should have considered the context starting with the power balance between the parties. Here, the legal practitioner should have noted that the defendant was – comparatively speaking – 'small fry' in comparison to his client. As a reminder, his client was Prasa – a major state-owned enterprise. Thus, his client was not a 'relatively evenly matched private part[y]',[373] a context noted by the court itself in the judgment.[374] The legal practitioner should also have considered the public nature of his client's enterprise – being state owned.[375] Of course, the unlevelled playing field and public nature of the client would not constitute the end of the enquiry as to whether one could use various tactics. The legal representative should then have considered the purpose of (1) alleging

[371] McMorrow & Scheuer make a related point: '[M]any would agree that preventing the breach of laws is better than simply cleaning up after they already have been broken. After all, it is generally better to prevent pollution than to litigate over its clean up. But lawyers doing this work should recognize that they cannot rely on systematic justifications like litigators can. They are morally accountable when they facilitate actions on behalf of their clients and should take this into consideration when agreeing to represent a particular client or take on a particular assignment.' See JA McMorrow & LM Scheuer 'The moral responsibility of the corporate lawyer' (2011) 60 *Catholic University Law Review* 275 at 279.

[372] This role has been expressed as a 'process value' and is implicit in the maxim: 'the ends don't justify the means'. See RS Summers 'Evaluating and improving legal processes – A plea for "process values" (1974) 60 *Cornell Law Review* 1 at 1.

[373] D Luban *Lawyers and Justice: An Ethical Study* (1988) 65.

[374] M Galanter 'Why the haves come out ahead: speculations on the limits of legal change' (1974) *Law and Society Review* 95 at 119-22.

[375] Courts have consistently held that counsel acting on behalf of the state in litigation must act ethically and serve as role models of propriety. See *L v MEC for Health, Gauteng* 2015 (3) SA 616 (GJ) where Robinson AJ summarised a raft of cases where legal representatives of the state attracted the courts' ire for litigating 'as if at war' with the opposing parties – 'the citizens'. See paras 80ff. See also *Madibeng Local Municipality v Public Investment Corporation Ltd* [2020] ZASCA 157 para 48.

defective service; and (2) failing to provide proof that his client had paid a portion of the debt. If there was any suggestion that Prasa was prejudiced in any way by such defective service, the legal practitioner would have been entitled to raise such issue in a rescission application. However, the court found that it was common cause that the client was given timeous notice (and, in fact, the application had been served properly). Further, the court found that it would have been very easy for the client to provide proof to support its submission that a portion of the debt had been paid. Instead, the legal representative continued to push ahead with obfuscatory tactics that appeared to be directed at delaying and outlitigating the opponent.

In a 'reset' of these circumstances, had the legal practitioner considered the principle of Ubuntu against that of other important principles in client representation, the tactics would not have used. Fortunately, the matter came before a court which was well functioning and could determine the matter fairly. But a functioning institutional context may not always be present – a consideration that must be taken into account. Because of the lessons learnt in chapter 5, Ubuntu does not presuppose that legal practitioners cannot take full advantage of procedural points; only that the decision to use them must be made carefully in accordance with the context.

### *6.3.1 Information control: Confidentiality, particularly legal professional privilege*

In the only South African textbook dedicated to legal ethics,[376] Lewis suggests that the first lesson of an articled clerk[377] 'ought to be the duty to preserve confidentiality'.[378] The

[376] EAL Lewis *Legal Ethics: A Guide to Professional Conduct for South African Attorneys* (1982). See discussion of this textbook in chapter 1.
[377] Articled clerks are known now as candidate attorneys or candidate legal practitioners under the Legal Practice Act 28 of 2014. The definitions section sets out that a candidate attorney 'means a person undergoing practical vocational training with a view to being admitted and enrolled as an attorney'; and a candidate legal practitioner 'means a person undergoing practical vocational training, either as a candidate attorney or as a pupil'.
[378] Lewis *Legal Ethics* 292.

importance of this duty is recognised in other jurisdictions, with commentators suggesting it is one of the most 'fundamental,'[379] 'prominent'[380] and 'sacred'[381] duties of a legal practitioner.[382]

The question for the purposes of this thesis is whether the current confidentiality rules and practice in SA withstand scrutiny when considered in the light of post-Constitutional jurisprudence and the value of Ubuntu.[383] It would be impossible to cover the width and breadth of the duty, which is evidenced in various statutes,[384] common law[385] and is incorporated as a legal practitioner's duty in the code.[386] The duty distinguishes between the general duty to keep confidences[387] and legal professional privilege, which in turn manifests itself into two separate

[379] Nicolson & Webb *Professional Legal Ethics* 248 (writing in the context of England and Wales). In Australia, the court in *Baker v Campbell* (1983) 49 ALR 385 stated at 417 that legal professional privilege is 'a mere manifestation of a fundamental principle upon which our judicial system is based'. The court in *S v Safatsa* 1988(1) SA 868 (A) referenced the *Baker* quote and suggested at 8851I-J that 'the same holds true for our own [South African] judicial system'. See also *Euroshipping Corporation of Monrovia v Minister of Agricultural Economics and Marketing & others* 1979 (1) SA 637 (C) 643H.

[380] WH Simon 'Attorney-client confidentiality: A critical analysis' (2017) 30 *Georgetown Journal of Legal Ethics* 447 at 447 (writing in the context of the United States).

[381] M Freedman *Legal Ethics in an Adversary System* (1975) 5 (writing in the context of the United States).

[382] JE Moliterno & PD Paton *Global Issues in Legal Ethics* 2 ed (2014) at 77 note that the duty of confidentiality is central to many other legal ethics topics inter alia conflict of interest rules and the basic relationship with a client.

[383] While Zeffertt & Paizes make no mention of Ubuntu, they ask a similar question in relation to the rule pre- and post-Constitution. See DT Zeffertt & AP Paizes *The South African Law of Evidence* 2 ed (2009) 627.

[384] These statutes both provide for, and limit, legal professional privilege. For its provision, see for example s 40 of the Promotion of Access to Information Act 3 of 2000. See also s 201 of the Criminal Procedure Act 51 of 1977 which sets out that '[n]o legal practitioner … shall be competent, without the consent of the person concerned, to give evidence at criminal proceedings against any person by whom he is professionally employed or consulted as to any fact, matter or thing … Provided that such legal practitioner shall be competent and compellable to give evidence as to any fact, matter or thing which relates to or is connected with the commission of any offence with which the person by whom such legal practitioner is professionally employed or consulted, is charged, if such fact, matter or thing came to the knowledge of such legal practitioner before he was professionally employed or consulted with reference to the defence of the person concerned'. For an example of the limitation of non-privileged confidential information, but also the protection of privileged information, see ss 29 (read with sched 1) and 37 of the Financial Intelligence Centre Act 38 of 2001 respectively.

[385] For an excellent history of the privilege, see Zeffertt & Paizes *The SA Law of Evidence* 627-29.

[386] See code provisions 3.6 and 57 discussed below. These code provisions are similar to the corresponding rule for the attorneys' profession in terms of the Attorneys Act 53 of 1979, GN 2 GG 39740 of 26 February 2016. See especially rule 40.5 where the rule states that 'Members [of the law society] shall at all times … maintain confidentiality regarding the affairs of present or former clients, unless otherwise required by law'. The new code explicitly includes legal professional privilege whereas the previous rules dealt with confidentiality in the broad sense.

[387] *Robinson v Van Hulsteyn, Feltham and Ford* 1925 AD 12 at 21. Confidentiality in this sense is a term of the mandate contract, but it is also part of the fiduciary relationship between the legal practitioner and the client. JR Midgley *Lawyers' Professional Liability* (1992) 78 and K Wagner & C Brett 'I heard it through the grapevine: The difference between legal professional privilege and confidentiality' (2016) Aug *De Rebus* 22.

categories: 'legal advice privilege'[388] and 'litigation privilege'.[389] For the purposes of this chapter, I specifically consider confidentiality in the form of legal professional privilege, while recognising that there is a broader fiduciary duty of confidentiality between attorney and client.

The code sets out that legal practitioners must 'maintain legal professional privilege and confidentiality regarding the affairs of present or former clients or employers, according to law'[390] and must 'scrupulously preserve the personal and confidential information of a client communicated to him or her, unless the information is not privileged and disclosure is required by law'.[391] In South Africa, communications between practitioners and their clients are privileged if: the legal practitioner was acting in a professional capacity at the time; the practitioner was consulted in confidence; the client communicated with the practitioner for the purpose of obtaining legal advice; and the advice does not facilitate the commission of a crime or fraud.[392]

Simon suggests that the standard justification for a strong confidentiality rule (such as the South African rule) operates on two premises. The first is that strong confidentiality is needed for informed legal advice; what Simon calls the 'disclosure' premise.[393] The second is that informed legal advice furthers the rule of law and justice; what Simon calls the 'benefit' premise.[394] In terms of the former premise, it is argued that clients will not fully and freely disclose all relevant facts to legal practitioners without the assurance that such facts are confidential.[395] In terms of the latter premise, the argument is that legal practitioners need to

[388] Legal advice privilege covers communications between legal practitioners and their clients whereby legal advice is sought or given. Our law follows the English and Wales position as set out in *Three Rivers District Council & others v Bank of England (No. 6)* [2005] 1 AC 610 at para 10. See reference to this case in *Astral Operations Ltd t/a County Fair Foods v Minister for Local Government, Environmental Affairs and Development Planning (W Cape)* 2019 (3) SA 189 (WCC) at para 5. Binns-Ward J comments in *Astral* that the privilege is not restricted in its ambit to advice on matters of law; it also extends to 'advice as to what should prudently and sensibly be done in the relevant legal context', including advice as to how a client's position or case should best be presented'. See also *A Company v Commissioner for the South African Revenue Services* 2014 (4) SA 549 (WCC) para 25.

[389] Litigation privilege is said to protect communications between a litigant or her legal advisor and third parties, if such communications are made 'for the purpose of pending or contemplated litigation' (*Astral Operations* para 8). See also *Competition Commission of South Africa v Arcerlormittal South Africa Ltd & others* 2013 (5) SA 538 para 20.

[390] Code provision 3.6.

[391] Code provision 57.2.

[392] *Thint (Pty) Ltd v National Director of Public Prosecutions; Zuma v National Director of Public Prosecutions* 2009 (1) SA 1 (CC) at para 183. For a discussion of each requirement, see PJ Schwikkard & SE van der Merwe *Principles of Evidence* 4 ed (2016) 160-62.

[393] Simon 2017 *Georgetown Journal of Legal Ethics* 450-1.

[394] Ibid.

[395] In *Bennett v Minister of Safety and Security* 2006 (1) SACR 523 (T) at para 58, the court agreed with the reasoning in *New Jersey v Sugar* (1980) 417 AD 474 (NJ S Ct) at 858D-E that '[a]ny interference with the relationship of trust between attorney and client may destroy the counsel's effectiveness'. See also *Euroshipping*

know all the facts in order to represent clients properly. The benefit premise also works on the basis that, where a client discloses future plans, the legal practitioner will be able to induce compliant behaviour,[396] thereby preventing otherwise unlawful or even immoral behaviour.[397] While proponents of a strong confidentiality rule acknowledge that injustice may sometimes occur, they argue that, *in the long run*, client's autonomy is preserved and justice is served.[398]

Zeffertt & Paizes suggest that South Africa's current privilege rule, which operates on the basis of the justifications set out above, is very much in keeping with the ideology of individualism, ie with a strong emphasis on the preservation of client autonomy.[399] In this way, the privilege is deemed to be morally defensible to the extent that the legal system's aim of determining truth (which requires information disclosure) be tempered by the legal system's concern for the autonomy of the individual.[400] Courts have held that inroads to this privilege should not be made liberally, since such inroads may constitute an infringement on the dignity and privacy of the individual,[401] rights that are now protected by the Constitution.[402]After the coming into force of the Constitution, the rationale for the privilege also lies in the constitutional right to access the courts, even though there is no express reference to a person's right to confidentiality in the Constitution.[403]

However, is it right that the rule continues to operate in its current form? It is important to question whether the near-absolute form of legal professional privilege in SA (ie that it operates with very limited and explicit exceptions) is sustainable given that it runs counter to what Zeffertt & Paizes state is the 'equally venerable' and 'cherished' principle that all relevant evidence should be disclosed in court to facilitate the search for truth.[404] Moreover, is this form of privilege justified in a constitutional order where (as argued in previous chapters) the typical western norms of autonomy and liberalism need to be balanced against the need for

---

where Friedman J held that 'inroads should not be made into the right of a client to consult freely with his legal adviser, without fear that his confidential communications to the latter will not be kept secret' (at 643H).

[396] Simon 2017 *Georgetown Journal of Legal Ethics* 450-1.

[397] Nicolson & Webb *Professional Legal Ethics* 258. In fact, particularly in the highly regulated areas of inter alia labour, tax and environmental matters, confidentiality may provide an opportunity for the client to weigh up the benefits accrued through lack of compliance with the likelihood of enforcement and type of sanction imposed.

[398] Nicolson & Webb *Professional Legal Ethics* 258. See also WB Wendel *Lawyers and Fidelity to Law* (2010) 170.

[399] Zeffertt & Paizes *The SA Law of Evidence* 628.

[400] Ibid.

[401] *S v Safatsa* 1988 (1) SA 868 (A) at 885-86.

[402] Sections 10 and 14 of the Constitution respectively.

[403] Section 34 of the Constitution.

[404] Zeffertt & Paizes *The SA Law of Evidence* 630.

transformation and autonomy-in-relation?[405] Simply put, does the current format of the rule find the right balance between the interests preserved by the privilege duty and the harm that such duty may cause third parties (as autonomous beings in their own right) and the interests of justice?

Simon suggests that the problem with reliance on 'liberty' in the context of strong confidentiality rules is that while it implies client autonomy, it also implies respect for the liberty of others – something that the current nature of the rule does not take into account.[406] Rhode, for example, notes that confidentiality may impact detrimentally on other individuals' health, safety, or economic security.[407] In the US, cases have shown how the confidentiality rule has resulted in a distinct violation (or potential violation) of others' liberty. These cases include the near death of a party to litigation,[408] and the punishment of persons who are innocent of the crimes charged.[409] Other instances where the rule may harm third parties include situations where persons potentially need privileged information to defend themselves against a criminal charge,[410] or where harm has or will occur from a defective product (ie where a corporation is willing to pay out a few claims for negligence rather than recall a defective product).[411] Implicit in these harms is the idea that lawyers and clients can (and do) use the

[405] See the discussion in chaps 4-5 on this issue. See also Simon 2017 *Georgetown Journal of Legal Ethics* 450 where he suggests that strong confidentiality occurs in jurisdictions where law is seen as designed to protect liberty 'by guaranteeing each individual a sphere of autonomy in which he can act as he pleases'.

[406] Simon 2017 *Georgetown Journal of Legal Ethics* 450. In other words, the rights of non-clients.

[407] DL Rhode 'Institutionalizing ethics' (1994) 44 *Case Western Reserve Law Review* 665 at 675.

[408] *Spaulding v Zimmerman v* 263 Minn. 346, 116 N.W.2d 704. See discussion of hypothetical based on this case below.

[409] C Miller 'Ordeal by innocence: Why there should be a wrongful incarceration/execution exception to attorney-client confidentiality' (2007-2008) 102 *Northwest Law Review Colloquy* 39. Miller recalls the tragic case of Alton Logan who was convicted of first degree murder and imprisoned for life. Another man, Andrew Wilson, actually confessed to the crime Logan allegedly committed, but did so in confidence to lawyers. Logan spent 26 years in prison until the lawyers where able to convince their client to waive confidentiality. A similar situation (although with a shorter timeline) occurred in Scotland around 1970. Paddy Meehan was jailed for life in 1969 for the murder of a woman during a robbery at her home. William 'Tank' McGuiness actually committed the murder and admitted to Joe Beltrami – his lawyer at the time – that he was the real killer. Beltrami kept confidentiality until McGuiness died seven years later. For a discussion of this case, see RHS Tur 'Confidentiality and accountability' (1992) 1 *Griffith Law Review* 73 at 76-78. See also a similar situation in Arizona where the court held that the lawyer could not disclose confidences to prevent an innocent man from being imprisoned, *State v Macumber*, 582 P.2d 162 (Ariz. 1978).

[410] *S v Safatsa* 1988 (1) SA 868 (A). In this particular situation, counsel for the accused argued at 884 that 'two public policies are in conflict … , namely the public policy underlying the protection generally afforded against the disclosure of communications subject to legal professional privilege, and the public policy that no innocent man should be convicted of a crime'. The issue in *Safatsa* was whether a court could compel disclosure of a privileged communication made by a witness to her attorney to an accused person, since such disclosure might assist the accused person in defending the charges against her, thus establishing her innocence. For a discussion of this case, see Zeffertt & Paizes *The SA Law of Evidence* 644.

[411] Nicolson & Webb *Professional Legal Ethics* at 249 identify two instances where this has occurred: the Ford Pinto *cause celebre* and the Dalkon Shield litigation. For a general discussion of these two matters, albeit in the

privilege as a 'device for cover-ups', and that injustice occurs.[412] In response to proponents of the idea that*, in the long run*, justice is served by a strong confidentiality rule, a number of scholars point out that there is virtually no research on the aggregate effects of confidentiality,[413] and doubt that the rule operates as claimed. For the purposes of this thesis, even if we accept that the premises hold true generally, does this still mean that strong confidentiality rules fit better in our constitutional democracy than a moderate or more discretionary form? To consider this question, it is useful to consider a hypothetical based on the facts in a matter decided in the United States, namely *Spaulding v Zimmerman*.[414] I use *Spaulding* as a basis since the case has been said to force

> 'law students [and I include here current legal practitioners] to grapple with the harsh reality that the lawyer's partisan role in the adversary system, reinforced by the narrow exceptions to the professional duty of confidentiality, prevent a lawyer, without the consent of the client, from doing the right thing …'.[415]

The facts in *Spaulding* also raises the concern at issue in this section: 'do the profession's confidentiality rules give lawyers sufficient discretion to disclose information to protect the superior interests of third persons, when the client insists on an immoral course of conduct, threatening serious harm to others?'[416] I have avoided using the actual facts of the *Spaulding* case in this context since there were a variety of features in the original case that makes the explanation and discussion more complicated than is needed for present purposes.[417]. Contrary to the facts in *Spaulding,* in my hypothetical, the client is directly responsible for the damages claim and is given full information by the legal practitioner.

---

context of punitive damages awards in the US, see DG Owens 'Problems in assessing punitive damages against manufacturers of defective products' (1982) 49 *University of Chicago Law Review* 1.

[412] G Hazard 'An historical perspective on the attorney-client privilege' (1978) *California Law Review* 1061 at 1072. See, for example, *South African Airways Soc v BDFM Publishers (Pty) Ltd & others* 2016 (2) SA 561 (GJ).

[413] Simon 2017 *Georgetown Journal of Legal Ethics* 451 and Nicolson & Webb *Professional Legal Ethics* 259.

[414] *Spaulding v Zimmerman v* 263 Minn. 346, 116 N W 2d 704. For a general discussion of this case, see R Cramton & L Knowles 'Professional secrecy and its exceptions: Spaulding v Zimmerman revisited' (1998) 83 *Minnesota Law Review* 63; and R Cramton 'Lawyer disclosure to prevent death or bodily injury: A new look at Spaulding v Zimmerman' (1999) 16 *Journal of the Institute for the Study of Legal Ethics* 163.

[415] Cramton 1999 *Journal of the Institute for the Study of Legal Ethics* 164-65. Cramton finishes this paragraph by saying that the right thing was to tell 'Spaulding that he has a life-threatening condition that needs immediate attention'.

[416] Ibid 165-66.

[417] One major complicating feature was the fact that the litigation involved a liability insurer on behalf of the Zimmermans. Another complicating feature (related to this concern) was the fact that counsel never consulted with the Zimmermans about the question whether to disclose the aneurysm. As Cramton notes (ibid 166): '[c]ounsel that is selected, directed, and paid by the liability insurer creates a risk that defense counsel may ignore the insured, deferring to the economic interest of the insurer, since the insurer controls repeat business'.

Suppose that a person (the plaintiff) is in a serious accident on a construction site, and sues a construction company for his injuries. A legal practitioner acts for this construction company, and it becomes clear that there was negligence on its part. The legal practitioner advises the company to concede this, but advises it to contest quantum. The plaintiff's legal practitioners are asking for R5 million for the plaintiff's injuries, temporary loss of future earnings, and general pain and suffering. The company's legal practitioner asks for an independent examination of the person by a medical expert. This medical expert finds that, apart from the manifest external injuries, the plaintiff has an aneurysm of the aorta. The medical expert reports this to the company's legal practitioner. He also reports that the claim is consistent with injuries of this type, and that the existence of the aortic aneurysm could push the claim up to R10 million if the plaintiff can show that the aneurysm was caused by the accident, which a likely scenario. Prior to the close of pleadings and the discovery of any documents, the legal practitioner is contacted by the plaintiff's legal practitioners and is asked whether her client would consider settling the matter, since the plaintiff wishes to get on with his life, and he is running out of funds. They ask for a settlement of R3 million. The plaintiff's legal practitioner never asked for sight of the company's medical expert report, and it is obvious that the plaintiff's medical expert did not pick up the aneurysm. The legal practitioner consults with the client, and the client insists that the legal practitioner settle for the R3 million amount, and that the medical report not be released.

The question arising from these facts, and which implicates confidentiality duties, is whether the company's legal practitioner should follow the client's instructions and settle on the amount suggested, without disclosing the report to the plaintiff?[418] (Note: an aortic aneurysm, if found in time, can usually be repaired with surgery, but left unchecked it will most certainly result in fatality).

Under South Africa's current confidentiality rules, the company's legal practitioner cannot disclose the medical report if the client does not give his or her informed consent.[419] While the SA courts have been amenable to limiting information protection by balancing the interests

[418] One could make the scenario more complex by asking: Would it make a difference whether the client (the construction company) advises that they have not paid their public liability insurance timeously, and so would have to cover the claim from the company's profits. This could possibly mean retrenchment of half of their workforce given the negative effects of COVID.

[419] In the real case of *Spaulding v Zimmerman,* it appears that the defendant client was never consulted on the issue – a matter that positivist legal ethics theorists take more seriously than the consequences of maintaining the privilege. See A Woolley 'Is positivist legal ethics an oxymoron' (2019) 32 *Georgetown Journal of Legal Ethics* 77 at 81 fn 14, See also WB Wendel *Lawyers and Fidelity to Law* (2010) 72-3.

that confidentiality and disclosure uphold,[420] this would have to be on application to court to do so by an interested party. The problem in most scenarios where confidential information can lead to harm is the fact that the persons, entities or communities who may be harmed by a lack of disclosure do not know they are in harm's way, and are unaware they might need to apply for disclosure in the first place. In the *Spaulding* case, neither the plaintiff nor his legal practitioner knew of the aortic aneurysm that was threatening his life: this knowledge was in the exclusive domain of the legal practitioners for the defendant.

Another point to note is that, if the plaintiff had not reached out in settlement, and instead opted to proceed to court, then South Africa's civil procedure discovery rules would have required disclosure of the medical report. In considering this particular context, it appears perverse to endanger a life for the sake of pursuing an early settlement.

Is this position justified? In discussing the facts in *Spaulding,* commentators have long debated the issue of harm to life, with the result that the American Bar Association ultimately introduced a discretionary exception into their model rules.[421] This discretionary exception sets out that

> '[a] lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary: … to prevent reasonably certain death or substantial bodily harm'.[422]

This concession is insightful for the SA jurisdiction, and accords with the approach I have argued for in this thesis. First, it introduces a discretion which is in keeping with Simon's general approach that ethical rules should not be categorical (which encourages legal practitioners to exercise judgement) and, second, the exception conforms with an updated notion of *seriti* in the Ubuntu conception.[423] This notion, discussed in chapter 5, recognises the 'the energy or power that both makes us ourselves and unites us in personal interaction with

---

[420] This is clear in the dictums of *S v Safatsa* and *Thint (Pty) Ltd v NDPP; Zuma v NDPP* 2008 (2) SACR 421 (CC).

[421] Rule 1.6(b) of the American Bar Association Rules, available at https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_6_confidentiality_of_information/.

[422] Ibid.

[423] As discussed at 5.2.2, *seriti* has been updated and it is not necessary to rely on *seriti's* metaphysical claims (see 5.2.2). However, the original meaning (as captured by Battle) resonates with the *Spaulding* example: 'To cause bloodshed is not only to kill the body but to damage the *seriti* which results in a weakened society.' See M Battle *Ubuntu: I in You and You in Me* (2009) 116.

others' – that is, a life-force that connects persons in the community.[424] *Seriti* provides us with a basis to argue that, no matter the utilitarian 'long run' benefits to a strong privilege rule, legal practitioners have to consider the importance of life and how their conduct affects the lives of others. These aspects (discretion and *seriti*) show how our current rule is problematic. In addition, the fact that the person's life could have been saved by a different resolution setting (ie court rules regarding discovery) must be seen as problematic.

In using the *Spaulding* example in this way, my purpose is not to simply suggest that another exception should be added to the rule. Instead, I believe the example shows up the shortcomings of the current categorical structure of the rule to achieve justice. Significantly, in the field of criminal law, the CC has already amended another form of privilege given the advent of constitutional values in South Africa. In 1995, under the interim Constitution, the CC found that the blanket privilege attached to police dockets was problematic.[425] Instead of keeping it as a rule with a qualifying exception, the court found that in cases where an accused is refused sight of the docket, a court would need to 'exercise a proper discretion balancing the accused's need for a fair trial against the legitimate interests of the State in enhancing and protecting the ends of justice'.[426] This type of approach is insightful for legal practitioners' duties more generally. Zeffertt & Paizes note that 'problems [relating to privilege] would have been less likely to arise had we kept our sights set on the balancing mechanisms that gave the privileges life rather than the sterile rule-driven mechanisms we created in an illusory quest for certainty'.[427]

In the quest for an approach that is more fit for purpose, Nicolson & Webb, and Simon himself, recognise two ways of moving from a strong confidentiality rule to a moderate one. First, one could expand the number of the current disclosure exceptions, which could be made mandatory or permissive, depending on the issues at stake.[428] Second, the duty could be reorganised as a standard rather than a rule,[429] allowing a legal practitioner to disclose privileged information whenever a legal practitioner considers that substantial injustice outweighs the values protected by confidentiality.[430]

---

[424] A Shutte *A Philosophy for Africa* (1993) 55.
[425] *Shabalala & others v Attorney-General of Transvaal and another* 1995 (2) SACR 761 (CC).
[426] *Shabalala* 782F-G.
[427] Zeffertt & Paizes *The Law of Evidence* 694.
[428] Nicolson & Webb *Professional Legal Ethics* 263.
[429] Simon 2017 *Georgetown Journal of Legal Ethics* 455.
[430] Ibid. Nicolson & Webb set out this option in similar terms, but instead of using the standard of 'substantial injustice', they refer at 263 to 'the public interest, the interests of specific others, or the environment'.

In Simon's most recent work on confidentiality (2017)[431] he argues for a standard rather than a rule, suggesting a contextual form of moderate confidentiality that allows for legal practitioners to disclose privileged information in instances where they consider 'substantial justice' would otherwise result. He argues for this approach in that it would give coherence to confidentiality exceptions by unifying them around the concept of 'justice'. Further, he argues that by giving legal practitioners' discretion, it would ensure that 'idiosyncratic but highly compelling cases' do not 'fall in the cracks' between the current exceptions.[432]

While I have argued for a greater discretion to apply in most ethical contexts, in line with Simon's general approach, I believe that arguing for a general discretion in this context may be a bridge too far in the immediate future. This is because of the almost sacred way in which legal practitioners, the courts, and clients perceive confidentiality (despite the reality that there are exceptions that clients often do not know about).[433] Such a radical change may also affect (rightly or wrongly)[434] the client's faith in the system. As such, I agree with Nicolson & Webb's more nuanced approach, which amounts to what I call 'guided discretion'.[435] This guided discretion would require that the code set out a presumption in favour of confidentiality, but then would set out factors that legal practitioners need to consider for situations in which disclosure might be appropriate.[436] Given the nature of Ubuntu, one such factor that would have to be considered is the extent of the harm that would result from withholding information from another party, weighed against the harm inflicted on the client if it were to be disclosed. A legal practitioner would also have to consider the imbalance of power between the relevant parties. So, for example, Luban tells us that where there are two roughly equal litigants or clients seeking to pursue their financial or other personal interests, a legal practitioner should be less likely to be concerned if they opt to withhold information from the opposing party.[437] Also, where it is before a resolution setting where the body adjudicating the issue is competent, this would also tilt the argument in being less concerned with the harm to others. On the contrary, if there are unequally matched litigants, then legal practitioners need to exercise

[431] Simon 2017 *Georgetown Journal of Legal Ethics* 447. For earlier articles dedicated to the issue of confidentiality, see Simon 1978 *Wisconsin Law Review* 29 and Simon 2006 *Fordham Law Review* 1453.
[432] Simon 2017 *Georgetown Journal of Legal Ethics* 459.
[433] For example, Simon suggests that the current confidentiality rule is 'riddled with exceptions and qualifications'. See Simon 2017 *Georgetown Journal of Legal Ethics* 456.
[434] Rightly or wrongly in the context that it has never been empirically proven that confidentiality actually influences the way in which clients consult with their counsel. See the discussion below.
[435] I develop this term from Nicolson & Webb's statement that '[a] general discretion to disclose need not entail an unguided discretion'. See Nicolson & Webb *Professional Legal Ethics* 264.
[436] Ibid.
[437] D Luban *Lawyers and Justice: An Ethical Study* (1988)

discretion as to how and when to act. This appears to be in keeping with the current understanding of Ubuntu in the contract cases as discussed in chapter 5. This 'guided discretion' approach is also not foreign to SA legal practitioners since it involves a balancing exercise that has become both essential and commonplace in the wake of the Bill of Rights.[438]

## 6.4 EXERCISING DISCRETION TO REFUSE TO REPRESENT A CLIENT IN CONTEXT

I deal here with the situation where a legal practitioner is approached to take on a matter, and where a legal practitioner has already agreed to act. I argue that Ubuntu gives a legal practitioner greater discretion to (1) refuse to continue a matter in a specified manner; (2) refuse to raise prescription; and (3) refuse to take on a matter at all. There are some obvious overlaps with the previous section. Such an overlap may well be, for example, where the client asks the practitioner to delay the matter for purposes unrelated to the actual litigation (for example, liquidity).[439] In this way the legal practitioner has to exercise a discretion regarding whether (and how) to adopt certain tactics and strategies to further the client's ends. However, this section attempts to focus on the substantive law / instructions, rather than procedural / technical points.

### *6.4.1 A refusal to continue a matter in a specified manner*

In the normal course of events, a legal practitioner must take instructions from the client, and act on those instructions.[440] However, I suggest that where such instructions lead to injustice, conceived through balancing Ubuntu against other important principles in the legal system, the legal practitioner may refuse to continue a matter in a specified manner, or may withdraw from the matter.

Importantly, in this conception of the duty, the instructions need not be unlawful for such a withdrawal to take place. If the instructions amount to conduct that would be wrongful and

[438] Zeffertt and Paizes *The SA Law of Evidence* 646 Zeffertt and Paizes *The SA Law of Evidence* 647 point out that the SCA saw the limitation clause (s 36) as the ideal vehicle for conducting a balancing enquiry of the kind needed in the privilege context.

[439] So for example, I set out in the relevant footnote that one could make the scenario more complex by asking: Would it make a difference whether the client (the construction company) advises that they have not paid their public liability insurance timeously, and so would have to cover the claim from the company's profits. This could possibly mean retrenchment of half of their workforce given the negative effects of COVID.

[440] There is a distinction between the duties of the attorney and the advocate in whether the cab rank rule applies. For the purposes of this thesis, I do not focus on the rule per se, but accept for our purposes, that a legal practitioner will ordinarily accept instructions from any client.

immoral in the Ubuntu conception,[441] then this would be sufficient. It is hard to find illustrations of this requirement given the confidential nature of lawyer-client communications, but deep in the details of *General Council of the Bar of South Africa v Jiba & others*[442] there is one such example of Ubuntu-discretion for which I have argued in chapter 5. In this matter, the General Council of the Bar sought to disbar the then acting head of the National Prosecution Authority (Jiba) for alleged unethical misconduct. For present purposes it is sufficient to know that one such act was Jiba's decision to set aside charges against a politically-connected police officer, and her subsequent defence of the matter when a civil organisation took her decision on review.[443]

After two sets of counsel withdrew from a challenge to this decision, Jiba appointed Halgryn SC to advise her on defending the review against her decision. In his advice (captured in a then-confidential memorandum released to the court), Halgryn SC criticised the way in which his client had instructed previous counsel to defend the matter. In a section of the memorandum titled 'Fundamental flaws in the prosecution of the matter thus far'. Halgryn SC referred to several flaws in the prosecution and advised his client:

> 'These flaws in the prosecution of the matter thus far, (which we had very little difficulty in uncovering), on behalf of our clients are fundamental – so much so – that we are under no doubt that as matters now currently stand our clients are headed towards a certain judgment against them, with every potential of irreparable harm to the credibility and reputation of the National Prosecution Authority. … As the papers correctly stand there is simply no defence.'

Halgryn SC goes on to state:

> 'If there is a decision to continue with the opposition of this matter, on the basis of attempting to justify the decisions to discontinue the prosecutions, with reference to the records/dockets, our client will regrettably have to find yet, another team of counsel to do so. We are unable to do so. None of the reasons advanced thus far makes any rational sense, let alone establish a defence.'

The court goes on to record that Halgryn SC did in fact withdraw, given that the client (Jiba) insisted on continuing to oppose the matter in the way counsel suggested would be 'a sinking

[441] See discussion of 'wrongful and immoral conduct' in the context of custom and practice in the context of mandate, chapter 7 at x.
[442] 2017 (2) SA 122 (GP) at 135ff.
[443] *Freedom under Law v National Director of Public Prosecutions & others* 2014 (1) SA 254 (GNP).

ship'. It could be argued that Halgryn SC was simply following one of the primary principles of advocacy: that of being independent of client. However, even after factoring independence into the context, it is probable that a neutral partisanship stance would have resulted in a different outcome. Under neutral partisanship, Halgryn SC would have been indifferent to the harm and credibility of the NPA, and the rationality of the defence, since this did not fit with his client's ends. Even if counsel pursued a moderate neutral partisan stance, it certainly would not have required counsel to withdraw. This fits in with neutral partisanship in that it would oblige the lawyer to take whatever legal action is necessary to further the client's goals, even if the legal practitioner considered such legal action to be dubious or 'a sinking ship'. However, if one considers the eventual finding of the court, the credibility and harm suffered was exactly what the court found problematic:

> 'Suffice to say that the conduct of the respondents is unbecoming of persons of such high rank in the public service and is especially worrying in the case of the NDPP: a senior officer of this court with weighty responsibilities in the proper administration of justice. The attitude of the respondents signals a troubling lack of appreciation of the Constitutional ethos and principles underpinning the office they hold.'[444]

It may be suggested that 'arguing the inarguable' is not acting in the client's best interests and that the principle that legal practitioners act independently and act as officers of the court would settle this matter by allowing legal practitioners to say 'no' to their client. The challenge with this suggestion is that, despite the independence principle, the code sets out that SA legal practitioners may place any matter before a court 'in which the legal practitioner's opinion is adverse to the prospects of success'.[445] The code provision specifically states that it is then 'for the adjudicating officer to decide the matter, and the legal practitioner *shall advance that case as best as the circumstances allow*'.[446] In this way, the code promotes the idea that legal practitioners can pursue matters which they think will be unsustainable, or even contrary to the 'constitutional ethos' mentioned in the quote above.

It is exactly the lack of appreciation of the Constitutional ethos and its principles (of which Ubuntu is one) that led to the criticism of the legal representatives conduct in *Imbumba Association for the Aged v MEC for Social Development Eastern Cape & another.*[447] This case,

[444] Ibid para 24.
[445] LPA code para 9.9.
[446] Ibid. My emphasis.
[447] [2020] ZAECGHC 112.

discussed on chapter 3, is a prime example of where, had the legal representatives weighed the principle of Ubuntu against the Department's rights to defend its unilateral action, the legal representatives would have counselled the Department to pay the subsidies or refuse to defend the matter. Instead, the legal representatives sought to defend the matter based on technicalities (lack of urgency) and a contrived defence of force majeure.[448] The court dismissed both defences, and other defences too, finding that the legal representatives had acted irresponsibly in their attempt to raise them. While one may argue that the resolution setting allowed justice to prevail, the legal practitioners did not factor in the power imbalances between a powerful state entity and a vulnerable group who – but for a committed public interest law firm – would probably have been outlitigated, and their constitutional rights denied to them.

In *Imbumba* and *Jiba*, there is a question mark regarding the extent to which legal practitioners can act as mere 'mouthpieces' for their client.[449] The CC discusses and criticises this very issue in *De Lacy & another v South African Post Office.*[450] Here, the legal practitioners provided multiple (but eventually unsuccessful) avenues for their client (De Lacy) to spew unwarranted invective against a panel of judges who had dismissed their client's claim. In this matter, the application arose from a complaint that a tender had been irregularly awarded.[451] In the court a quo, De Lacy had been partially successful, but the SCA reversed the court a quo's decision and dismissed his claim with costs.[452] The legal practitioners then tried to appeal that judgment (unsuccessfully) twice to the CC. In addition, De Lacy, aided by his legal practitioners, also lodged a complaint with the JSC, and also changed course by applying for direct access to the CC. This application was based on allegations that the SCA judges were biased and, as such, its judgment constituted an infringement of the client's right to equal protection and benefit of the law, the right to a fair hearing, and the right to be heard by an independent court that must apply the law impartially and without fear, favour or prejudice.[453] While there were many 'twists and turns' in the hearing,[454] after De Lacy's claim was dismissed, the court considered the conduct of De Lacy's representatives, and the number and substance of the failed avenues

[448] *Imbumba* paras 27, 39 & 42.
[449] See D Markovits *A Modern Legal Ethics: Adversary Advocacy in a Democratic Age* (2008) 95.
[450] 2011 (9) BCLR 905 (CC).
[451] *De Lacy* para 5.
[452] Ibid.
[453] Ibid para 1.
[454] These twists and turns are beyond the topic of this dissertation, suffice to mention that counsel – at the last minute – attempted to retract the real allegation of bias in the papers, substituting it with an argument relating to a reasonable apprehension of bias by way of a letter to court. The court was incredulous at this assertion, in the light of two years of hardened and unwarranted talk of bias against the SCA panel, together with an unsuccessful complaint to the JSC, that the SCA panel of judges were biased. See *De Lacy* para 35.

that they had utilised on behalf of their client, as factors in [cost order].[455] However, the court declined to order costs *de boniis propriis,* instead referring its judgment to the regulatory authority to decide whether such conduct amounted to a breach of an ethical duty.[456]

It is clear that the court found the 'mouthpiece' approach of the legal practitioners to be problematic. In particular, the court expressed concern that De Lacy's practitioners were happy to simply rehash 'word for word' their client's unwarranted accusations against the SCA panel of judges,[457] without any evidence to back up such accusations.[458] In condemning this approach, the court stated:

> 'An officer of the court may not without more convey to a court allegations or claims by a client when there is reason to believe that the allegations are untruthful or without a factual basis. This duty is heightened in circumstances where imputations of dishonesty and bias are directed at a judicial officer who ordinarily enjoys a presumption of impartiality. It behoves the legal representative concerned to examine carefully the complaints of judicial bias and dishonesty and the facts, if any, upon which the accusations rest. Here it is doubtful whether these legal representatives did so.'[459]

Interestingly, the court implied that the officer-of-the-court model was a sufficient guide to resolve, or at least to direct, the legal practitioner to act appropriately. However, while the current code requires legal practitioners to act independently by giving 'a true account of his or her opinion' and not 'pander[ing] to a client's whims or desires', the code equally resolves that the legal practitioner may proceed to argue the matter despite the countervailing ethical considerations.[460] The implication of this code provision is again that, even if legal practitioners believe that their clients have absolutely no prospects of success, they still have a discretion (found in the word 'may') to place their client's case before the court. But what would govern this discretion? If the legal practitioner followed the neutral partisanship approach, each and every time the legal practitioners exercised discretion it would land on the side of placing the matter before the court. This is because the neutral partisanship model would not see legal

[455] *De Lacy* paras 57-8.
[456] *De Lacy* para 122.
[457] *De Lacy* paras 118-9.
[458] This the court said was evident throughout the hearing since: 'When their clients changed tack, so did they' (Ibid para 119).
[459] Ibid para 120.
[460] Code provision 9.9.

practitioners as 'pandering to a client's whims and desires' but would rather see them as enhancing the autonomy of clients by acting as a conduit for them to access the legal system.

What would a legal practitioner following the approach advocated for in this thesis have done? A legal practitioner who is faced with a client (such as De Lacy), who appears hell bent on pursuing unwarranted accusations against a court, could do a number of things. First, if she considered the matter to be without any basis, she should have advised the client of this opinion clearly (this appears to be a mandatory step in the rule set out above). However, this advice would also include a discussion about the potential harmful impact of his ends.[461] Second, if the client wanted to pursue the unwarranted line of argument anyway,[462] the legal practitioner would then need to consider the merits of pursuing such a claim by exercising her judgement. The legal practitioner would have to look at the nature of the client's accusations, and the purpose for which they would be put. In addition to considering the nature and purpose of the accusations, the legal practitioner also would have to look at the consequences that such accusations would have. In this particular matter, the court itself provided such consequences in *De Lacy*, namely the tarnishing of the reputation of the judges and the corrosion of the public confidence in the judiciary.[463] In weighing up the values, the legal practitioner would have to look at the value of the client to have the freedom to express himself (autonomy) and balance that against the value of Ubuntu in considering whether such actions displayed sufficient concern or respect for another[464] – in this case, the judiciary. Having considered the comparable value in furthering the autonomy of her client, versus the need for sufficient concern or respect, it appears that the legal practitioner should have refused to rehash the client's accusations, and

[461] Many critical ethics theorists emphasise the importance of this step, calling it a 'moral dialogue'. In this way, the legal practitioner not only engages the client on potential harm, but also on the means of representation. By doing so, the legal practitioner also avoids assuming their client is a 'cardboard' client (see discussion at 3.2.1) and avoids the paternalism that often occurs when there is information asymmetry such as that found in the attorney-client context. Dolovich notes that it is possible that a neutral partisan will engage in a serious moral discussion with their client, but the chances are far less. See S Dolovich 'Ethical lawyering and the problem of integrity' (2002) 70 *Fordham Law Review* 1629 at 1643 fn 52. In general, see D Luban 'Partisanship, betrayal and autonomy in the lawyer-client relationship: A reply to Stephen Ellman' (1990) 90 *Columbia Law Review* 1004 at 1025-26; S Pepper 'The lawyer's amoral ethical role: A defense, a problem, and some possibilities' (1986) 4 *American Bar Foundation Research Journal* 613 at 621-23; TL Schaffer 'The legal ethics of radical individualism' (1987) 65 *Texas Law Review* 963 at 982-4; and Nicolson & Webb *Professional Legal Ethics* 214-15.

[462] Nicolson & Webb *Professional Legal Ethics* at 214-5 acknowledge that the efficacy of moral dialogue may be limited where one needs it most. This is since one needs a client who is amenable to moral persuasion, and it is the unscrupulous client that is of real concern.

[463] *De Lacy* paras 49 & 66. The court was at pains at para 63 to explain that this did not mean that the judiciary was not immune to criticism, only that any such criticism had to be based on evidence, something that was distinctly missing in this case.

[464] J du Plessis 'Fairness and diversity in the South African law of contract' in SP Donlan & J Mair *Comparative Law Mixes, Movements, and Metaphors* (2020) 47.

should have counselled the client not to pursue these processes unless strong evidence existed over and beyond the client's mere say-so. If the client disagreed, then the legal practitioner should have withdrawn.

On this approach, the current legal representatives for the former president (Jacob Zuma) would have struggled to justify their conduct to date in front of the current Zondo Commission into State Capture.[465] In this matter, Zuma's legal representatives have adopted tactics and strategies for over two years (including an unsuccessful recusal application and leaving the Commission without permission) to avoid their client having to give testimony at the Commission.[466] This is despite the reality that the allegations investigated by the Commission, as the CC has pointed out, 'are extremely serious'[467] and '[i]f established, they would constitute a huge threat to our nascent and fledgling democracy'.[468]

After many delays and ignoring of requests to appear and depose affidavits, the Commission sought Zuma's compliance with a summons by bringing a direct application to the CC on an urgent basis to order him to do so. In its judgment directing Zuma to appear before the Commission, the CC noted that it was 'remarkable that the respondent [Zuma] would flout regulations made by him whilst he was still President of the Republic'.[469] The CC also found it unacceptable that Zuma attempted (through his legal representatives)[470] to incorrectly rely on a right (to remain silent) that exists for arrested and accused persons only.[471] In the wake of this judgment, commentators in SA have asked:

---

[465] It will be recalled at 3.3.3 that the Zondo Commission is a judicial commission set up by the President to 'inquire into allegations of state capture, corruption and fraud in the public sector including organs of state'. See Proclamation 3 of 2018, *GG* 41403, 25 January 2018. A judicial commission is not a court as such, so no duty to court applies. However, it should be noted that s 5 of the Commissions Act 8 of 1947 sets out that 'any person' who willfully hinders or obstructs a commission shall be guilty of an offence. See *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma* [2021] ZACC 2.

[466] Suffice to mention that the Commission's lawyers were chastised for their overly deferent conduct towards the former President which contributed to the delay. See *Secretary of the Judicial Commission of Inquiry* paras 58 and 71.

[467] *Secretary for the Judicial Commission of Inquiry* para 71.

[468] Ibid.

[469] Ibid para 58.

[470] The CC records that, before Zuma left the Commission on 19 November 2020, without permission, Zuma's counsel argued that Zuma did not have to testify: 'If you blow us, today, you do not agree with us – as I have said, I have a mountain to climb – what happens? Do we get Mr Zuma here as a guarantee? No, no, if we are approached that way, we will just – even if we lose, we will review you, we will go as far as wherever and that is not helpful. If you force me to bring him here without the climate being created for him to believe that he is not being charged. Well, I put him there, Chair, and he will exercise his right to say nothing.' See *Secretary of the Judicial Commission of Inquiry* para 89.

[471] *Secretary of the Judicial Commission of Inquiry* paras 90-93. While it is beyond the scope of this thesis, there are certain similarities between this context and the conduct by legal practitioners acting for the former US

> '[W]hich lawyers, all of whom owe a fidelity to the Constitution and the rule of law, are prepared to lend a serious hand to any attempt to destroy the very system they are enjoined to uphold?'[472]

In a partial answer to this question, the commentator states:

> 'It is not that Zuma should not be afforded the best possible legal advice/representation. That is clearly his right. But when the strategy is designed to hold the highest court in contempt, subvert the workings of a judicial commission …, and in effect produce a constitutional crisis by refusing to obey a legitimate legal obligation, then it is high time the legal profession begins, at last, to engage in serious ethical self-reflection.'[473]

The cases discussed above are simply examples of where – had the legal representatives used their discretion in balancing their client's autonomy against harm to the community – they would have acted in a way that would have vindicated 'justice' in important matters affecting important constitutional institutions and the community at large. In all these matters (and beyond), Ubuntu contributes to the discretion exercised by practitioners as to whether to adopt a particular tactic, by recourse to more than just the client's instructions.

### *6.4.2 A refusal to raise prescription in context*

The idea of refusing to raise prescription[474] is really a continuation of the argument that legal practitioners should be free to refuse to pursue a matter in a particular way. However, because the idea that legal practitioners may refuse to raise prescription is likely to be contested,[475] I dedicate a separate section to it. My argument is that, where the context requires, a lawyer must

president regarding the 2020 US election outcomes there. See Open Letter 'Call for bar condemnation and investigation of President Trump's campaign lawyers for subverting American democracy' 3 December 2020 available at https://lawyersdefendingdemocracy.org/call-for-bar-condemnation-and-investigation-of-president-trumps-campaign-lawyers-for-subverting-american-democracy/.

[472] Serjeant at the Bar 'Zuma, accountability and the courts: It's time for reflection from lawyers' (3 February 2021) *News24* available at https://www.news24.com/news24/columnists/serjeant_at_the_bar/serjeant-at-the-bar-zuma-accountability-and-the-courts-its-time-for-reflection-from-lawyers-20210203. The commentator does reflect that Zuma's lead counsel before the Zondo Commission could not have penned certain statements given he had contracted COVID at the time. See also P de Vos 'Jacob Zuma and the State Capture Commission: We need to talk about his lawyers' *Daily Maverick* 1 February 2021, available at https://www.dailymaverick.co.za/article/2021-02-01-jacob-zuma-and-the-state-capture-commission-we-need-to-talk-about-his-lawyers/.

[473] Sergeant at the Bar 'Zuma, accountability and the courts' ibid.

[474] Prescription in South Africa is governed by the Prescription Act 68 of 1969. The Act provides inter alia that 'debts' are effectively extinguished after a period of 3 years. It is the equivalent then to a Statute of Limitations found in other types of legal systems.

[475] For example, cf S Pepper 'Locating morality in legal practice: Lawyer? Client? The law?' in C Parker 'Forum: Philosophical legal ethics: Ethics, morals and jurisprudence' (2010) 13 *Legal Ethics* 165 at 174-5.

raise the defence of prescription with a client, but may refuse to plead prescription where it would conflict with Ubuntu. While the idea is controversial, it is arguable that the CC has implicitly condoned this approach – at least when one of the parties is an organ of state:

> 'A decision … whether or not to invoke prescription in a particular case must be informed by the values of our Constitution.'[476]

It is useful to go back to the case of *Njongi v MEC, Department of Welfare, Eastern Cape*[477] (discussed in chapter 3)[478] to understand the circumstances where refusing to plead prescription would be appropriate. It will be recalled that the provincial government terminated Mrs Njongi's social security payment unilaterally (along with several thousands of other disabled social security beneficiaries). When she applied to court for backpay due to the provincial government's unlawful decision, the government legal advisors advised its political head (the MEC) to plead prescription of the debt to avoid payment, which advice he followed. The CC was scathing in its criticism of this advice, particularly around the issue of prescription. It noted that s 17 of the Prescription Act[479] requires debtors to make a decision as to whether they should avail themselves of the defence of prescription. It follows that a legal practitioner ordinarily has to advise her client as to whether he or she should plead prescription, since the court cannot take prescription into account *mero motu.*

In deciding the matter, the court managed to avoid the question whether a social grant could qualify as a debt under the Prescription Act.[480] Accepting for its present purposes that it was a debt so defined, the court found that prescription had not yet begun to run. The court reasoned that the fact that the applicant's grant was never fully reinstated was an indication that the state had never disavowed the administrative decision. As a result of the state's failure to disavow the decision, prescription had not yet begun to run, and Mrs Njongi's claim was good.[481]

Notwithstanding this, the court directed that the provincial government show good cause as to why it should not be mulcted in costs for defending the matter in the way that it had. Having heard the reasons of both the MEC and his legal advisor, the court characterised the opposition to the case as 'unconscionable conduct'.[482] The court then went on to suggest what the legal

[476] *Njongi* para 79.
[477] 2008 (4) SA 237 (CC).
[478] Chapter 3 at 3.1.
[479] Act 68 of 1969 ('the Act').
[480] *Njongi* para 36.
[481] See *Njongi* paras 31-38.
[482] *Njongi* paras 55-56.

advice in this matter *should* have looked like in order for the client to have taken an informed decision. In the circumstances, the court found that the legal advice should have included 'moral and policy considerations'. These factors include an interesting mix of power balance issues (see points (1) and (6)) and merits:

1. The applicant was poor and vulnerable.
2. She lived with a 100% permanent disability.
3. The disability grant payable to her was constitutionally obligatory; in other words in paying it the Provincial Government was performing an important constitutional obligation.
4. The arrears had accrued as a result of an unlawful administrative decision made by the Provincial Government.
5. The Eastern Cape High Courts as well as the SCA had already expressed considerable disquiet about the approach of the Provincial Government to the reinstatement and had all but said that the Provincial Government is at least morally obliged to ensure reinstatement.
6. Mrs Njongi was in all probability not aware of the fact that she was entitled to arrear payments.[483]

In considering the affidavit of the legal advisor justifying his conduct, the court found that his justifications were: 'defending the morally indefensible' and 'a cynical position devoid of all humanity'.[484]

While the court did not explicitly reference Ubuntu, the court implicitly condoned an approach which would require the legal practitioner to advise her client in the light of the peculiar circumstances of the matter, particularly focusing any advice on how the applicant was 'embedded' in a community for which the client was responsible.[485] In addition to the court requiring the applicant's 'embeddedness' to be the focus, the court also noted that the legal advisor failed to advise the client on settling the matter, given the shockingly low amount of the debt (a debt of R5 800), the circumstances of the applicant, and the fact that there was no

[483] Ibid para 80.
[484] Ibid para 90.
[485] Ibid para 78. This type of approach to counselling (incorporating what appears to be 'extra-legal' considerations) has been implicitly endorsed by Hershowitz and Greenberg where they argue (separately) that there is no such thing as a distinctive 'legal domain of normativity' (S Hershovitz 'The end of jurisprudence' (2015) 124 *Yale Law Journal* 1160 at 1203). For example, Hershovitz suggests that legal obligation includes prudence, morality and other reasons (at 1181). See also M Greenberg 'The moral impact theory of law' (2014) 123 *Yale Law Journal* 1288 at 1290.

question that the money had been owed.[486] Ubuntu's considerations of embeddedness, responsibility and solidarity all take form in this light – these factors need to be considered before the decision to raise prescription is made. Indigenous African views on prescription seem to endorse these factors. According to Driberg, prescription in African thought operated in a particular way: a debt or a feud is never extinguished until the equilibrium has been restored.[487] Had the legal practitioner incorporated Ubuntu into his practice, he would have weighed all considerations, even those seemingly 'extra-legal' considerations, when determining a course of conduct.

This process again has similarities to Simon's ethical discretion approach, where he asks lawyers to consider the principles/purposes inherent in the provision. In *Njongi*, the legal advisor only appeared to focus on one aspect of prescription – that is, the need for legal certainty and finality in a debtor/creditor relationship after the lapse of a particular period. The fact that this would aid his client in avoiding the debt no doubt contributed to this focus. However, this type of focus is inadequate, since Ubuntu is all about context and weighing of values. Here, the legal advisor all but ignored the other value of prescription – that is, that rights are timeously exercised and disputes promptly adjudicated on,[488] given the obvious problems with stale evidence and faulty memories.

Simon would contend that the lawyer's ethical decision-making depends on the legal practitioner's determination regarding which of these value propositions captures the true purposes of the Act in issue – in our case, the Prescription Act. Simon weighs the competing values in considering whether to plead prescription in the following way: 'A lawyer who concluded that repose [ie certainty] was the underlying principle might decide that pleading the statute was appropriate simply because of the passage of the prescribed period',[489] but a lawyer 'who concluded that the basic principle of the statute was to spare judicial determination of claims on unreliable evidence might infer it inappropriate to plead the statute'. This would be

[486] *Njongi* para 67.
[487] JH Driberg 'The African conception of law' in E Cotran & NN Rubin (eds) *Readings in African law* (1969) 172. Mbaye explains that prescription is alien to Africa in the following terms: 'Prescription is unknown in African law. The African believes that time cannot change the truth. Just the truth must be taken into consideration each time it becomes known, so must no obstacle be placed in the way of the search for it and its discovery.' K Mbaye 'The African conception of law' in R David & International Association of Legal Sciences (eds) 'The legal systems of the world: Their comparison and unification' (1974) 2 *International Encyclopaedia of Comparative Law* 37.
[488] SALRC *Discussion Paper 148: Alternative Dispute Resolution in Family Matters* Project 100D (June 2019) 66.
[489] Simon *Practice of Law* 32.

since there is no difficulty for the lawyer to determine the merits of a claim if the client has admitted the validity of the debt.[490]

The Ubuntu-type enquiry would work in a similar way, but with a focus on the values of the Constitution that emphasise embeddedness, again starting with the factors relating to a power imbalance, the resolution setting, and institutional competence. I would argue that a legal practitioner, in the context of *Njongi*, would find that the structure of s 17 of the Prescription Act implies that it is unreliable evidence, rather than certainty, that aligns better with the purpose of the Prescription Act in cases where constitutional rights are implicated. This is so given that if the purpose was simply the need for certainty, the legislature would have allowed a court *mero motu* to take account of prescription. Instead, the section requires the debtor explicitly to raise the defence. The legal advisor in *Njongi* could not truly have valued the need for legal certainty as an end, given that the validity of the debt of R5 800 was never contested.

If Ubuntu informed the legal practitioner's views, there would also be consideration of the power imbalances embedded in the value of the right of access to courts.[491] The SALRC has recommended that 'more is required of prescription than routine utilitarian justice, especially in the face of a society emerging from the shadow of entrenched discrimination and inequality'.[492] The gist of the SALRC's complaint is that there is a presumption that all people are capable of bringing their matters to court timeously, and when they do not, they are presumed to be negligent or careless in their conduct. The reality, as the SALRC states, is that often

> 'the right to access to courts coincides with the ability to access resources which in turn is influenced by the high cost of legal services, high levels of poverty and unemployment, inadequate social security, high levels of illiteracy, alternatively limited rights awareness, and geographical isolation in outlying rural areas, informal settlements and townships serviced by underdeveloped infrastructure and unreliable public transport'.[493]

This is borne out by experiences of many courts facing prescription defences, particularly in relation to road accident and medical negligence claims.[494] If one goes back to Mrs Njongi,

[490] Ibid 33.
[491] Section 34 of the Constitution.
[492] SALRC *ADR in Family Matters* xiii.
[493] Ibid 162–63.
[494] In the particular area of road accident fund claims, the Satchwell Commission, for example, indicated that only 50 per cent of the population was aware of the opportunity to claim compensation, and that this percentage increased with increased household level incomes and living standards. Quoted by Justice Froneman in *Road*

most of the impediments raised by the SALRC applied to her situation. In fact, one can say that but for the intervention of the Legal Resources Centre, the Black Sash and various other public interest organisations, thousands of disabled people would not have challenged the Eastern Cape Department of Welfare's decision – timeously or late – and none of them would ever have received arrears payments.

In so far as this discretion to refuse is concerned, there is no doubt that the legal practitioner is duty-bound to bring the client's attention to all factors that should influence her decision – thus avoiding any allegation that the legal representative acts in a paternalistic way.[495] It goes without saying that where prescription may apply, it should be brought to the attention of the client.[496] However, whether to obey an instruction by the client to pursue prescription should rest on the lawyer's conscience considering the circumstances. Where there is a constitutional right at play, the decision should weigh more heavily in favour of realising the right, but in private matters, the lawyer might raise a myriad other factors that could influence the client's decision. This is in line with the court's thinking in *Njongi* – that the legislature left the choice to invoke prescription to the debtor, since it is the debtor who would have to face 'commercial, community and other consequences for that choice'.[497] Thus, legal practitioners, in claims against private entities such as mining houses, corporations and banks, must avoid encouraging clients to exploit legal loopholes and test legal limits[498] where doing so negates the values of the Constitution. This may mean that lawyers have to be brave enough to advise clients to pay their debts where they exist, despite the existence of the right.[499] In some instances this may mean refusing to raise prescription.

---

*Accident Fund v Mdeyide* 2008 (1) SA 535 (CC) *Mdeyide* paras 116-7. The Commission also found that there were other impediments: often, and linked to the apartheid bureaucracy, people are unable to produce documentation providing birth, marriage and dependence or produce proof of income when working in the informal economy.

[495] See Nicolson & Webb *Professional Ethics* 143–4 where they argue the case for client consent.

[496] Luban implies that a legal practitioner, following a moral activist stance, would *not* have to consult with client in ethically problematic situations and could proceed to act without the client's input. This view appears to be too categorical for me, see D Luban 'Fiduciary legal ethics, zeal and moral activism' (2020) 33 *Georgetown Journal of Legal Ethics* 275.

[497] *Njongi* para 78. Significantly, the ABA Model Rules are better developed in this regard: Rule 2.1 requires that lawyers 'exercise independent professional judgment and render candid advice'. The rules specifies that candid advice may include 'moral, economic, social and political factors … that may be relevant to the client's situation'. Luban suggests that this requirement should be mandatory not permissive. See Luban 2020 *Georgetown Journal of Legal Ethics* 288-89.

[498] B Green & R Pearse 'Public service must begin at home: The lawyer as civics teacher in everyday practice' (2009) 50 *William & Mary Law Review* 1207 at 1215.

[499] In *Madibeng Local Municipality v Public Investment Corporation Ltd* [2020] ZASCA 157 the SCA found at para 50 that an attempt by a municipality to defend a matter on a defence of prescription (and its subsequent appeal) to be 'inexplicable' and 'reprehensible'. This was because the municipal manager had at all times

In all this, of course, there remains another presumption that needs to be challenged, and that is a legal practitioner's assumptions that clients[500] are cold, calculating, selfish beings.[501] This assumption is diametrically opposed to the notion of Ubuntu, which seeks to move away from libertarian notions of maximum freedom of the individual in the framework of a social contract of 'restraint' rather than 'enabling' factors. Ironically, this assumption also violates the very client autonomy that the legal practitioner is supposed to realise in a libertarian framework. Legal practitioners therefore should be slow to conclude that their clients would want to avoid payment at all costs and, as the *Njongi* suggests, raise both the legal issues but also the 'moral and policy considerations' of the matter where the context requires this.

### *6.4.3 A refusal to take on a matter at all*

It will be recalled from chapter 2 that while attorneys need not take on matters or clients to which they object, advocates have less scope to do so, given the existence of the cab rank rule that presently operates in South Africa. Given that the approach advocated here requires the consideration of discretion incorporating Ubuntu, it is fairly clear that the cab rank rule should not survive in its current state as a shield against questionable conduct.[502] Essentially, the problem with the rule is that it prevents legal practitioners from considering the moral aspects of a matter. Kentridge's consideration of the cab rank rule under apartheid displays this kind of thinking: that while the cab rank rule preserves important rule-of-law considerations, it is not the end of the matter. He suggested that the rule could not be absolute.

Significantly, Yacoob DCJ auggested that it is not the cab rank rule itself that is the problem, but its abuse:

> 'Some members of the profession have sought opportunistically and impermissibly to misconstrue the so-called "cab rank" rule. … These detractors unashamedly assert that they are, by some inexplicable extension of a well-meaning rule, obliged (indeed entitled) to act without constraint to protect their clients and to carry out instructions to the letter regardless.'[503]

---

'acknowledged that it owed the money' and 'would not avoid its obligations'. In this light, the Court berated counsel in conducting proceedings in the knowledge that it had no defence on the merits.

[500] Simon 1978 *Wisconsin Law Review* 54.

[501] See 3.1.

[502] Although it is worth mentioning that advocates have a significant discretion given that they can rely on the qualifications to the rule, inter alia, availability and expertise.

[503] Justice Zac Yacoob, Keynote address at the SADC Lawyers' Association regional solidarity webinar on independence of the legal profession on 7 October 2020, available at https://www.dailymaverick.co.za/article/2020-10-11-a-truly-independent-lawyer-is-a-caring-human-being-first-a-courageous-democrat-second-and-a-lawyer-only-third/.

When would one exercise this discretion to refuse? I have previously argued (together with Whitear)[504] that one such instance could be in the context of a client wanting a practitioner to take on a 'hopeless case' in a resource-scarce institution. This was the issue in *Mashishi v Mdlala*,[505] a case mentioned in chapter 4.[506] In this matter, the legal practitioner assisted the applicant to apply for the review of a bargaining-council arbitration award five years late. In terms of relevant labour legislation, the review application should have been filed within six weeks of the arbitration award.[507] The court found that there was no plausible reason for the delay,[508] and as such, the condonation application was a hopeless case. Unusually, the court went on to comment that the applicant's representatives had had an ethical obligation *not* to pursue the matter, notwithstanding the applicant's instructions to the contrary.[509]

In reaching this conclusion, the court explicitly aligned itself with the stance taken by Rogers, who has argued extra-curially that it was improper for an advocate to act for a client in a case that is hopeless in law or on the facts.[510] He explained that a hopeless case is one in which the advocate is not able to

> 'formulate a coherent argument comprising a series of logical propositions which have a reasonable foundation in law or on the facts and which, if they are all accepted by the court, will result in a favourable outcome, even if counsel believes that one or more of the essential links are likely to fail'.[511]

Instead, the court opined that legal practitioners should:

> 'place the interests of justice and of the court before the parochial interests of their clients and what might seem to be a principle of partisanship that requires representatives to advance their partisan interests with the maximum zeal permitted by law; and the principle

[504] N Whitear & H Kruuse 'Legal practitioners' ethics in resource-scarce institutions: A discussion of *PM Mashishi v Mdlala & others* [2018] 17 BLLR 693 (LC); (2018) 39 ILJ 1607 (LC)' (2019) 40 *Obiter* 383.
[505] [2018] 7 BLLR 693 (LC)
[506] See 4.4.
[507] *Mashishi* para 1.
[508] *Mashishi* paras 12 and 10. Accordingly, and in line with the principles set out above, the court found that his prospects of success were irrelevant (*Mashishi* para 8; see also *Keetso and 211 others v CTP Ltd* [2011] ZALCJHB 48).
[509] *Mashishi* paras 14 & 17. The judge explained that counsel acts improperly in pursuing a case where s/he 'is quite satisfied' that one or more of the essential links of the argument will fail. In particular, there is 'an ethical obligation on counsel to ensure that only "genuine and arguable" cases are ventilated, and that this be achieved without delay'. See O Rogers 'The ethics of the hopeless case' (2017) 30 *Advocate* 46 at 51.
[510] *Mashishi* para 14; Rogers 2017 *Advocate* 46.
[511] See also D Ipp 'Lawyers' duties to the court' (1998) 114 *Law Quarterly Review* 63 at 99.

> of non-accountability, which insists that a representative is not morally responsible for either the ends pursued by the client or the means of pursuing those ends.'[512]

I doubt there many people would argue with the fact that the case was a 'hopeless' one, and should not have been pursued. However, the more difficult cases would be where there is some 'wiggle room' for whether a case amounts to one that is hopeless. Every lawyer is well aware of the dictum in *John v Rees*[513] where, in another context, the court explains that this task may be more complex than it appears at first. Megarry J famously commented that

> '[a]s everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change.'[514]

How would Ubuntu require lawyers to proceed where a *prima facie* 'hopeless case' presents itself? It would seem counter-intuitive to block parties' access to the dispute-resolution system when, in fact, that is the very point of the system's existence in the first place. Ubuntu requires reconciliation, so blocking access to that possibility appears to contradict the ends that Ubuntu supports. Furthermore, the SCA in *Van der Berg v General Council of the Bar of South Africa*[515] has approved of both the following statements:

> 'A man's rights are to be determined by the Court, not by his [solicitor] or counsel … A client is entitled to say to his counsel, *I want your advocacy, not your judgment*; I prefer that of the Court.'[516]

and

> '[A barrister] has a monopoly of audience in the higher courts. No one save he can address the judge, unless it be a litigant in person. This carries with it a corresponding responsibility. A barrister cannot pick or choose his clients. He is bound to accept a brief for any man who comes before the courts. No matter how great a rascal the man may be. No matter how given to

[512] *Mashishi* para 16; see also Van Niekerk J, address to the SASLAW conference in Port Elizabeth, September 2018 (on file with author).
[513] [1970] 1 Ch 345.
[514] *John v Rees* 402.
[515] [2007] 2 All SA 499 (SCA) (22 March 2007) para 14.
[516] Quoting Bramwell in D Pannick *Advocates* (1992) 92–3. My emphasis.

> complaining. No matter how *undeserving* or unpopular his cause. The barrister must defend him to the end.'[517]

However, it is important to notice that both statements refer to a liberal legalist stance which does not reference any other considerations. Ubuntu would require that other considerations come into play. For example, the legal practitioner could ask him- or herself whether representation in a hopeless case will assist in promoting the values that Ubuntu encompasses. On this approach, a legal practitioner may agree to take on the matter given the importance of easy access to justice, and the value of dispute resolution in the labour context, and also the general inequality suffered by employees.[518] However, in the context of a setting with overburdened court rolls, and delayed outcomes, Ubuntu may require that the lawyer not take on the case. Webb has an interesting approach on this:

> 'Where a hopeless case is brought with the assistance of the advocate, the advocate must either be believing that it is hopeless (and therefore assisting in the abuse), or believing it is not hopeless (and therefore incompetent) or not caring whether it is hopeless (and therefore guilty of recklessness or gross negligence). In any of these cases the conduct of the advocate warrants action being taken by the court.'[519]

If a lawyer considered Ubuntu, she may have to consider institutional competence: if the Labour Court was functioning optimally, surely she would not want practitioners to be sceptical of client claims, and she would indeed encourage creativity in legal argument that might be in the best interests of the administration of justice in the long run.[520] However, this is not the situation in which the South African labour courts operate.[521] In a situation where the institution itself is under severe strain, and where this threatens the administration of justice in worthy cases, the lawyer may have to assume more direct responsibility for substantive justice. In the *Mashishi* case, this would probably mean not taking the matter on.[522]

[517] *Rondel v Worsley* 1967 (1) QB 443 (CA) 502. My emphasis.
[518] Whitear & Kruuse 2019 *Obiter* 395.
[519] D Webb 'Hopeless cases: In defence of compensating litigants at the advocate's expense' (1999) 30 *VUWLR* 295 at 297.
[520] Ibid.
[521] Whitear & Kruuse 2019 *Obiter* 383.
[522] Ibid 395.

## 6.5 CONSENSUS-BUILDING IN CONTEXT

A further area of interest in relation to the application of Ubuntu is consensus-building. I use two contexts that I believe to be paradigmatic of the need for, and the value of, Ubuntu in legal practice. These areas are fields in which I believe the context and aims of Ubuntu will often (but not always) align: family law, and transformative initiatives in terms of the SA Constitution. These two examples show how Ubuntu can improve the processing and resolution of disputes.

### *6.5.1 Litigating disputes within the family*

Given the importance of context in considering whether Ubuntu applies, family disputes lend themselves to the type of consensus-building that is contemplated here. In a dispute about the validity of a customary marriage in *Mayelane v Ngwenyama*,[523] the CC found Ubuntu in customary law to be particularly useful in this type of setting since it

> 'provides room for consensus-seeking and the prevention and resolution, in family and clan meetings, of disputes and disagreements; and … [T]hese aspects [also] provide a setting which contributes to the unity of family structures and the fostering of co-operation, a sense of responsibility and belonging in its members, as well as the nurturing of healthy communitarian traditions like *Ubuntu*.'[524]

In this context, Ubuntu and the 'ethics of care' approach discussed in chapter 4 are similar.[525] In fact, Bohler-Muller[526] explicitly links Ubuntu to the ethics of care approach when she notes that:

> 'An ethical relationship or ethic of relationships, embraced in the philosophy of *Ubuntu*, demands that we listen to the other without preconceptions and without attempting to assimilate her otherness.'

The SALRC, while not explicitly referencing Ubuntu or the ethics of care, has considered ideas resonant with these approaches as suitable for the resolution of disputes involving the family.[527]

---

[523] *Mayelane v Ngwenyama* 2013 4 SA 415 (CC).
[524] Ibid 24.
[525] See chapter 4, at 4.x.
[526] N Bohler-Muller 'Beyond legal metanarratives: The interrelationship between storytelling, Ubuntu and care' (2007) 18 *Stell LR* 133 at 159.
[527] One obvious reason is that a family dispute is relational in nature, rather than the usual 'transactional' nature of commercial disputes. See SALRC *ADR in Family Matters* 14.

For example, the SALRC has noted that alternative dispute resolution aimed directly at reducing conflict is a better form of resolution given 'the negative effect of adversarial and protracted court proceedings on children' in particular.[528] The SALRC has also noted that:

- 'The traditional adversarial culture sometimes not only fails to alleviate conflict, but often exacerbates it.'[529]

- 'The excessive adversarialism on family justice problems is compounded by the broader trend in modern society to legalise human relationships and emphasise rights-based thinking.'[530]

As a result the SALRC, by appearing to follow an ethics of care approach, suggests a number of factors that lend themselves to consensus-building in a way that supports the Ubuntu-approach:

- 'Family cases are often highly emotional and characterised by significant financial, interpersonal and psychological stress for family members. The non-legal (emotional, interpersonal and relational) problems often fuel and complicate the legal problems. This is particularly true in high-conflict cases.'[531]

- 'Relationships are ongoing. It is the restructuring of familial relationships rather than their termination that is the central objective of the family law process. Unlike parties to other types of civil case, parties in family law cases must frequently sustain a long-term working relationship after the legal issues have been resolved. Family relationships seldom actually end; they are simply reorganised. Spouses must continue to parent while jointly navigating problems and renegotiating obligations as personal and financial circumstances change. This implies both a need for dispute resolution processes that sustain relationships and a need for post-resolution support mechanisms.'[532]

- 'Outcomes [of family disputes] are provisional and subject to revision as needs, capacities and obligations change with circumstances.'[533]

For these reasons, it appears that an approach which sees Ubuntu as the favoured value may be useful, given the unique nature of many family disputes. However, this is just a starting point,

[528] SALRC *ADR in Family Matters* 2.
[529] Ibid 21. Footnote omitted.
[530] Ibid 21-22.
[531] Ibid 15.
[532] Ibid.
[533] Ibid 16.

and a legal practitioner must still consider all factors in deciding how to represent the client. In all this though, there is another potential lesson to be learnt, especially in family law disputes. This lesson is that it is dangerous to paint litigation in courts as the 'bogeyman' and to conflate neutral partisanship with the adversary system. By this I mean that it should not be a given that courts are places were consensus cannot be reached. It should not be assumed that truth, rights and justice (as objectives of the adversary system) can *only* be achieved by adversarial contestation. It is possibly more accurate to blame certain practitioners and their excessive neutral partisan tactics in courts, rather than the adversarial system per se, for the way in which people view the courts as inherently unable to resolve personal matters fairly or justly. Courts have recognised some unjust consequences for clients when legal practitioners act in this fashion. For example, in *MB v NB*[534] the court suggests:

> 'Acrimony between legal representatives, which can carry over from one case to the next, easily produces an overidentification with the client's cause and an attitude of win-at-all-costs. These emotions can act as a complete barrier to settlement.'[535]

It is worth repeating how the court suggests how this plays out in divorce proceedings in particular:

> 'Lawyers create the illusion that clients are solely responsible for the stances that are adopted in litigation, but of course their advice is profoundly influential and shapes the demands being made and strategies used to achieve them. With this in mind, the lawyers have much to answer for when a party requires the other "to vacate the matrimonial home forthwith"; when requests for particulars are deflected on the grounds of petty mistakes in the formulation of the questions; when there are interminable skirmishes over documents that result, eventually, in the production of bundles totalling almost 1000 pages, few of which have any direct bearing on the matter at hand; and when the parties threaten each other with criminal proceedings and respond by saying that the threat is being dismissed "with the contempt it deserves".'[536]

In the quotation above, the tactics mentioned (obstruction, delay, obfuscation, threats) are more a part of neutral partisan position than a *necessary* part of the adversary system per se. They

[534] For example, see *Clemson v Clemson* [2000] 1 All SA 622 (W). In this matter, the court found that the only rational explanation for an application (brought in terms of Rule 6(12) of the Uniform Rules) was to harass the respondent in order to intimidate her. Finding that the application was a wilful, deliberate strategy with no basis in law, the court ordered counsel to pay respondent's costs de bonis propriis and was precluded from collecting any fee from his client concerning the application.
[535] *MB v NB* para 54.
[536] Ibid.

are a result of choices made by the legal practitioners in the conduct of litigation within that system. Thus, one should not conflate neutral partisanship with the adversary system. As discussed in chapter 2, neutral partisanship is not a necessary corollary of that system. Metz[537] suggests that reconciliation (and by extension, consensus-building) is not at odds with the adversarial system if one accepts that 'reconciliation includes moving forward together in the light of an accurate awareness of what transpired in the past'.[538] Metz goes on to say:

> '[I]f it happened to be the case that an adversarial system is necessary to facilitate that adequately or did so to a much greater degree, then there would be a strong, under-appreciated case for adversarialism on grounds of reconciliation. Any plausible African ethic will make space for competitive fora such as sports and markets (which does not necessarily mean capitalism) roughly because they can facilitate a greater harmony on balance for society, and it could be that a competitive courtroom is analogously justified.'[539]

Thus, while consensus-building is particularly useful since it is inherently relational, it does not mean that Ubuntu could not (or should not) influence legal practitioners' approaches in other areas.

### *6.5.2 Litigating commercial disputes related to Broad-Based Black Economic Empowerment (B-BBEE)*

I believe that commercial disputes in and out of court are also susceptible to the use of Ubuntu despite their transactional nature. As always, context is important. Ubuntu would require one to assess the circumstances of each case. Clearly, it is not consensus-building where allegations in court papers are 'reckless', 'odious', 'vitriolic or 'generalisations', and where clients – through their legal practitioners – use the litigation as a platform to abuse their opponent or to spread propaganda.[540] These tactics may have been highlighted in a family context in *MB v NB*, but they also have application in the commercial sphere. As the CC observes:

---

[537] T Metz 'Reconciliation as the aim of a criminal trial: *Ubuntu's* implications for sentencing' (2019) 9 *CCR* 113 at 123.
[538] Ibid.
[539] Ibid.
[540] *Helen Suzman Foundation v President of the Republic of South Africa & others; Glenister v President of the Republic of South Africa & others* 2015 (2) SA 1 (CC) at paras 23-30. See also *Habitat Council v City of Cape Town & others* [2018] ZAWCHC 36.

> '[S]tereotyping and political narrative are an abuse of court process… And courts should never be seen to be condoning this kind of inappropriate behaviour, embarked upon under the guise of robustness…'[541]

Thus, another 'paradigmatic' context where Ubuntu appears to be the favoured value in representation is where the explicit purpose of the law is transformative in nature. It is in this vein that I believe that legal practitioners, acting or advising in terms of the Broad-Based Black Economic Empowerment Act (B-BBEE Act), ought to adopt a role that emphasises Ubuntu.[542] The Act, the amended codes, sector specific codes and the charters have the broad aim of facilitating black people's sustainable access to the economy.[543] It is in incontrovertible that the clear purposes of the B-BBEE policy is to benefit people previously disadvantaged by apartheid and the legacy it left. Mogoeng CJ notes:[544]

> 'One of the most vicious and degrading effects of racial discrimination in South Africa was the economic exclusion and exploitation of black people. Whether the origins of racism are to be found in the eighteenth and nineteenth century frontier or in the subsequent development of industrial capitalism, the fact remains that our history excluded black people from access to productive economic assets. After 1948, this exclusion from economic power was accentuated and institutionalised on explicitly racially discriminatory grounds, further relegating most black people to abject poverty.'[545]

As a result, the B-BBEE programme (through legislative and other regulatory measures) is aimed at enabling organs of state to award tenders to enterprises where previously marginalised individuals hold a significant amount of shares.[546] The programme operates on a preferential point system: the points are awarded on condition that historically disadvantaged shareholders actively participate in the enterprise in a way that is commensurate with their ownership.[547] The more points awarded to an enterprise, the more likely the enterprise is to be awarded a

[541] *Helen Suzman* para 29-30. See also *Habitat Council* paras 31-2.
[542] Act 53 of 2003.
[543] 'Black people' are defined in the Act as a generic term which means Africans, Coloureds and Indians and which now, subsequent to the Chinese Association of South Africa case, includes people of Chinese descent. See L Williams 'Pro bono legal services and broad-based black economic empowerment' (2010) April *Without Prejudice* 56 at 57.
[544] *Viking Pony Africa Pumps (Pty) Ltd t/a Tricom Africa v Hidro-Tech Systems (Pty) Ltd & another* 2011 (1) SA 327 (CC).
[545] *Viking Pony* para 1.
[546] Ibid para 2.
[547] Ibid para 2.

state tender – all other things being equal. In this way, B-BBEE provides exposure and rewards those enterprises which are inclusionary and appoint affirmatively.

Despite the obvious theoretical benefits to both parties in a B-BBEE transaction, there have been many issues arising from the implementation of this regulatory regime. One practice has become such a concern to the state that it first issued guidelines on its prevalence,[548] and then subsequently amended the Act to make it a criminal offence.[549] This practice is called 'fronting'.[550] The state noticed that, within a few years of introducing the programme, it was not achieving the Act's purpose – that is, benefits were not reaching those intended to be the beneficiaries of the programme.[551] Commentators found that while black persons ostensibly had ownership and control of companies on a B-BBEE basis, such ownership and control was effectively a 'sham'[552] since third party funding instruments effectively maintained the status quo of primarily white persons or foreigners owning and/or controlling the economy.

The most common form of fronting is said to be 'window-dressing'. This includes cases in which black persons are appointed or introduced to an enterprise for token purposes. Often they are then discouraged or inhibited from substantially participating in the core activities of an enterprise; and discouraged or prohibited from substantially participating in certain stated areas and/or levels of their participation.[553] This is normally achieved through contract: the company

[548] *Guidelines on Complex Structures and Transactions, and Fronting* released by the Department of Trade and Industry in 2009.
[549] Broad-Based Black Economic Empowerment Amendment Act 46 of 2013.
[550] Section 1 of B-BBEE Act, as amended, defines the term 'fronting practice' as 'a transaction, arrangement or other act or conduct that directly or indirectly undermines or frustrates the achievement of the objectives of this Act or the implementation of any of the provisions of this Act, including but not limited to practices in connection with a B-BBEE initiative – … (d) involving the conclusion of an agreement with another enterprise in order to achieve or enhance broad-based black economic empowerment status in circumstances in which –
(i) there are significant limitations, whether implicit or explicit, on the identity of suppliers, service providers, clients or customers; (ii) the maintenance of business operations is reasonably considered to be improbable, having regard to the resources available; (iii) the terms and conditions were not negotiated at arm's length and on a fair and reasonable basis.'
[551] TV Warikandwa & PC Osode 'Regulating against business "fronting" to advance black economic empowerment in Zimbabwe: Lessons from South Africa' (2017) 20 *PELJ* 1 at 19. Rather, it appeared that 'a few well-connected business elites colluding with politically-connected black elites managed to capture the opportunities spawned by the programme' (ibid).
[552] A term used in the *Peel* judgment regarding sale of share agreements amounting to fronting. At the time of the judgment, the Act had not been amended to make fronting a criminal offence. *Peel* paras 19 & 55.
[553] This is considered to be the most common form of fronting. See Deloitte *A New Challenge for South African Companies* 2012 2. Other types of fronting practices mentioned by the guidelines include: (a) Benefit Diversion. This includes initiatives implemented where the economic benefits received as a result of the B-BBEE status of an enterprise do not flow to black people in the ratio as specified in the relevant legal documentation; and (b) Opportunistic Intermediaries. This includes enterprises that have concluded agreements with other enterprises with a view to leveraging the opportunistic intermediary's favourable B-BBEE status in circumstances where the agreement involves significant limitations or restrictions upon the identity of the opportunistic intermediary's suppliers, service providers, clients or customers; the maintenance of their business operations in a context

or a third party who funds the buying of shares usually incorporates clauses in the transactional documents that strips the value of the B-BBEE transaction from the black shareholder and funds flow to the white or foreign funder.[554] A basic example of fronting can be found in *Peel & others v Hamon J&C Engineering (Pty) Ltd & others.*[555] Here, a company purported to sell shares to the company's black tea lady and black driver/messenger to maximise its B-BBEE points in order to be awarded tenders by the state.[556] In a s 163 Company Act application,[557] the court found that the two black shareholders derived no real benefit from the sale,[558] and that such sale was a business risk, leading it to be prejudicial and oppressive to the other shareholders.[559]

It is difficult to ascertain the involvement and actual type of advice given to clients by legal advisers in such matters, given attorney-client confidentiality.[560] However, it is reasonable to suppose that most companies will use legal advisors to draft their contracts and advise them in

---

reasonably considered improbable having regard to resources; and terms and conditions that are not negotiated at arms-length on a fair and reasonable basis

[554] This is achieved by, first, requiring the black person to either return the shares on request with no added value, or paying back the funder with the dividends plus interest. Second, the black person is effectively denied participation in the control of the company by the inclusion of 'director control' clauses. These clauses require that the black shareholder may not vote against the third party funder in director decisions or/and must effectively give up control to the third party

[555] *Peel & others v Hamon J&C Engineering (Pty) Ltd & others* 2013 (2) SA 331 (GSJ).

[556] The parties were purportedly jointly 'sold' 26 per cent of the shares. This is significant as this allows a company to earn maximum points for B-BBEE ownership. See *Peel* para 17.

[557] Section 163 of the Company Act 71 of 2008 is known as the 'oppression remedy'. It provides that: '(1) A shareholder or a director of a company may apply to a court for relief if – (*a*) any act or omission of the company, or a related person, has had a result that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant; (*b*) the business of the company, or a related person, is being or has been carried on or conducted in a manner that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant; or (*c*) the powers of a director or prescribed officer of the company, or a person related to the company, are being or have been exercised in a manner that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant.'

[558] *Peel* para 20. It was clear to the court that the sale of shares constituted fronting for a variety of reasons, including: first, the fact that the shares were transferred to the black shareholders for R1. Second, the agreement allowed the company the right to repurchase the shares at any time, simply on request (which they also did six months after conclusion of the agreement). Third, that the price of the shares to be repurchased would be calculated proportionate to the company's net asset value, and the number of shares held by each black shareholder. Given the fact that the company had a negative net asset value at the date of concluding the agreement with the black shareholders, this would result in the retransfer of shares back to the company without transferring any value to the black shareholders. Fourth, one of the black shareholders confirmed that her position at the company remained unchanged, but for the payment of a shareholder's allowance, an unusual payment in company law.

[559] *Peel* para 7 & 55. Similarly, in *Esorfranki Pipelines (Pty) Ltd and Another v Mopani District Municipality & others* 2014 2 All SA 493 (SCA) at para 26 fronting was described as a 'fraud on those who are meant to be the beneficiaries of legislative measures put in place to enhance the objective of economic empowerment'. See also *Passenger Rail Agency of South Africa v Swifambo Rail Agency (Pty) Ltd* 2017 (6) SA 223 (GJ) at para 109.

[560] Tur suggests that legal practitioners are well aware of the harm associated with their advice but are shielded through confidentiality rules: '[The] widespread loss and distress associated with massive banking, insurance and pension frauds … simply could not occur without … lawyers who, as professionals, must have at least an inkling of the rule nature of their principals' activities.' See RHS Tur 'Confidentiality and accountability' (1992) 1 *Griffith Law Review* 73 at 73.

these matters.[561] It is also reasonable to suppose that, given the prevalence of the practice, and its sophistication over the years, that legal advisors are involved in designing increasingly creative ways in which to derive maximum benefit from the programme, with minimal real change in ownership and control, despite the broader purpose of the Act being to transform participation in the economy.[562] This is certainly the view of the SA Minister of Trade and Industry, Rob Davies, who noted in 2010:

> 'It is not just the obvious one, where you take the factory-floor worker and call him the managing director. … [Fronting is] now beginning to involve accountants, lawyers and verification agents that are *giving people ideas of more sophisticated ways to front. ... Fronting is becoming analogous to tax avoidance and tax evasion.*'[563]

Given the prevalence of fronting, a critic may argue that black persons and black-owned enterprises will have legal practitioners who advise them to look out for onerous provisions regarding value (through restrictions on control and ownership). In this way, representation on both sides levels the playing field. However, this argument presumes equal power differentials in contracting,[564] and presumes that the black participants or black-owned enterprises will have their own (and 'equal') legal representation. However, one should doubt a presumption that operates in this way. I doubt that targeted black low-level employees of enterprises will have legal advice. For example, both the black employees in the *Peel* matter had no legal representation at the time of the conclusion of the sale agreement.[565] Even where there is a black-owned company involved, anecdotal evidence suggests that these companies rely on the third party funder's attorneys in the drafting of the sale agreement, despite the real possibility of a conflict of interest.[566] However, and keeping with the discretionary nature of the approach

---

[561] Cf In the *Peel* matter, however, the company stated (despite this being contested) that they had not used external legal advice at the time of entering into the sale agreement. The judgment does not mention the use of internal legal advisors in drafting the sale agreement. See *Peel* paras 19(8), 31, 39 & 58.

[562] J van Zyl 'B-BBEE fronting' GIBS Business School Seminar available at https://youtu.be/OuWl7EJ8eBA. At 1:10 mins he notes: 'Unfortunately, most of the [B-BBEE] advisors, if you pay enough, you will get what you want, they will tick the boxes for you.'

[563] Quoted in GA Gerber 'An appraisal of the offence of "fronting" in the context of broad-based black economic empowerment (B-BBEE) in South Africa' unpublished LLM thesis, University of Johannesburg (2017). My emphasis. The issue of lawyer involvement in fronting advice was more recently a concern at a meeting of the Black Lawyers' Association (BLA) as reported in K Ramotsho 'Legal practitioners must be ambassadors in fighting corruption' (2018) July *De Rebus* 10.

[564] This is a presumption that is contested by those opposing the neutral partisan approach, see chap 3 above.

[565] *Peel* para 19(8).

[566] As found in *Jordan and another v Farber* [2009] ZANCHC 81. While this was not a B-BBEE matter, its contents are analogous: In this matter, the legal practitioner drew up a lease contract in his personal capacity as well as an attorney for the applicants. The court held that, as such, he acted in his own interests to the detriment of the applicants (his clients). The court further found that the attorney had a duty to advise the applicants to seek independent legal advice. The court declared the lease agreement void in these circumstances.

advocated here, a legal practitioner may well find that – should there be a levelled playing field in terms of representation (and considering the other factors) – then there may be value in a tougher client-centred approach.

What Ubuntu really does, then, is to discourage legal practitioners and their clients from seeking newer, more creative ways to maximise profits from the B-BBEE programme (with minimum effort or change in control and management). If legal practitioners follow this approach, the only time they can adopt these strategies is when there are effective measures to counter or challenge such efforts. However, it may be useful to go back to a likely scenario: if the other side is unrepresented, and a legal practitioner represents a client who wishes to effectively engage in fronting, how should the legal practitioner give advice? It is useful here to consider how a neutral partisan lawyer may reason out her representation. First, a neutral partisan legal practitioner would privilege form over purpose.[567] Thus, such a lawyer would have no problem in drafting a contract that allows for the existence of 'form' (that a black shareholder must have 25 + 1 per cent in the company),[568] even if it undercuts substantive rules (that the black shareholder has *effective* ownership and control of the company). This legal practitioner would have no problem in appealing to interpretations of rules that frustrate the purposes of the rules.[569] For example, such a legal practitioner would find it permissible to draft a sophisticated fronting contract that could be construed as being permitted by the language of the Act, but which is substantively contrary to the legislative intent. The neutral partisan lawyer would reason that it would be up to the opponent's legal representative, if any, to pick up on any detriment to her client through the contract. In Simon's words: '[I]t permits a party to a contract to take advantage of the contractual language in ways that thwart the expectations of the other party.'[570]

By contrast, adopting an approach relying on Ubuntu, the matter would not be as cut and dried, and the decision to take advantage of the contractual language would depend on the particular circumstances of the parties. For example, it may be that, in power imbalance situations, the legal practitioner could do two things. First, the legal practitioner could refuse to finalise the contract that thwarts the purpose of the legislation. Or, she would not just advise the low-level

[567] WH Simon 'Ethical discretion in lawyering' (1988) 101 *Harvard Law Review* 1083 at 1085.
[568] This is the threshold for large enterprises.
[569] Simon 1988 *Harvard Law Review* 1086.
[570] Ibid 1108.

employee to get legal representation (as required by the Code's conflict of interest rules),[571] but insist that she take up independent advice before the conclusion of a contract.

Simon's approach to a tax avoidance scenario is illuminating in this regard, not only given the SA Minister's analogy to it, as set out above, but also as to how a legal practitioner would deal with fronting using discretionary judgment. I set out Simon's scenario and his response in full, and suggest thereafter how such an approach could be adapted in the SA context in relation to fronting:

> 'Suppose an experienced tax practitioner has conceived a new tax avoidance device. She herself is convinced that it is improper, but there is a nonfrivolous argument for its legality. The lawyer might believe that the Internal Revenue Service and the courts are best situated to resolve such questions. She might reason that the agency and the courts have greater expertise than she, that they are better able to resolve issues in a way that can be uniformly applied to similar cases, and that they are subject to various democratic controls.'[572]

Simon responds to his own scenario as follows:

> 'However, such arguments are plausible only to the extent that the agency and the courts will in fact make an informed decision on the matter. In such a situation, the lawyer should respond to the procedural failure. She can do so by trying to remedy it, for example, by bringing the issue to the attention of the IRS. If that course is not possible (for example, because the client will not permit it), or if it will not be sufficient to remedy the procedural deficiencies (for example, because the agency is so strapped that it cannot even respond to such signals), then the lawyer has to assume more direct responsibility for the substantive resolution. *If she thinks that the device should be held invalid, she should refuse to assist with it.* In these circumstances, she is the best situated decisionmaker to pass on the matter. In situations in which the procedure is sufficiently reliable that the lawyer need not assume direct responsibility for the substantive merits, she retains a duty to take reasonably available actions to make the procedure as effective as possible and to forego actions that would reduce its efficacy. When she need not consider the substantive merits herself, she should do what she can to facilitate the adjudicator in doing so.'[573]

In our case, we can replace the tax practitioner with an experienced B-BBEE legal practitioner who comes up with a sophisticated fronting practice on the request of her client. She is

[571] Para 59.2 of the code of conduct.
[572] Simon 1988 *Harvard Law Review* 1100.
[573] Ibid. My emphasis.

convinced that it is improper, but there is a somewhat unconvincing argument that the shareholder's allowance to the black shareholder is sufficient,[574] or that limited control (albeit with voting rights waived) is fair compensation, or that the practice is unlikely to be discovered by regulatory authorities. The practitioner might believe that the regulatory authority for these types of transactions (the BEE Commission)[575] and the courts are best situated to resolve whether the practice effectively amounts to fronting. She might reason that the BEE Commission and the courts have greater expertise than her, that they are better able to resolve issues in a way that can be uniformly applied to similar cases, and that they are subject to various democratic controls.

However, and following Simon, the B-BBEE legal practitioner can only rely on these arguments to the extent that the agency (in our case the BEE Commission) and the courts will *in fact* make an informed decision on the matter. But – in a slight deviation from Simon's tax avoidance piece – the practitioner would have to consider also the ability of the low-level employee to be properly advised / have adequate legal representation (ie the power balance issue). If the employee does not have this representation, and the client is reluctant to allow the practitioner to request the BEE Commission to consider the practice, or if the legal practitioner doubts the efficacy of this route, then the practitioner has to assume more direct responsibility for the substantive resolution. *If she thinks that the practice is invalid, she should refuse to assist with it.* In these circumstances, then, the legal practitioner assumes direct responsibility for the substantive merits of the matter. This means that she has to take action that is reasonably available to make the procedure as effective as possible, and to forego actions that would reduce its efficacy. While she need not consider the substantive merits himself, she should do what she can to facilitate the employee or any other person in doing so.[576]

Overall, this type of approach is ideally suited to the B-BBEE context. Given the explicit transformative imperative of the regulatory framework, it is hard to imagine how legal practitioners could legitimately assist their client with a fronting practice. But the practice continues (in B-BBEE and other areas) on the flawed bases – especially in SA – that every

[574] As in the *Peel* matter.
[575] The BEE Commission (formally known Broad-Based Black Economic Empowerment Commission) is established in terms of s 13B of the Broad-Based Black Economic Empowerment Act 53 of 2003. Its functions (as set out in s 13F of the Act) are to 'oversee, supervise and promote adherence with this Act in the interest of the public'. This includes 'the power to investigate, either of its own initiative or in response to complaints received, any matter concerning broad-based black economic empowerment' (see s 13F(1)(d) in particular).
[576] Adapted from Simon 1988 *Harvard Law Review* 1100.

person has equal access to legal services; that the regulatory institutions make up for any deficiencies; and that legal practitioner pursue the client's ends even if those ends undermine the purpose of the legislation crafted for that transaction. Knowing all of this to be false, legal practitioners have to 'recalibrate' their approach in all areas, but this requirement may be particularly relevant within transformative contexts.

## 6.6 CONCLUSION, AND REFLECTION ON A DECISION-MAKING 'SCHEMA' FOR SA LEGAL PRACTITIONERS

This chapter takes its point of departure from critical theorists' insights that legal practitioners should exercise discretion in the resolution of ethical dilemmas. In doing so, it rejects an approach where legal practitioners can effectively hide behind categorical rules or suggest that the 'system' justifies the role. The justification for this approach lies in a consideration of the values underlying SA's legal system – particularly constitutional values, one of which is Ubuntu. This chapter also recognises that there are other important constitutional values, but one must be able to balance out these values using discretion *and* after considering the content of these values in the light of SA's transformative Constitution. The legal practitioner's exercise of discretion may tip decision-making to follow a certain path of conduct, depending on the context. On the one hand, this conduct may need to be directed at substantive outcomes, treating others as important, and promoting connections between community members in certain contexts. On the other hand, this conduct may require legal practitioners to be less concerned with institutional competence, for example, or even disavow discord by acting zealously for their client.

From a discussion of hypotheticals and case law, it is now possible to go back to the outward-looking factors that I set out at the beginning of this chapter,[577] which I believe could aid legal practitioners in this role. It will be recalled that these were: 1) The power imbalances between the parties to the dispute; 2) the setting in which the matter is to be resolved; 3) the competence and capacity of the institution resolving the matter; and 4) the strength of legal practitioner objection versus strength of client interest. I consider these factors to be 'outward-looking', as these factors deal with the legal representative's relationship with 'the Other'. In chapter 7, I shall look at 'inward-looking' factors which deal with the direct relationship between the legal practitioner and the client.

[577] At 6.1.

In relation to the first factor (power imbalances), it has been shown throughout the examples cited in this chapter, that where the other side is particularly vulnerable or is in an inferior position vis-à-vis the legal practitioner's client, this may require that the legal practitioner has to bear more responsibility for substantive outcomes. Traditionally, in the ethics domain, the extent of this duty (arising in the context of a conflict of interests) may be to advise an unrepresented opposing party of their right to obtain independent advice, but no more. Under the approach advocated here, this factor would require more of the legal practitioner: it effectively requires that legal practitioners cannot use the other side's lack of resources or information as a strategic opportunity to be exploited on behalf of their more powerful or better resourced clients.

The second factor (where the dispute is to be resolved) is particularly important in the context of dilemmas faced outside of a court room. Here, the legal practitioner has to consider whether the dispute will be heard before a court, a tribunal, or other oversight setting (eg a regulatory agency such as the South African Revenue Service). In this context, the legal practitioner obviously has to consider the converse: whether the dispute or dilemma occurs where there is no oversight or other party, such as general advice, lobbying and facilitative work. Where legal practitioners can rely on equally resourceful adversaries or negotiating partners, or authoritative institutional actors (eg magistrates, judges, and regulatory agencies) then legal practitioners can act as vigorous partisans for their clients. However, where there is no oversight or authoritative institutional actors, then one cannot exploit errors, loopholes or ambiguities given the inability of the 'system' to correct this exploitation on its own. Both Simon[578] and Nicolson & Webb[579] consider this factor important in their approaches for good reason. Nicolson & Webb note:

> '[T]he absence of neutral arbiters available to ensure fair play dictates that fundamentally different considerations apply, just as players are expected to display greater honesty and fairness in sports where there is no referee. … [I]t can be argued that the absence of a court requires higher standards of propriety rather than lower.'[580]

In terms of the third factor (institutional competence and capacity), the legal practitioner needs to consider whether that institution is capable and competent in resolving an issue. In other

[578] Simon 1988 *Harvard Law Review* 1096-97 and 1102ff.
[579] Nicolson & Webb *Professional Legal Ethics* 244ff.
[580] Ibid.

words, is there sufficient evidence that the institution can reliably resolve the issue? Thus, even where the setting involves an impartial referee/oversight body, one has to consider the competency of that institution. Where the procedures and institutions are considered to be reliable, the legal practitioner can afford to assume less responsibility for substantive outcomes.[581] I explicitly rely here on Simon's premise. By directing the lawyer to attempt first to improve the reliability of the procedure, 'the discretionary approach respects the traditional premise that the strongest assurance of a just resolution is the soundness of the procedure that produced it'.[582] Thus, if there is a major breakdown in the procedure, the legal practitioner cannot exploit that breakdown, but must act to remedy that breakdown.

This factor is perhaps the most important reason as to why the Ubuntu approach does not follow the general trend in legal ethics thought that criminal defence is a special case which justifies neutral partisanship. Most theorists, even most moral activist theorists, take the criminal defence paradigm as a categorical or irrebutable instance of neutral partisanship.[583] I disagree, and suggest that the legal practitioner in this context still needs to consider power imbalance, setting, competence and interests even in criminal defence work. While many western theorists justify neutral partisanship in the criminal defence role as one concerned with civil liberties and the idea of state power,[584] it may be problematic in a society where judicial,[585]

[581] Nicolson & Webb *Professional Legal Ethics* imply that this is a factor by suggesting at 245 that a lawyer consider 'the checks and balances necessary for legal procedures to operate fairly'.
[582] Simon 1988 *Harvard Law Review* 1098.
[583] R Wasserstrom 'Lawyers as professionals: Some moral issues' (1975) 5 *Human Rights* 1 at 6ff; D Luban *Lawyers and Justice* (1988) 58ff; D Luban 'Are criminal defenders different? (1993) 91 *Michigan Law Review* 1729; Nicolson & Webb 194ff; and R Atkinson 'Neutral partisan lawyering and international human rights violators' (1993) 17 *Fordham International Law Journal* 531 at 541-42. Cf WH Simon 'The ethics of criminal defense (1993) 91 *Michigan Law Review* 1703.
[584] For example, Luban suggests that zealous partisanship in criminal defence work helps to maintain the balance in an otherwise unbalanced contest by 'overprotecting' the rights of the weaker party – the accused. See D Luban *Lawyers and Justice* (1988) 58-56.
[585] For example, see allegations before the Zondo Commission that judges were bribed for favourable treatment in certain matters: JudgesMatter 'The SSA allegations: A threat to the credibility of the judiciary' (9 February 2021) available at: https://www.judgesmatter.co.za/opinions/judicial-bribery-corruption/.

regulatory,[586] prosecutorial,[587] and policing institutions[588] may have been actively incapacitated or stripped of competence and resources by the very persons who are the accused in the system. Thus, for example, the idea that a 'totally scorched-earth criminal defence' is justified because prosecutors have an overwhelming advantage,[589] may not be as accurate in SA as in other jurisdictions, for example, where a former powerful politician may be accused of corruption under the very system she sought to malign while in power.[590] Thus, for the quotidian criminal defence cases in South Africa, zeal may be the most appropriate decision. However, under this approach, the legal practitioner cannot assume that all criminal defence situations reflect a kind of 'David-versus-Goliath' picture where an individual stands against the 'awesome power of the state'.[591]

The fourth and final factor that emerges from the discussion in this chapter, is the need for a legal practitioner to consider the basis for his or her ethical objection versus the basis for the client's proposed course of action. In this setting, the legal practitioner has to ask: how are constitutional rights implicated, if any, and what weight should be attached to them depending on the relationships at stake? The relationship qualification ensures that the legal practitioner cannot just interpret these rights from an individualist paradigm, but from a view that considers that rights can fit within a communitarian framework. The most striking example of this in the chapter discussion emerges from the prescription and confidentiality examples. In the *Spaulding* confidentiality matter, a legal practitioner may need to consider the right to life (s

[586] See, for example, P Govender 'Chapter nine institutions: 'Time to guard the guardians' (28 August 2014) *South African Human Rights Commission,* available at https://www.sahrc.org.za/index.php/sahrc-media/opinion-pieces/item/75-chapter-nine-institutions-time-to-guard-the-guardians. See also a judicial commission's findings that the South African Revenue Service was weakened and compromised in the last few years: The Commission of Inquiry into Tax Administration and Governance by the South African Revenue Service (SARS) (constituted on 24 May 2018 by GG 41652 Proc No 17 of 2018). See its final report available at file:///C:/Users/lawr054/Downloads/SARS%20Commission%20Final%20Report.pdf.

[587] For example, in *Corruption Watch NPC & others v President of the Republic of South Africa & others; Nxasana v Corruption Watch NPC & others* 2018 (2) SACR 442 (CC) at para 6, the CC noted comments in the court a quo that it was common cause 'that since September 2007 the recent history at the NPA "has been one of paralysing instability"'. The court further noted that '[w]ith a malleable, corrupt or dysfunctional prosecuting authority, many criminals–especially those holding positions of influence–will rarely, if ever, answer for their criminal deeds.'

[588] See *Glenister v President of the Republic of South Africa & others* 2011 (3) SA 347 (CC), and *Helen Suzman Foundation v President of the Republic of South Africa & others; Glenister v President of the Republic of South Africa & others* 2015 (2) SA 1 (CC) where the court found that political interference in the independence of policing units undermined their efficiency.

[589] RW Gordon 'The radical conservatism of *The Practice of Justice*' (1999) 51 *Stanford Law Review* 919 at 928.

[590] The CC implicitly condones this approach in its remark in *Corruption Watch* at para 19: 'With a malleable, corrupt or dysfunctional prosecuting authority, many criminals – especially those holding positions of influence – will rarely, if ever, answer for their criminal deeds.'

[591] R Atkinson 'Neutral partisan lawyering and international human rights violators' (1993) 17 *Fordham International Law Journal* 531.

11 of the Constitution) versus the right to have information kept confidential (implied in the access to courts provision in s 34 of the Constitution).

When considering these competing factors, legal practitioners should use the balancing exercise that is found in many areas of the law, such as for example delict or contract. Additionally, in SA's administrative and constitutional law context, a s 36 limitations enquiry or a rationality review approach needs to be adopted. This may include consequentialist thinking. What is the likely harm from each course of action: upholding the first value (objection) versus upholding the second or other value (client's end)? This balancing must take into account the nature of autonomy in SA's constitutional democracy as autonomy-in-relation. As indicated in my discussion on confidentiality, this may mean that the right to life may take precedence over the client's right to privacy and to access courts. However, and again as pointed out in the confidentiality example, there may be good reason to fetter this balancing exercise in particular areas because of the need for some type of certainty.

In this schema, then, I have tried to outline how my approach requires legal practitioners to consider certain outward-looking factors derived from a consideration of Ubuntu. However, in the next chapter I turn to traditional (what I call 'inward-looking') factors that complement and support the outward-looking Ubuntu factors in the legal practitioner's role. These factors are derived from the contract between the legal practitioner and the client. The chapter is then an attempt to show legal practitioners that the 'baby has not been thrown out with the bathwater'. Instead, I argue that legal practitioners in SA can still carry out their clients' mandates effectively, but within the context of well-known institutions re-calibrated for a constitutional democracy. To do this, in the next chapter I outline how I intend to convince legal practitioners in SA that they need to consider both outward-looking factors (mentioned here) and the inward-looking factors that will be explored in the chapter that follows.

# CHAPTER 7: THE ART OF THE POSSIBLE: PERSUADING SOUTH AFRICAN LEGAL PRACTITIONERS TO ADOPT A CONTEXT-BASED, UBUNTU-INFUSED APPROACH TO LAWYERING

> 'In the familiar imagery of Neurath's nautical metaphor, the legal profession is already well launched on the historical sea and unable or unwilling to return to the dry-dock for a complete overhaul. If change is to be effective, it must be made one plank at a time and while the ship is still at sea.'[1]

## 7.1 INTRODUCTION

Thus far I have canvassed the prevailing lawyer role in SA, its shortcomings, and possible alternatives. The aim has been to explore ways in which the normative foundations of the lawyer's role in SA could be re-set in a way that is congruent with the South Africa's relatively new constitutional democracy. It is from these normative foundations that we could then work out the place that the lawyer should occupy relative to his or her clients, to the system of laws, and ultimately to ordinary morality.[2] I explored the South African courts' use of the indigenous value system of Ubuntu in adjudication in chapter 5, and argued in chapter 6 how it could (and should), be used to build an alternative approach to lawyering in South Africa, using the structure of Simon's discretionary approach to lawyering, with some practical examples.

This chapter attempts to address two outstanding issues in relation to the approach developed thus far. First, I recognise that without a well-thought out strategy to convince the South African legal profession of the need for change, this thesis will remain only a theoretical one. One need only consider the length of time it has taken to convince (more realistically: cajole and threaten[3]) the South African legal profession to agree to regulatory changes through the conceptualisation, drafting and coming into force of the Legal Practice Act[4] to realise that this is an important and necessary issue to work through. If this thesis is to have any chance of having practical application, then it must be accessible and convince the quotidian South African lawyer engaged in the profession of law of the value and utility of its proposals. As

[1] A Hutchinson 'Calgary and everything after: A postmodern re-vision of lawyering' (1995) 33 *Alberta Law Review* 768 at 778. Footnotes omitted.
[2] See Woolley, who makes this important point: that the normative foundation is important to use as a springboard to figure out the everyday ethical dilemmas facing legal practitioners. A Woolley 'The problem of disagreement in legal ethics theory' (2013) 26 *Canadian Journal of Law and Jurisprudence* 181.
[3] H Kruuse & P Genty 'The state's role in the regulation and provision of legal services in South Africa and the United States: Supporting, nudging, or interfering' (2018) 42 *Fordham International Law Journal* 373 at 395-98.
[4] Act 28 of 2014. See the discussion of this at 2.7.

Coyle notes, in attempting to resolve legal issues, 'one must begin from the lawyer's perspective, the administration of justice at the concrete level'.[5] Complementing this stance, Woolley notes that any suggestion for change must entail a theory of action, not [just] contemplation.[6] As a result, this chapter seeks to take the theory of change suggested here from contemplation to action.

Secondly, this chapter seeks to develop factors that legal practitioners ought to take into account that are 'inward-looking' in order to complement the 'outward-looking' factors set out in chapter 6. These factors fit here most appropriately given that they emerge from the very same vehicle that I propose to use in order to persuade legal practitioners of the need to change their approach to lawyering – that is, the contract of mandate between the legal practitioner and client.

Persuading the South African legal profession to adapt their thinking and understanding of their role in the context of SA today will not be easy. Two challenges exist. First, as the historical context of this thesis has shown, South African legal practitioners are generally steeped in a formalist and (crude) positivist[7] culture that has persisted despite the rupture in the legal record[8] presented by the Constitution.[9] Klare discusses the anomaly of this persistence when he states:

---

[5] S Coyle 'Legality and the liberal order' (2013) 76 *The Modern Law Review* 401 at 418.

[6] Woolley 2013 *Canadian Journal of Law and Jurisprudence* 182. In more impressive language (addressing the attainment of justice in general), Schlag notes that 'the efficacy and redemption of law, the rule of law, and justice (indeed, many of the crucial values associated with law) ostensibly depend upon our knowing what we [lawyers] are doing when we do law'. See P Schlag 'Formalism and realism in ruins (mapping the logics of collapse)' (2009) 95 *Iowa Law Review* 195 at 223.

[7] The adjective 'crude' is placed here specifically to denote a particular form of positivism to justify certain conduct, what commentators have called the plain facts approach. For an overview of the plain fact approach and its application in South Africa, see D Dyzenhaus *Hard Cases in Wicked Legal Systems: South African Law in the Perspective of Legal Philosophy* (1991) 217-19. See also J Dugard 'The judiciary in a state of national crisis with special reference to the South African experience' (1987) 44 *Washington and Lee Law Review* 477 at 496.

[8] Bilchitz et al helpfully uses the Dworkinian dimensions of 'fit' and 'value' to understand how legal practitioners should deal with the existing common law given that the Constitution did not – again in the Dworkinian sense – start a new 'chain novel' – but allowed for the continuation of the novel subject to the development of the common law to 'fit' the new constitutional order. See D Bilchitz, T Metz & A Oyowe *Jurisprudence in an African Context* (2017) 91-92. The debate around this issue is outside of the parameters of this thesis, but for an interesting overview, see Fagan and Davis on the issue: A Fagan 'The secondary role of the spirit, purport and objects of the Bill of Rights in the common law's development' (2010) 127 *SALJ* 611and D Davis 'How many positivist legal philosophers can be made to dance on the head of a pin: A reply to Professor Fagan' (2012) 129 *SALJ* 59.

[9] Klare discusses this in terms of the prevailing conservative legal *culture* in South Africa: 'A visiting U.S. lawyer cannot help but be struck by the conservativism of South African legal culture. In this context, "conservatism" does not refer to political ideology. Rather, I mean cautious traditions of analysis common to South African legal practitioners of all political outlooks. … . [U].S. lawyers are often struck by their South African colleagues' relatively strong faith in the precision, determinacy and self-revealingness of words and texts. Legal interpretation in South Africa tends to be more highly structured, technicist, literal and rule-bound than in the States, whereas U.S. legal culture is much more policy-oriented and consequentialist. South African lawyers appear more prepared than their U.S. counterparts to deduce relatively specific conclusions from general and abstract premises, with fewer intermediate steps than the Americans would look for.' KE Klare 'Legal culture and transformative

> 'One has the indelible impression of a disconnect or chasm between the Constitution's substantively transformative aspirations and the traditionalism of South African legal culture. If there is anything in this observation, it should be a matter of both academic and normative concern.'[10]

Klare goes on to suggest that this disconnect has produced the kind of intellectual caution in SA practitioners that discourages 'appropriate constitutional innovation and leads to less generous or innovative interpretations and applications of the Constitution than are permitted by the text and drafting history'.[11] It is thus plausible to suggest that SA legal practitioners will practice this intellectual caution not only in respect of interpretation and application, but also in their perception of their role in the legal system. Klare's perceptions of how legal practitioners operate in SA may now be outdated given that he expressed his views over 20 years ago. However, there has not been research to suggest this,[12] and given the legal profession's general reticence to change (through the implementation of the Legal Practice Act during the 2000s),[13] we can accept that these views still hold for most of those who are currently practising. This conservative mind-set may also hold true for those who aspire to practise.[14] This is the case given the focus in both legal education and legal training in SA that legal ethics is essentially an injunction to follow the professional rules of lawyering, and no more.[15] While this stance has been challenged and is slowly changing, at least in the LLB education sphere,[16] the idea of ethics-as-rules remains a steadfast view in the SA profession.

---

constitutionalism' (1998) 14 *SAJHR* 146 at 168-9. See also J Dugard *Human Rights and the South African Legal Order* (1978) 393; P Langa 'Transformative constitutionalism' (2006) 17 *Stell LR* 351 at 355 and Moseneke J (writing extra-curially) has similarly described the South African legal culture prior to 1994 as 'homogenous, conservative and predictable', informed by 'inflexible legal positivism'. See D Moseneke 'The fourth Bram Fischer memorial lecture: Transformative adjudication' (2002) 18 *SAJHR* 309 at 316.

[10] Klare 1998 *SAJHR* 170.

[11] Ibid 171.

[12] Research in the profession has generally focused on gender and race transformation. See for example, Centre for Applied Legal Studies *Transformation in the Legal Profession* (August 2014). While this has focused on demographics, it does indicate that (see 32ff), at least in the most densely populated province (Gauteng), the legal profession displays an aversion to change, in this context, in the intersection of race and gender and othering.

[13] Kruuse & Genty 2018 *Fordham International Law Journal* 395-98.

[14] Schlag, quoting Maitland and Grey respectively, notes that formalism 'rules from the grave' and that for practitioners and scholars, 'Langdellian formalism retains a primeval and often unrecognized power'. There is no doubt that these observations are equally applicable in South Africa. See Schlag 2009 *Iowa Law Review* 215-16 & fn 66.

[15] N Whitear Nel & W Freedman 'A historical review of the development of the post-apartheid South African LLB degree – with particular reference to legal ethics' (2015) 21 *Fundamina* 234; M Robertson & H Kruuse 'Legal ethics education in South Africa: possibilities, challenges and opportunities' (2016) 32 *SAJHR* 344 at 351 & 358ff. Anecdotally, during the Council of Higher Education's audit of the LLB degree, there were law schools who were re-accredited subject to a condition that they overhaul/introduce/revise their ethics offering to reflect a substantive approach to legal ethics. For a discussion of the CHE audit of the LLB degree, see 8.3.1.

[16] See Council of Higher Education 'Higher Educations Qualifications Sub-Framework Qualification Standard for Bachelor of Laws (LLB)' (May 2015) in its preamble point 5, also South African Law Deans' Association *A*

More recently, it appears that it may not only be intellectual caution and rule-following that prevents innovation or change, but also possible outright hostility from South African legal practitioners to philosophy and theory. This holds true in other jurisdictions: Hutchinson, for example, remarks that most legal practitioners in the Canadian jurisdiction 'eschew the worth of legal theorising', preferring to think of themselves as 'practical' men and women of the world who are guided by the traditional imperatives of their professional craft.[17] In the US jurisdiction, Freedman suggests that 'a significant body of work that has been dedicated to philosophizing about lawyers' ethics […] have little or no relevance to the fundamental norms and practical realities of the constitutionalized adversary system in which American lawyers function'.[18] In the South African context, Gravett comments that '[a]ny practicing lawyer knows, theorising has never solved anything' and 'clients need practitioners, not philosophers or pedagogues'.[19]

Secondly, and as Woolley aptly puts it, there is generally 'the problem of disagreement in legal ethics theory'.[20] Her basic thesis goes as follows: Theories of lawyers' ethics make *exclusive* claims against each other. Each theory not only claims that its position is the most defensible, sensible and rational and, of course, ethical, it also claims that the other theories are wrong, or at least mistaken in a material way.[21] Woolley points out that this is not to suggest some sort of 'irrational hostility or unreasonable aggression' by theorists, but simply that it is in the nature of the theoretical arguments offered, and the specific stances taken, that each theory necessarily claims that it is correct, and that theories inconsistent with it are not.[22] Woolley may be treating her fellow theorists too kindly or, at best, seeking to distinguish them from those within legal philosophy generally. Rather, critics of the legal philosophers characterise their debates as 'point-scoring',[23] 'a sharp-shooter approach',[24] and a showdown of a 'High Noon' encounter,[25] instead of promoting any understanding.

---

*Model Curriculum for Legal Ethics in the South African LLB* (2016)). See also E Snyman-Van Deventer & CF Swanepoel 'Teaching the theory and skills of legal ethics to South African LLB students' (2017) 38 *Obiter* 127.

[17] AC Hutchinson *Legal Ethics and Professional Responsibility* 2 ed (2006) 19.

[18] M Freedman 'A critique of philosophizing about lawyers' ethics' (2012) 25 *Georgetown Journal of Legal Ethics* 91.

[19] WH Gravett 'Why Pericles should learn to fix a leaky pipe – Why trial advocacy should become part of the LLB curriculum (part 1)' (2018) 21 *PELJ* 1 at 9 and 10 respectively.

[20] Woolley 2013 *Canadian Journal of Law and Jurisprudence* 181. See also, in general, D Markovits 'What are lawyers for' (2014) 47 *Akron Law Review* 135.

[21] Woolley 2013 *Canadian Journal of Law and Jurisprudence* 182.

[22] Ibid.

[23] R Cotterrell 'Why jurisprudence is not legal philosophy' (2014) 5 *Jurisprudence* 41 at 50-51.

[24] E Shils 'On the eve: A prospect in retrospect' In M Bulmer (ed) *Essays on the History of British Sociological Research* (1985) 168.

[25] NE Simmonds 'Kramer's high noon' (2011) 56 *American Journal of Jurisprudence* 135.

Given this type of caution, intractable disagreement and possible hostility, it is important that any role based on philosophical reasoning must be persuasive and practicable. While regulators and educators arguably have time and space to grapple with the philosophical concepts discussed in this thesis, it is likely that some concepts are fairly foreign to the lawyer's daily toil.[26] It is arguable that practitioners would generally feel uneasy in relying on these lofty premises, rather than the rules that they are accustomed to and familiar with.[27] US theorist, Shaffer, is similarly sceptical that 'misty conventional societal values' will be sufficient to guide legal practitioners to a path of 'righteousness'.[28] Thus, this chapter offers an opportunity for SA legal practitioners (and current regulators and educators responsible for producing a new generation of SA practitioners) not to be bogged down by the theorists' debates, but instead offers the tools and the motivation to embrace the new role from the outset.

In seeking assistance from theorists, legal practitioners might face additional woes. As Woolley points out, some theorists often spend more time on articulating and re-affirming disagreement than actually working towards 'what follows for individual action or public policy from the norms that they articulate'.[29] And this is where one may have sympathy for legal practitioners hostile to philosophy and theory. Gravett qualifies his earlier quoted statement (that 'theorising has never solved anything') with the following remark: 'It is only when theory is combined with *doing* – the ability to use the law and legal process – that change comes about.'[30]

In sum, then, the picture painted above of South African legal practitioners' attitudes to theory or philosophy is not meant to demean or belittle the profession, but to recognise possible obstacles created by the prevailing legal culture in South Africa. Persuading a legal profession

[26] Some commentators have criticised the CC for overly 'philosophising' in their judgments. For example, Wallis at 560 suggests that '[t]he opacity of jurisprudential rhetoric has no bearing for a magistrate or a judge in motion court'. See M Wallis 'Commercial certainty and constitutionalism: Are they compatible?' (2016) 133 *SALJ* 545 at 560.
[27] D Rhode 'Keynote: Law, lawyers, and the pursuit of justice' (2002) 70 *Fordham Law Review* 1543.
[28] T Shaffer 'The irony of lawyers' justice in America' (2002) 70 *Fordham Law Review* 1857 at 1860. Schneyer is similarly dubious that legal practitioners have, or can develop, a coherent vision of legal practice based on an ephemeral idea of 'in the interests of justice'. See T Schneyer 'Reforming law practice in the pursuit of justice: The perils of privileging "public" over professional values' (2002) 70 *Fordham Law Review* 1831.
[29] Woolley suggests that legal practitioners are not especially interested in philosophical enquiries of existential significance. Markowits appears to agree with the statement that '[p]hilosophical ethics is therefore structurally unsuited to serving a directly regulative role in practical life,' see Markovits 2014 *Akron Law Review* 135. See also Cotterrell *Jurisprudence* (2014) 52. This suggestion is perhaps too generalised in respect of both legal practitioners and theorists: many theorists attempt to translate ideas into action via codes and education. See, for example, A Boon *Lawyers' Ethics and Professional Responsibility* (2015) and Nicolson & Webb *Professional Legal Ethics.*
[30] Gravett 2018 *PELJ* 9 (my emphasis).

that is steeped in rule-bound ethics to adopt an alternative approach will inevitably prove difficult.

Notwithstanding these obstacles, legal practitioners are trained in skills of logic and reason. Therefore, legal practitioners ought to be persuadable if good reasons exist for them to do so, and the change is practicable.[31] It should also be recognised that if philosophical arguments contain 'high-flown rhetoric and sonorous phraseology' instead of 'principled analysis and reasoning and clarity of expression' then perhaps the person doing the arguing is not doing a very good job![32] As the famous Lewin saying goes, '[t]here is nothing so practical as a good theory'.[33]

Essentially, my task in this chapter, in addition to providing the 'inward-looking' factors for legal practitioners to consider, is to follow Simon's lead in using extant concepts and institutions within the legal profession to convince legal practitioners of their new role. I agree with Simon that appealing to 'law' is important for the message to 'stick'. Simon sets out why this approach is preferable:

> 'I emphasize legal rhetoric because I want to take advantage of the tendency in the professional culture to associate law with relatively objective, rational, socially grounded judgement. At the same time, I want to escape the corresponding tendency to associate moral judgement with relativism and subjectivism. For lawyers and law students, law has weight and palpability. To deny this is nihilism. On the other hand, to deny that moral values have more than a subjective basis is the conventional wisdom. Thus, the lawyer who appeals to moral judgment against "the law" is accused of "playing God" or "imposing her own values".'[34]

My argument is that if these good reasons (analysed and reasoned clearly) can be 'housed' or framed in a way that is familiar and accessible to the South African lawyer, the more chance there is of real reform. Thus, it is in the nature of this persuasion that these obstacles can be overcome. Even if one is unlikely to convince existing legal practitioners to depart from their entrenched neutral partisanship understanding, the greatest potential for imbuing the context-specific, Ubuntu-inspired approach is through educational and regulatory means for aspiring

[31] See WH Simon 'The legal and the ethical in legal ethics: A brief rejoinder to comments on *The Practice of Justice*' (1999) 51 *Stanford Law Review* 991 at 992.
[32] Wallis refers to certain CC judgments with these complaints. See M Wallis 'Commercial certainty and constitutionalism: Are they compatible?' (2016) 133 *SALJ* 545 at 564.
[33] Quoted in LE Sandelands 'What is so practical about theory? Lewin revisited' (1990) 20 *Journal of the Theory of Behaviour* 235 at 235.
[34] Simon 1999 *Stanford Law Review* 992.

legal practitioners.[35] I consider some aspects of these means in chapter 8, but for the purposes of this chapter I explore what existing tools I can use for current practitioners to understand, and from there to embrace, the approach.

## 7.2 THE METHOD: THE 'BOTTOM-UP' APPROACH

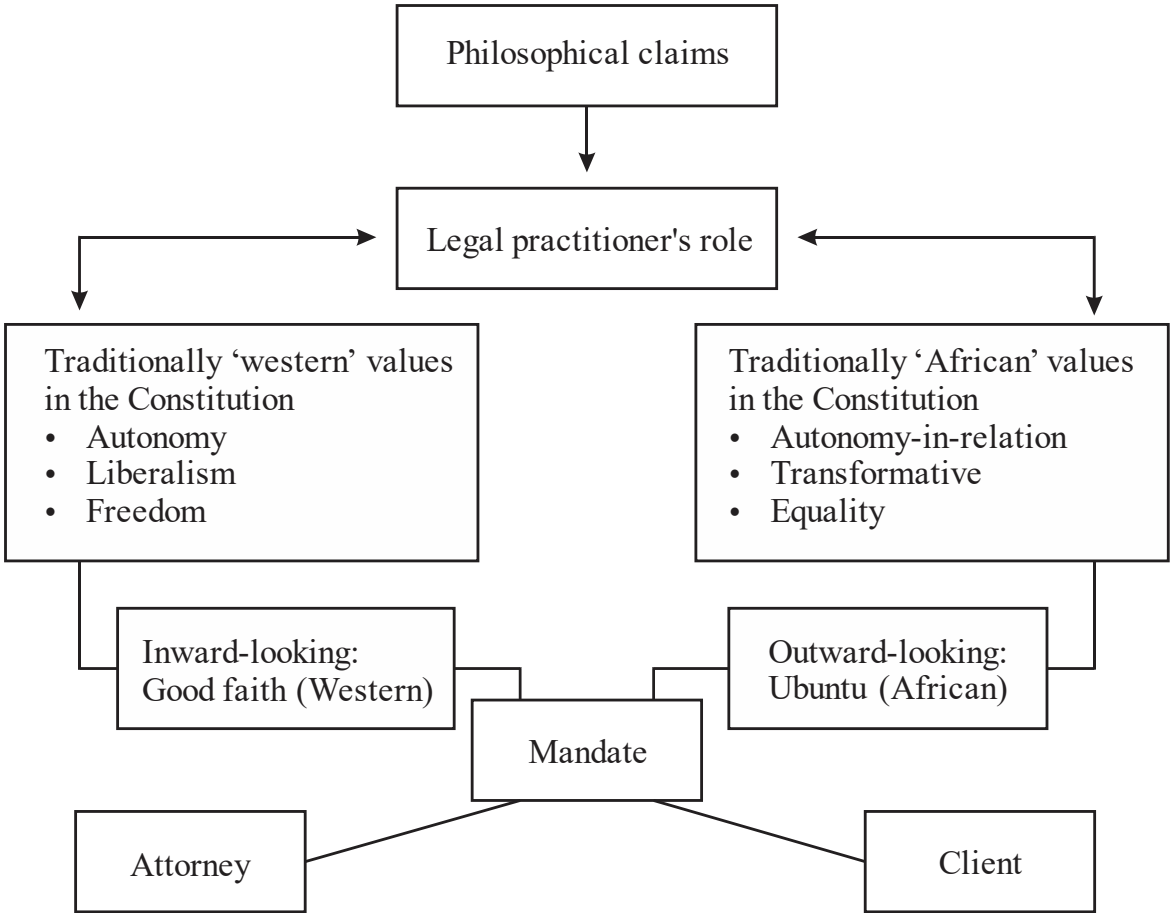
In convincing the legal profession of a new approach to lawyering, a starting point is to show how the role is not so much about seeking philosophical enlightenment (although this is a positive goal) but it is more about practical, concrete measures produced by the new role as a response to the ethical dilemmas of legal practice. In other words, legal practitioners in SA are unlikely to want to think about legal ethics theoretically, but would welcome an approach that connects with their basic understanding of their position. In its most basic form, this approach takes its point of departure from the 'bottom': the instructions of the client to the legal practitioner, being the contract of mandate and its various obligations.

If one then uses this contract as a point of departure, I believe that legal practitioners will be more easily persuaded to adopt a new approach to lawyering if offered reasons that resonate with 'the intellectual instincts and habits of mind of the traditional common or Roman-Dutch lawyer trained and professionally socialised during the apartheid era'[36] or the newly trained lawyer who has been subjected to a rule-based compliance approach to legal ethics.[37] Given this prevailing legal culture amongst legal practitioners, would it not be more accessible, convincing, and plausible to introduce their alternative approach to practice within the requirements in the very mandate that they are responsible for executing?

In following what I identified as the three distinct factors affecting South African legal practitioners in chapter 3 (autonomy understood in relation, a need to connect with local belief and custom, and law as transformative and not mere social ordering),[38] figure 1 below illustrates the possible different 'housing' of my method for change. This 'housing' I call the bottom-up approach. It includes the outward-looking factors already discussed in chapter 6, and the inward-looking factors, to be discussed below:

---

[35] One such educational approach in other jurisdictions has been to use a pedagogy named 'Giving Voice to Values' developed by a US business academic, Mary Gentile. For an interesting example of its implementation in an Australian law faculty, see V Holmes '"Giving Voice to Values": Enhancing students' capacity to cope with ethical challenges in legal practice (2015) 18 *Legal Ethics* 115.
[36] Klare 1998 *SAJHR* 156.
[37] Robertson & Kruuse 2016 *SAJHR* 364.
[38] See chapter 3, at 3.4.3.1.




I borrow the bottom-up approach from Chanock's influential ideas around 'bottom-up constitutionalism' in Africa.[39] In the context of African constitution-making, Chanock has argued that the implementing of constitutional states in Africa has been largely unsuccessful. He attributes this failure to the approach taken to the issue, that being that the bulk of legal and political literature and actual political practice regarding the search for constitutional democracy, has been 'upside down'.[40] In this regard he comments:

> 'The habit in academia, and, more sadly, in practice, has been to start at the top, with the writing of increasingly complex constitutions, with increasingly sophisticated institutions and rights guarantees, which have, as has been shown time and time again, floated meaninglessly above the societies for which they have been designated, until the bubble bursts in outbreaks of violence.'[41]

[39] M Chanock 'African constitutionalism from the bottom up' in H Klug & S Merry (eds) *The New Legal Realism: Studying Law Globally* (2016) 13.
[40] Ibid 13.
[41] Ibid 14.

Chanock goes on to suggest that the quest for constitutionalism in Africa must be based on 'a rule of law that builds from the bottom-up, rather than a bill of rights handed down'. He goes on to state that

> '[l]ike successful western constitutionalism, African constitutionalism must be based on a common law with which people identify. *This will mean a basic intellectual and institutional re-engagement with the legal forms and processes with which Africans identify.* '[42]

Chanock's metaphor is apt in the legal professional context. This thesis has debated the various approaches (and source philosophies) to develop a suitable role for the legal practitioner. This 'top down' method has been necessary to formulate *the norms and basis* of any alternative approach. However, a 'bottom up approach' is decidedly better (for the reasons that Chanock raises) to develop the *best method of implementing* those developed norms. In particular, I believe that the SA legal practitioner will find a bottom-up approach to legal ethics convincing and justifiable if one starts from the 'bottom-up'. This 'bottom-up' approach starts with the familiar legal relationship of the contract of mandate and incorporate processes 'with which Africans identify' through that relationship's obligations (the finer details being discussed below). Mandate also brings attention to the traditional obligations of a legal practitioner, obligations that are not done away with, but are rather supplemented and supported by the outward-looking factors discussion in chapter 6.

This approach also borrows from the recent debates in public fiduciary theory between Lieb & Galoob[43] and Criddle & Fox-Decent.[44] These scholars' approaches provide a useful comparison to convince legal practitioners to adopt a particular approach to legal ethics. On the one hand, Leib & Galoob's methodological approach draws on abstract moral philosophy to deduce ethical norms that operate as legal constraints on a fiduciary's internal mental states and processes.[45] This may be likened to the top-down approach used by legal ethics theorists seeking to justify approaches to ethical decision-making based on various philosophical claims. On the other hand, Criddle & Fox-Decent favour an interpretivist approach that uses the extant

[42] Ibid 14. My emphasis. See also Ake who suggests: 'Law defines the realm of freedom. … It is extremely alienating for people to live under a system of law which does not connect to their social experience; it goes a pervasive sense of helplessness amid a chaos of arbitrariness.' See C Ake *Democracy and Development in Africa* (1996) 178-80.
[43] EJ Leib & SR Galoob 'Fiduciary political theory: A critique' (2016) 125 *Yale Law Journal* 1820.
[44] EJ Criddle & E Fox-Decent 'Keeping the promise of public fiduciary theory: A reply to Leib and Galoob' (2016) 126 *Yale Law Journal Forum* 192.
[45] Lieb & Galoob 2016 *Yale Law Journal* 1831-32. See also Criddle & Fox-Decent 2016 *Yale Law Journal Forum* 196 & 211.

legal norms, institutions, and practices in the legal system as their point of departure for critical analysis.[46] I accept that, in fact, both approaches are necessary since the first approach is about formulation (Leib & Galoob), while the second one is about implementation (Criddle & Fox-Decent). So, for example, one cannot develop legal norms without understanding and/or endorsing their philosophical justification.

However, having canvassed the justification for an alternative approach (top-down) in the preceding chapters, my task in this chapter (being about implementation and incorporating traditional obligations) follows the bottom-up approach à la Criddle & Fox-Decent. This approach also aligns with Simon's modus operandi which, as Gordon sets out, shows

> 'how a system of lawyers' ethics can be rebuilt on its existing foundations, using existing construction materials – the ordinary working conceptions of law and justice that lawyers bring to bear in other aspects of their practices'.[47]

The advantage of adopting this implementation phase is that – as set out in chapter 4 and discussed below – the extant norms, institutions, and practices of SA's legal system themselves open up avenues to consider certain claims or customs about what the legal practitioner's role should be. Before considering the institution of mandate, it is necessary to deal with one more possible obstacle or barrier – that is, the decolonisation critique.

## 7.3 THE DECOLONISING CRITIQUE AT THE IMPLEMENTATION PHASE

In the light of contemporary arguments for decolonising the law in South Africa,[48] there may be another obstacle to change, and that is political in nature. It seems counterintuitive to suggest that we go back to the contract of mandate in the common law which is originally of Roman and Roman-Dutch origin.[49] As Hutchison notes, some scholars view the common law as a 'repository of antiquated values crafted through a process of formalism to entrench inequalities in society, including those based on race'.[50] The common law in this sense is certainly not part

[46] Criddle & Fox-Decent 2016 *Yale Law Journal Forum* 196.
[47] RW Gordon 'The radical conservatism of *The Practice of Justice*' (1998-1999) 51 *Stanford Law Review* 919 at 919.
[48] See for eg, B Matolino 'Universalism and African philosophy' (2015) 34 *South African Journal of Philosophy* 433 and J Murungi *An Introduction to African Legal Philosophy* (2013). See also the special issue in the *SAJHR* (2018) 34 on the topic: Conquest, Constitutionalism and Democratic Contestations.
[49] See *Gaius 3 135* & *D 17 1 1*. R Van der Bergh 'A rule must arise from the law as it is – and it is not cast in stone' (2014) 20 *Fundamina* 965 at 966 notes that the contract came into existence at some time in the second century BC.
[50] A Hutchison 'Good faith in contract: A uniquely South African perspective' (2019) 1 *The Journal of Commonwealth Law* 1.

of an 'indigenous value system' of South Africa. However, I would argue that the contract of mandate is familiar and 'customary' terrain for the lawyer. It thus provides a conduit for the inclusion of constitutional values which include an African value system. This is because of the inherently equitable nature of the Roman-Dutch law.[51] It is also often forgotten that just like customary law arose from the grievances, disputes and conflicts of the day,[52] so too Roman and then Roman-Dutch law (and the contract of mandate) would have arisen from principles tested in that society. For example, the contract of mandate took on various permutations through the years, starting as an unenforceable agreement based on friendship,[53] to one where professional services were rendered for a fee,[54] as we now currently understand mandate. These changes occurred due to social, economic and political changes where – during the late Republic – the expansion of Roman power meant that the old system of law had to be changed to meet the needs of a new complex and sophisticated society.[55]

While we can accept that there is really nothing 'common' in SA about 'common law' to the general populace,[56] we can accept that the contract of mandate in the common law is at least (1) familiar to legal practitioners; and (2) it is capable of reconceptualisation through local values and insight. The reality is that the contract of mandate goes beyond the familiar, to being something that is actually entered into hundreds of times a day, even if those entering it know not of its heritage. In other words, it is an effective modern legal instrument and not merely a historical hangover. Thus, while we can be frank about the contract's western European roots,[57] we can also acknowledge that the concept itself is particularly adept as being used as a

[51] See in general, J Dugard *Human Rights and the South African Legal Order* (1978) 71 & 393; E Fagan 'Roman-Dutch law in its South African historical context' in R Zimmerman & D Visser *Southern Cross: Civil Law and Common Law in South Africa* (1996) 33. See also, Van der Bergh 2014 *Fundamina* 971ff where she suggests that it was the influence of *aequitas* that caused mandate to change with the times so as to remain just and fair. For a discussion of Voet's notions of equity and justice, see A Domanski 'Fundamental principles of law and justice in the opening title of Johannes Voet's *Comentarius ad Pandectas*' (2013) 19 *Fundamina* 251 at 258.
[52] N Okafo *Reconstructing Law and Justice in a Postcolony* 2 ed (2009) chap 1.
[53] Watson notes: '[m]andate derives from the habit of close friends of asking one another to act for them, rather than from commercial practice.' See A Watson *Contract of Mandate in Roman Law* (1961) 21.
[54] Van der Bergh 2014 *Fundamina* 969 points out that these services in late Roman law were known as *operae liberals*, that is, services rendered by persons exercising a profession worthy of a free man (*liber*): primarily intellectuals such as lawyers, physicians and architects.
[55] G Mousourakis *The Historical and Institutional Context of Roman Law* (2003) 181. Mousourakis notes: 'It was in response to changed social, economic and political conditions that Roman law broke through the barrier of formalism, was secularised and internationalised, and from a system that was strictly and often unjustly applied, became a highly developed system marked by its flexibility and adaptability to new and changing conditions.'
[56] E Zitzke 'A decolonial critique of private law and human rights' (2018) 34 *SAJHR* 492 at 498.
[57] Ziztke argues that this is the first step required in his 'decolonial' approach to private law in general. Ibid 512.

conceptual apparatus in this instance.[58] This approach largely conforms to Wiredu's suggestion that in decolonising concepts, one should not effectively throw out the baby with the bathwater.[59] He notes:

> '[t]here is no assumption that what comes from Africa is necessarily true, sound, profound et cetera. Much less of course, should there be an over-valuation of what comes from the West. In fact, however, exactly such an over-valuation, at an apparently semiconscious level, is the hallmark of that infelicity of the mind called the colonial mentality that still afflicts us in African philosophy and other areas of African intellectual life. The cure for that mental condition, however, does not require the disavowal of all foreign sources of possible edification. It seems to me likely that any African synthesis for modern living will include indigenous and Western elements, as well, perhaps, as some from the East.'[60]

In what follows then, I consider whether the current contract of mandate can be developed to incorporate my context-based, Ubuntu-inspired approach by setting out how the legal practitioner's duty to the client is influenced by two aspects of the mandate contract that need to be weighed in ethical decision-making. The first is to recognise how the legal practitioner's outward-looking Ubuntu requirement, of distinctly African origin (and incorporated by the Constitution) can be linked to the mandate contract by virtue of mandate's 'custom' requirements. The second is to recognise that legal practitioners are *also* subject to inward-looking factors as a result of the good faith requirement in the contract of mandate, of typical western origin, but which has developed in the light of the Constitution. These inward-looking factors provide protection for the client's autonomy and cover, at least to a certain extent, any concern that the legal practitioner will unwittingly act to the detriment of their client when making important decisions not to refuse to represent, refuse to conduct a case in a particular manner, and other decisions that may affect the client.[61]

---

[58] See B Beinart 'Roman law in a modern uncodified romanistic system' 1971 *Acta Juridica* 131 at 140 where he suggests that 'Roman law can offer solutions, or at least give assistance for the solution, of modern legal problems.'

[59] See K Wiredu 'Conceptual decolonization as an imperative in contemporary African philosophy: Some personal reflections' (2002) 36 *Rue Descartes* 53.

[60] Ibid 54-5. The authors in D Bilchitz, T Metz, O Oyuwe *Jurisprudence in an African Context* (2017) take this same 'inclusive' view (at 5) when it comes to the study of theories of law and justice in the global north and south.

[61] Theorists have called this problem the 'epistimological demurrer'. In terms this concept, theorists suggest that legal practitioners should recognise that they can never 'know' for certain, or that courts are always better placed to 'know' the truth. See Nicolson & Webb *Professional Legal Ethics* 234. Notwithstanding this demurrer, the idea here is that, through considering the factors below, legal practitioners can be convinced that allegations against clients are well-founded before refusing representation. See Nicolson & Webb *Professional Legal Ethics*

By characterising good faith and Ubuntu in this way (as inward-looking and outward-looking respectively), I will argue that these requirements play different but mutually reinforcing roles.

The requirement of good faith requires legal practitioners to pursue the client's ends as their default point of departure, but with strong qualifications that such pursuit has to be tempered by certain limits imposed by the other obligations to the mandate contract, namely that the conduct may not be 'illegal, immoral or wrongful' and further must be in keeping with 'accepted customs, norms and usages'.[62] Given that the content of morality and wrongfulness must now be determined under a constitutional framework, I will argue that any formalist 'bare legality' idea would be problematic (given the purposive and transformative nature of South Africa's constitutional framework).

This argument is then bolstered by the second requirement – that is, to consider the implications of the value of Ubuntu in representation, since it is a custom that needs to be taken into account when acting on behalf of the client. This requirement is characterised as outward-looking since it requires that legal practitioners not only show concern for their client (as is the case with the good faith requirement), but also to show concern for the well-being of the community as a whole.[63] Where the legal practitioner finds these two requirements in conflict, this is where the legal practitioner's discretion is triggered, and legal practitioners then need to exercise their discretion in the light of the contextual factors discussed in chapter 6. By using mandate then, legal practitioners are duty-bound to be 'ethically aware' and take moral responsibility for their conduct.[64]

[62] See 7.5.2.
[63] H Du Plessis 'Harmonising legal values and uBuntu: The quest for social justice in the South African common law of contract (2019) 22 *PELJ* 1.
[64] The idea that legal practitioners will become more 'ethically aware' is borrowed from Nicolson & Webb *Professional Legal Ethics* 280.

## 7.4 AN INWARD-LOOKING DUTY: THE DUTY OF GOOD FAITH IN THE CONTRACT OF MANDATE[65]

Kerr notes that a mandatary is under a duty to act in good faith by conducting the affairs of the mandator in the mandator's best interests.[66] Van Zyl in turn suggests that where the context is that of attorney and client,

> '[t]he law exacts from an attorney *uberrima fides* – that is, the highest possible degree of good faith. He must manifest in all business matters an inflexible regard for truth; there must be a rigorous accuracy in minutiae, a high sense of honour and incorruptible integrity; he must serve his client faithfully and diligently.'[67]

Good faith, as understood in the mandate contract, is thus directed at furthering the mandator's own interests.[68] It requires that the mandatary act honestly and properly and in furtherance of their client's interests at all times.[69] On the face of it, a mandatary has no duty towards any third party or community.[70] Instead, the obligation is directed at protecting the mandator from the mandatary taking advantage of his or her position. Thus, the obligation requires that legal practitioners should not defraud their clients or act maliciously towards them.[71] The duty to act in good faith also encompasses the requirement that the legal practitioner should keep the client's information confidential, and avoid situations where their own interests conflict with the interests of their clients.[72]

---

[65] It should be noted that this duty of good faith is an actual obligation of the mandate contract, and should not be confused with any fiduciary duty that the legal practitioner may have towards their client, despite the overlap. See in general, K Idensohn 'The nature and scope of employees' fiduciary duties' (2012) 33 *Industrial Law Journal* 1539 and *Numsa obo Nganezi v Dunlop Mixing and Technical Services (Pty) Ltd* 2019 (5) SA 354 (CC).

[66] *S v Heller* 1971 (2) SA 29 (A) 44 and *Bellairs v Hodnett* 1978 (1) SA 1109 (A) 1125-26. See also the references in A Kerr *The Law of Agency* 4 ed (2006) 141.

[67] GB van Zyl *The Theory of the Judicial Practice of South Africa* (1921) vol 1 43. This passage was quoted with approval in *Goodriche & Son v Auto-Protection Insurance Co Ltd* (*In Liquidation*) 1967 (2) SA 501 (W) 504.

[68] DH van Zyl 'Mandate and negotiorum gestio' in WA Joubert & M Kuhne (eds) *The Law of South Africa* (2020) vol 28 (3 ed) para 64. See also *Law Society, Transvaal v Matthews* [1989] 2 All SA 195 (T).

[69] Ibid para 64.

[70] Midgley *Lawyers' Professional Liability* 77. For an egregious example of a violation of this obligation, see *Johannesburg Society of Advocates and Another v Seth Azwihangwisi Nthai & others* [2020] ZASCA 171. The judgment records at para 7ff how the legal practitioner concerned attempted to solicit a bribe from the opposing party in an arbitration; and thereby placed his own financial interest above the interest of his client; disclosed privileged information to the opposing party in the proceedings; and betrayed the confidence that his client and instructing attorney had placed in him to advance his client's interests honestly, objectively and independently.

[71] Van Zyl in Joubert & Kuhne *LAWSA* para 64.

[72] Midgley *Lawyers' Professional Liability* 77-84 and K van Dijkhorst & J Church 'Legal practitioners' in WA Joubert (ed) *The Law of South Africa* (2007) vol 14 para 306.

Significantly, the obligation to pursue the client's ends in good faith did not historically focus on enhancing the autonomy of the mandator (as it is conceived today), but focused more on the virtues of the mandatary. The idea that the duty of good faith requires the mandatary to display honesty, integrity and diligence finds its roots in the original meaning of *fides* in Roman law. This honour-based notion of *fides* was a notion tied up in ethical, legal and religious implications, but essentially stood for the idea that the ideal Roman (man) was said to act bona fide if he acted honestly and prudently,[73] and acted well, as among good men, and without fraudulence.[74] Roman society regarded *fides* in a general sense as the main component of perseverance (*constantia*), the central virtue of man.[75]

However, as the mandate contract developed over time, the focus of this obligation changed from an honour-based one to a client-based one. However, its origins still resonate with the relatively recent analogy drawn between friendship and neutral partisanship in the US jurisdiction. It is easy to find parallels between the original mandate in Roman times, where services were rendered to the client as a result of a 'moral duty and as generous and altruistic friends',[76] and Fried's justification for neutral partisanship in the US in his piece: 'The lawyer as friend: The moral foundations of the lawyer-client relation'.[77] Pothier's subsequent collation of the obligations of mandate in Roman-Dutch times[78] (which were received into South African law) includes the duty of good faith. This is so since the lawyer's relationship with the client is based on good faith, trust and friendship.[79] I would argue then that the good-faith obligations

[73] Rebuffus (Pierre Rebuffi, 1487-1557) cited in A Foldi 'Traces of the dualist interpretation of good faith in the *ius commune* until the end of the sixteenth century' (2014) 20 *Fundamina* 312 at 317.
[74] Cicero M De Officiis (1560) III 70 as discussed by P du Plessis 'Good faith and equity in the law of contract in the civilian tradition' (2002) 65 *THRHR* 397 at 400.
[75] Ibid 399. Van Zyl *Justice* 132.
[76] Van der Bergh 2014 *Fundamina* notes at 967 that friendship (*amicitia*) gave rise to serious and substantial duties (*amicitiae officia*), because Roman friends expected much of each other. The 'friendship' origin can also be found in England where barristers could not sue for fees initially because of the idea that 'the barrister, as a gentleman, appeared only as a friend and would not take money, but … the litigant would drop the appropriate amount in [the] purse at the back of the gown, in theory unknown to the barrister'. See C Friedman 'The history of the division of the South African legal profession' (1990) Feb *De Rebus* 136 at 138-40.
[76] Van der Bergh 2014 *Fundamina* 967.
[77] See C Fried 'The lawyer as friend: The moral foundations of the lawyer-client relation' (1976) 85 *Yale Law Journal* 1060. As an indication of this article's influence in the field of legal ethics, one database (HeinOnLine) indicates that the article has been cited by 753 articles.
[78] See below section x. R-J Pothier *Pothier's Treatise on the Contract of Mandate (Traite du Contrat de Mandat)* translated from the Dupin edition by BG Rogers and BX de Wet (1979) at 3.
[79]D Nörr "Reflections on faith, friendship, mandate" (1990-1992) xxv-xxvii *The Irish Jurist* 302 at 302 and 304-305. Woolley, by analogy, speaks about the fiduciary relationship between lawyer and client 'as moral relationship'. See A Woolley 'The lawyer as fiduciary: Defining private law duties in public law relations' (2015) 65 *University of Toronto Law Journal* 285.

in the contract of mandate include the following inward-looking factors which a legal practitioner can ascertain by asking the following questions:

### *7.4.1 Has there been sufficient work with client to limit information asymmetry between legal practitioner and the client?*

In the context of regulatory concerns, information asymmetry is generally defined as the client's inability to make accurate assessments about the services they receive from legal practitioners in terms of quality and cost.[80] In this context, the legal practitioner must consider whether the client is adequately empowered to engage with his or her legal practitioner on as much of a common understanding of the options available as possible. In other words, the legal practitioner should not bully a client into a particular viewpoint – the correct method would be to withdraw.[81] So legal practitioners should not 'hide' potential options from the client just because the legal practitioner finds these options objectionable. In an example of prescription, the legal practitioner should at least raise the possibility of prescription, if only to advance reasons to the client why the prescription in a particular matter should not be pursued.

### *7.4.2 Has there been sufficient work with the client as to moral dialogue, in particular, considering the impact of social, economic and other factors on client's interests?*

A moral dialogue has been described as a counselling conversation in which a legal practitioner may 'invoke morality, rather than solely law or the client's pragmatic self-interest, in an effort to persuade a client to make a particular decision'.[82] The idea behind a moral dialogue is that that legal practitioners should bring their fully integrated personality to bear on the legal advice they give. Their legal advice is more than just a summary of short-term legal outcomes. Part of the duty to advise is to incorporate not only 'legal' outcomes, but also the potential economic, social, and other effects of any action that the client may want to follow, which may or may not affect the client's reputation. The CC appears to have endorsed this approach in the case of *Njongi.*[83] In this case, the court suggested explicitly that the legal advice to the relevant political

[80] D Rhode & A Woolley 'Comparative perspectives on lawyer regulation: An agenda for reform in the United States and Canada' (2011-2012) 80 *Fordham Law Review* 2761 at 2762.
[81] This accords with Nicolson & Webb's ideas that factors must be taken into account that affect the balance of power between lawyer and client that raises the potential for invasions of client autonomy (245-46).
[82] R Dinerstein, S Ellmann, I Gunning and A Shalleck 'Connection, capacity and morality in lawyer-client relationships: Dialogues and commentary' (2004) 10 *Clinical Law Review* 755 at 794.
[83] *Njongi v Member of the Executive Council, Department of Welfare, Eastern Cape* 2008 (4) SA 237 (CC) as discussed in chapter 6, at 6.3.2.

office bearer was incomplete without reference to the 'moral or policy' issues at play in the matter.[84]

### *7.4.3. Timing of an ethical decision: has client been given sufficient notice of any discretion to disclose, withdraw or act contrary to instructions?*

It is important that legal practitioners consider the timing of any objection to a client's mandate. It may be more ethically problematic to withdraw late in the day than not at all. In these circumstances, such withdrawal may signal a 'problem' to any adjudicator, to the detriment of the client. This is what some commentators have called 'a noisy withdrawal'.[85] While the legal practitioner may withdraw at any stage, the practitioner must think about the timing of the withdrawal, and how it will affect the client.

Based on this short overview then, legal practitioners may well question whether their obligation to act in good faith *towards their client only* requires any of conduct discussed in chapter 6. It is only when this duty is understood in the light of some of the other mandatary duties that a Fried friendship model becomes more questionable as the proper way to conceive of the legal practitioner's role in SA. The particular duties in question here are the mandatary's duty to do what she has been instructed to do;[86] and to obey instructions.[87] My argument is that, on each duty's own terms, the legal practitioner has to exercise discretion as to what constitutes proper conduct. If this discretion is exercised in the light of SA's new constitutional norms, it may be that whatever good faith legal practitioners have towards their clients, must be tempered by the other requirements of the mandatary which require deliberation as to existing norms. One such norm is Ubuntu, as discussed below.

---

[84] Ibid para 64.
[85] See for example, RD Rotunda 'The notice of withdrawal and the new model rules of professional conduct: Blowing the whistle and waving the red flag' (1984) 63 *Oregan Law Review* 455 at 481.
[86] Kerr *The Law of Agency* 136. Midgley *Professional Liability* 73-74.
[87] The mandatary's other duties (not discussed here) are: to exercise care, skill and diligence (Kerr *The Law of Agency* 136-39 and Midgley *Professional Liability* 84-85); to account (Kerr *The Law of Agency* 136 and Midgley *Professional Liability* 77; and to advise. Kerr (ibid) divides this duty into two: the duty to impart information; and the duty to advise (at 139-41). I follow Midgley's approach (Midgley *Professional Liability* 74-75).

## 7.5 AN OUTWARD-LOOKING DUTY: COMPLIANCE WITH THE CUSTOM OF UBUNTU

In chapter 6,[88] I set up a decision-making schema for legal practitioners. I argued that they had to take into account 'outward-looking' factors, given constitutional imperatives and values. In what follows I argue that the contract of mandate itself provides a rationale for following this schema. In particular, I look at two traditional exceptions to mandate's requirements, interpreted in the light of prevailing norms, that provide the impetus and rationale for the outward and inward looking nature of this schema.

### *7.5.1 To do what she has been instructed to do*

The principal characteristic of a contract of mandate is that the mandatary undertakes to do something at the request or on the instruction of the mandator.[89] The Roman-Dutch authorities tell us that the object of the mandate may not be 'illegal, wrongful or immoral' and it must be capable of being performed both 'legally and physically'.[90] This duty still exists in this form. However, it is arguable that legal representatives have tended to ignore the wrongful and immoral objects of this exception, and have interpreted the constraint of 'illegality' as an opportunity to engage in a kind of 'linguistic gamesmanship' that stretches the meaning of law well past its intended purposes, if it is in the client's interests.[91] This appears implicit in a statement by a South African practitioner writing in the early 1970s that, since the client is 'paying the fiddler, he may call the tune', even if the legal practitioner disagrees with the particular tune.[92] Luban has characterised this approach 'zeal at the margin',[93] and suggests

[88] Chapter 6, section 6.5.
[89] Van Zyl in *LAWSA* para 2 defines a contract of mandate as: 'a consensual contract between one party, the mandator, and another, the mandatary, in terms whereof the mandatary undertakes to perform a mandate (commission or task) for the mandator.'
[90] Grotius *Inleidinge* 3 12 2; Van der Keessel *Prael ad Gr* 3 12 2 as quoted in Van Zyl in *LAWSA* para 2. In a case considering delictual liability for harm caused to a party to a matter (*Barlow Rand Ltd v Lebos*) the court made the general comment that the 'duty on the part of an attorney is not a servile thing. He is not bound to do whatever his client wishes him to do. However much an act or transaction may be to the advantage, profit or interest of a client, if it is tainted with fraud or is mean, or in any way dishonourable, the attorney should be no party to it, nor in any way encourage or countenance it.'
[91] Kruse 2011 *Hofstra Law Review* 580. Note however that Kruse critiques the way in which moral philosophers have characterised this problem.
[92] DH Sampson 'The attorney's mandate' (1971) *De Rebus* 145 at 146. In similar terms, Rhode has suggested that US large-firm practice prides itself in leaving no stone unturned on the client's behalf, provided lawyers can bill by the stone. See D Rhode 'Ethical perspectives on legal practice' (1985) 37 *Stanford Law Review* 589 at 635.
[93] D Luban *Legal Ethics and Human Dignity* (2007) 26. Wilkins has named this issue 'the boundary claim'. See DB Wilkins 'Legal realism for lawyers' (1990) 104 *Harvard Law Review* 468 at 471. Cf Wendel who suggests that the claim is '[t]he most shopworn aphorism in legal ethics.' WB Wendel 'Professionalism as interpretation' (2005) 99 *Northwestern University Law Review* 1167 at 1181.

that legal practitioners who adopt this approach do not engage in a good faith interpretation of the law, but treat legal limits in an instrumental fashion, usually by finding ways around or loopholes through such limits.[94] As a result, the boundaries of the law are pushed 'well past whatever moral and political insight constitutes the "spirit" of the law in question'.[95]

However, given our new constitutional dispensation, is the interpretation of this obligation as one requiring 'bare legality' still justified? There has always been the duty to act independently, but I argue that the requirement that the object of the mandate may not be 'illegal, wrongful or immoral' has to be interrogated in the light of the Constitution. The Constitution embodies an objective normative value system with the CC itself saying: 'The Constitution is more than law, however. It is the legal and moral framework within which we have agreed to live.'[96] As a result, not only are legal practitioners required to consider the lawfulness of their actions, but they must also consider whether their conduct amounts to immoral or wrongful conduct, understood in the light of constitutional values. In this way, legal practitioners are forced to consider the factors mentioned in chapter 6.[97] This judgement has to be exercised according to the context of the representation, considering power imbalances, resolution setting, competence of resolution bodies and the strength of legal practitioner objection versus strength of client interest. While this appears to be a daunting task, Hutchison suggests that the wrongfulness enquiry in delict – based on the *boni mores*, or community standards of reasonableness – is not 'worlds removed from the notion of good faith' and may prove insightful for any good faith consideration.[98] It is useful to look at the court's insights on the issue of wrongfulness in the case of *Road Accident Fund v Shabangu*[99] as one such example. In this matter, the SCA found that it was inevitable that legal practitioners' duties to advance the interests of their clients may affect the opposite party negatively, and even cause harm.[100] This is the nature of dispute resolution. However, the court emphasised that no delictual

[94] Ibid. Cf Kruse 2010 *Georgetown Journal of Legal Ethics* 111.
[95] Luban *Legal Ethics and Human Dignity* 26.
[96] See *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC) para 54 and *De Lange v Presiding Bishop of the Methodist Church* 2016 (2) SA 1 (CC) para 83. See also A Chaskalson 'From wickedness to equality: The moral transformation of South African law' (2003) 1 *Icon* 590 at 599: 'The new South African Constitution is a moral document.'
[97] Du Plessis has considered that, a good faith judgement in a contractual setting may require that a party in a contract, for example, should act according to the spirit of the transaction, not solely on the strictures of the law. J du Plessis 'Giving practical effect to good faith in the law of contract' (2018) 29 *Stell LR* 379 at 392. See also S Thompson 'Beadica 231 CC: An end to the trilogy?' (2020) 137 *SALJ* 641 at 656.
[98] D Hutchison 'Good faith in the South African law of contract' in R Brownsword, NJ Hird, & G Howells (eds) *Good Faith in Contract: Concept and Context* (1999) 213 at 241.
[99] 2005 (1) SA 265 (SCA).
[100] *Shabangu* para 11.

liability would arise where the legal practitioner conducted him- or herself *in a legitimate manner*.[101] Importantly, the court emphasised that the legal practitioner was not obliged to advance his client's interests at all costs,[102] contrary to arguably current practice. Significantly, the court suggested that

> '[g]enerally speaking, it is no part of an attorney's function to protect the interests of the opposite party by doing, or refraining from doing, something that might injure that party'.[103]

However, the court went on to say that delictual liability may be imposed where convincing legal and public policy considerations showed the legal practitioner's conduct to be wrongful. In a similar way, legal practitioners have to consider the 'legitimacy' of their conduct under their mandate, not only on legal grounds, but also on whether such conduct conforms with notions of good faith as developed through the Constitution. As a result, it cannot be that pursuing client's ends requires 'zeal at the margin' as a categorical claim. While legal practitioners should act to further client's autonomy, it cannot be done at the expense of the legal practitioner's honesty and integrity.

### *7.5.2 The duty to obey instructions*

A mandatary must follow the mandator's instructions.[104] However, as set out above, these instructions may not be 'illegal, *wrongful or immoral*'.[105] There is thus an explicit reference to the fact that law is not the *only* constraint on obeying the instructions of the client. In Pothier's art 1, he writes about this obligation, qualifying it as follows:

> 'In order that some business may become the subject of mandate, it is necessary (1) that there be business to be transacted; (2) that the business be contrary neither to law *nor to accepted custom.*'[106]

---

[101] Ibid.
[102] Ibid.
[103] Ibid.
[104] Van Zyl in Joubert *LAWSA* para 7 and the Roman and Roman-Dutch authorities cited therein.
[105] My emphasis.
[106] Pothier *Pothier's Treatise on the Contract of Mandate (Traite du Contrat de Mandat)* translated from the Dupin edition by BG Rogers & BX de Wet (1979) at 3. Midgley's commentary on this obligation uses more contemporary language, but similarly qualifies the obligation: 'A mandatary is obliged to follow the mandator's instructions but this is subject to certain general exceptions. As with all mandatories, carrying out the client's express instructions is not sufficient: *in addition, the lawyer must adhere to the norms and usages of the business in question.*' Midgley *Lawyers' Professional Liability* 75-76.

This means that legal practitioners, in carrying out the client's express instructions, must not only act within the law, but also adhere to accepted custom in the legal system.[107] The qualification 'nor to accepted custom' is an additional exception to the duty to obey instructions, and is key to suggesting to legal practitioners that any custom now accepted into society must be a constraint on a legal practitioner's obligation to obey instructions.

When considering what 'custom' may mean, case law has tended to focus on the fact that, while the legal practitioner has to act in accordance with client instructions, the legal practitioner decides the manner in which to operationalise these instructions.[108] This usually means that the legal practitioner is in control of the manner in which a matter is conducted in court. [109] In a rather bizarre set of circumstances, a legal practitioner attempted to rely on this exception (ie compliance with custom, norms and usage) to be paid for *not* attending postponements in cases where he had been appointed by Legal Aid South Africa.[110] In this case (*Mackay v Legal Aid Board*)[111] the attorney claimed fees from the Legal Aid Board, inter alia, for case postponements made in his absence, by arrangement with a magistrate or another legal practitioner. The attorney argued that he 'fulfils his mandate if he achieves the result which his mandate is designed to bring about'.[112] Given that the Legal Aid Board's instructions or guide did not spell out how he was to achieve the postponement, he argued that he had discretion on how to achieve the postponement.[113] He then argued that 'the accepted customs and usages obtaining in his profession are imported into the mandate for the arrangement of postponements'.[114] In this instance, he led evidence of a 'practice' or 'tradition' in the magistrates' courts in a particular city of legal practitioners charging attendance fees when not in attendance.[115] Significantly, the court found that 'an attorney who avails himself of this practice in order to arrange his postponements acts efficiently and appropriately'.[116] However,

[107] Midgley *Lawyers' Professional Liability* 75-76.
[108] *Goodriche & Son v Auto Protection Insurance Co Ltd (In liquidation)* 1967 (2) SA 501 (W).
[109] Case law has held that where the legal practitioner decides to go against the express wishes of the client, the client has to be informed and given an opportunity to withdraw their mandate. See *R v Matonsi* at 456H, *S v Naidoo & Others* 1974 (3) SA 706 (A) at 712G.
[110] Legal Aid South Africa was set up by the Legal Aid South Africa Act 39 of 2014. It is a statutory body which assists the vulnerable in tax-funded legal assistance. For a discussion of this body under this Act (and its predecessors) see H Kruuse '*Vuk'uzenzele* ('Arise and act'): Lawyers and Access to Justice in South Africa' in H Whalen-Bridge (ed) *The Role of Lawyers in Access to Justice: Asian and Comparative Perspectives* (2021) *(forthcoming)*..
[111] 2003 (1) SA 271 (SE).
[112] Ibid 280I-J.
[113] Ibid 281A-C.
[114] Ibid.
[115] Ibid 285B-D.
[116] Ibid 281C-D.

the court explicitly rejected any reliance on this tradition to charge fees to clients given the duty of good faith. The court noted that the tradition relied upon had to be compatible with the relationship of trust and good faith between the mandator and mandatary. In this instance, that mandator was not the actual client subject to the postponement, but Legal Aid South Africa. The court noted: 'This "practice" or "tradition" has no part in the relationship of trust and good faith between legal practitioner and legal aid grantor in terms of which scarce public funds are made available to the legal practitioner as his fee.'[117] If one extrapolates from the *Mackay* case, then, it is not open to the legal practitioner (as a mandatary) to argue that conduct is condoned where the so-called 'custom' serves the legal practitioner's own interests and, in context, amounts to an abuse of scarce public resources.

From the above references, legal practitioners have interpreted 'accepted custom' narrowly (if at all), with the default position being that it reflects 'what everyone else is doing in the legal profession'. My argument is that there is another way of reading this requirement of custom. This is by considering the custom of Ubuntu, and how it has been reinstitutionalised into a legal norm via the Constitution and jurisprudence. In this way, Ubuntu becomes a standard consideration in how legal practitioners carry out their instructions. If Ubuntu is taken into account, then legal practitioners may *have* to show sufficient concern and respect for more than just their client. However, this does not mean that suddenly, legal practitioners are going to sacrifice their clients for collective interests.[118] It simply means that legal practitioners cannot continue to act in a categorical fashion, and must consider a wider range of factors in the discharge of their obligation to obey instructions. Where in the discharge of their obligation there is potential harm to others, legal practitioners have to consider whether their wider moral duties of acting with integrity and concern for the interests of others trumps the autonomy of the client in achieving justice. As set out in chapter 6, the 'schema' for deliberating in this way allows legal practitioners to balance the inward-looking good faith requirement to their client against the outward-looking Ubuntu requirement that one shows sufficient respect and concern for others in one's conduct.

[117] *Mackay* 282B-E.
[118] As I set out in chapter 5, Ubuntu is not mere collectivism, but should be understood more in line with autonomy-in-relation.

## 7.6 CONCLUSION

This chapter has attempted to deal with the art of the possible: convincing legal practitioners of their adapted role in South Africa's constitutional democracy. I have argued that the housing for such persuasion should come in a principles reconceptualisation of how we understand the contract of mandate, interpreted in the light of prevailing constitutional values, among them, Ubuntu. I believe that this suggestion conforms with constitutional values in that it can mitigate the potential negative effects of unequal access to the law. This suggestion also emphasises that legal practitioners cannot evade taking responsibility for their conduct, since the very foundation of their representation requires such responsibility in the form of deliberation about custom, legality, morality and wrongfulness. This chapter should not be read as an offensive against the primary duty to client. On the contrary, it offers inward-looking factors focused on client's interests for legal practitioners to consider. Legal practitioners remain loyal to their clients, but – on consideration of both inward- and outward-looking requirements – they cannot, for example, take excessive advantage of an opponent's weakness (usually financial) to further their client's interests. In the final chapter to follow then, I summarise the approach, but importantly, I propose ways in which the approach needs to be instantiated, particularly focusing on the regulatory and educational framework. Even if I am unable to convince existing legal practitioners of the need for this approach with the existing tools at my disposal, I believe that certain regulatory and educational changes can be made now to develop a stronger, more socially accountable version of legal ethics for law students and aspiring legal practitioners.

# CHAPTER 8: INSTITUTIONALISING AN UBUNTU-INSPIRED APPROACH TO ETHICS

'[W]e should think about implementation only after we've thought about what we are trying to implement'[1]

## 8.1 INTRODUCTION

In chapter 7 I suggested that the current contract of mandate, read in the light of the Constitution with its relational values, can and should serve as a basis for directing and appraising how legal practitioners' exercise discretion in the resolution of ethical dilemmas. I suggested then that a modernised understanding of the traditional terms of a mandate contract (which I named inward-looking factors) needed to supplement and support the outward-looking factors developed in chapter 6. Taken together, these factors will encourage legal practitioners to think and act on the most pressing ethical issues they face in a way that promotes justice – understood in the specific context of the South African legal system.[2]

However, as commentators point out, any plausible approach to legal ethics should be capable of being institutionalised.[3] This is important for current practitioners, but more so for aspiring practitioners: law students. One major issue, even before one gets to justifications about role, is to convince legal practitioners and law students to *care* about behaving ethically, and commit to that goal.[4] While there are a vast number of changes that can be envisaged, I focus on what I regard to be the two most important aspects to develop for my approach.[5] These are:

(1) re-drafting the code of conduct for legal practitioners to embed the factors I have discussed; and

---

[1] WB Simon *The Practice of Justice: A Theory of Lawyer's Ethics* (2000) 195.
[2] Stated in this way, this approach clearly relies on Simon's approach, albeit adapted for SA's particular context.
[3] WB Simon *The Practice of Justice* 198-99. See also D Rhode 'Symposium introduction: In pursuit of justice' (1999) 51 *Stanford Law Review* 867 at 872 (1999) and D Nicolson & J Webb *Professional Legal Ethics: Critical Interrogations* (1999) 286.
[4] D Nicolson 'Making lawyers moral? Ethical codes and moral character' (2005) 25 *Legal Studies* 601 at 603.
[5] While not discussed here, an area that holds much promise in this area, is the creation of a Legal Services Ombud (provided for in terms of chap 5 of the Legal Practice Act). This is the first time in the history of the South African legal profession that an independent body ie separate from the law societies/bars/council and courts will have jurisdiction over conduct. While the President appointed a retired judge to the position in late December 2020, the provisions relating to the Ombud's office in the LPA have not yet come into force. See Staff Reporter 'Ramaphosa appoints Judge Desai as Legal Services Ombudsman' *IOL News* (22 December 2021) available at https://www.iol.co.za/news/politics/ramaphosa-appoints-judge-desai-as-legal-services-ombudsman-288aef1b-c015-4cdb-a0ff-6903d45f729d.

(2) introducing educational initiatives that align with the approach advocated for here.

## 8.2 THE REGULATORY REGIME: RE-DRAFTING THE CODE OF CONDUCT

In order to support the approach advocated here, I believe that there is a need to adjust the current regulatory regime, specifically in the form of redrafting the current code of conduct. We should be moving from the current approach that relies mostly on a discipline/command-and-control approach, to one that is pre-emptive[6] in form and relies on legal practitioners to be pro-active.[7] In this way, the code can provide for the kind of ethical deliberation contemplated in this thesis. The purpose of re-drafting would be to signal a change from categorical norms and rules[8] that produce a compliance-based mindset,[9] to a code that encourages the exercise of judgement. Unfortunately, as commentators note, too often codes are based on, or likened to, criminal-law regimes in their emphasis on sanction and penalties.[10]

However, this is not to say that any code developed to support my approach would be without sanction. This, as Abel has pointed out, is hugely problematic in the context of protecting the public interest.[11] But the important point here is that the code should be educative in the sense of encouraging ethical behaviour. Nicolson notes that too often codes encourage a type of minimum standards/risk analysis approach whereby legal practitioners appear to concern themselves with the question: 'What is the level of malpractice I can operate at to avoid disciplinary sanctions.'[12]

---

[6] Simon 2017 *Georgetown Journal of Legal Ethics* 459.

[7] Fortney suggested that the 'disciplinary' approach is problematic in that it largely 'swoops in' after the alleged conduct, providing no real educative value. See SS Fortney 'Promoting public protection through an attorney integrity system: Lessons from Australian experience with proactive regulation of lawyers' (2015) 23 *Professional Lawyer* 16 at 17.

[8] W Simon 'The trouble with legal ethics' (1991) 41 *Journal of Legal Education* 65 at 67.

[9] This type of approach is also characterised as the 'command-and-control' approach. See TM Madden 'Law and strategy *and ethics?*' (2019) 32 *Georgetown Journal of Legal Ethics* 181 at 193.

[10] Simon *The Practice of Justice* 202.

[11] For example, Abel suggests that – in general – 'too little unethical behaviour is named, blamed, claimed and punished' (quoted in Rhode & Woolley 2012 *Fordham Law Review* 2764). Where South African courts consider applications to strike a legal practitioner off the roll for misconduct, courts tend to stress that their main consideration is the protection of the public. At the point of enforcement, this has to be an important consideration, but it cannot be the *reason* for acting, ie the code should not be seen as promoting a deterrence/sanction strategy only. These are points made by Nicolson and Zacharias in relation to codes in the UK and the US respectively (see Nicolson 2005 *Legal Studies* 605 and FC Zacharias 'The purpose of lawyer discipline' (2003) 45 *William & Mary Law Review* 675 at 698.). For examples of the SCA emphasising the 'protection of the public' point, see *Law Society of the Cape of Good Hope v Budricks* 2003 (2) SA 11 (SCA) para 7, *Malan & another v Law Society, Northern Provinces* 2009 (1) SA 216 (SCA) paras 3-4 and more recently, *Hewetson v Law Society of the Free State* 2020 (5) SA 86 (SCA) para 47.

[12] Nicolson 2005 *Legal Studies* 619.

If one considers the factors developed in this thesis particularly relying on Ubuntu, and the type of issues at play, there are at least three ways in which the current SA code could be developed:

1) Separating out 'mere-regulation' aspects from the ethical provisions
2) Building in discretion into the substantive provisions
3) Widening duties dependent on resolution setting and third parties.

I set out why each of these ways are important considering some of the extant provisions in the Code as to whether they work / can be amended.

### *8.2.1 Separating out 'mere-regulation' aspects from the ethical provisions*

Nicolson notes that often codes are dominated by so-called etiquette or 'mere regulation' rules rather than actual ethical norms.[13] These etiquette or regulation rules, Nicolson tells us, resemble traffic or VAT regulations in requiring 'knowledge and implementation', but no 'thought and understanding'.[14] While I am not suggesting that these issues should not be regulated, it is the overwhelming focus on these issues in a code that can diminish the value of code provisions that deal with actual ethical issues. My recommendation is that these 'mere regulation' rules move to another 'space'. In South Africa, for example, these rules could be accommodated by the existing provisions in the LPA which provides for the LPC to draw up rules for the legal profession.[15]

Is the SA code of conduct subject to Nicolson's 'overcrowding' criticism? If one considers its make-up, the impression created is yes: most of its content is dedicated to regulatory aspects such as publicity,[16] sharing of fees and offices,[17] and disputes about fees.[18] There is also an obsession in the code with distinguishing the regulatory differences between the different types of practitioners introduced by the Legal Practice Act.[19] This obsession is understandable given

[13] Nicolson 2006 *Legal Studies* 621.
[14] Ibid.
[15] See ss 95(1), 95(3) and 109(2) for example. If these provisions are deemed too narrow to accommodate this change, then the recommendation would be for a minor legislative amendment along these lines.
[16] Code of conduct para 7.
[17] Code of conduct paras 12 and 13.
[18] Code of conduct paras 10, 12, 29, 30, 32, 34, 35, 45, 46, 50 & 51.
[19] The code takes its structure from this focus. So, for example, the code is divided into parts that deal with general provisions (part II), conduct of attorneys (part III), conduct of advocates without trust accounts (part IV), conduct of advocates with trust accounts (Part V) and conduct of all legal practitioners (including candidate legal practitioners in court and before tribunals (part VI) and conduct of legal practitioners not in private practice (part VII). The latter inclusion is a remarkable one since legal practitioners not in private practice (ie in-house counsel) have never been regulated or included in a regulatory authority's code of conduct.

the change that the Act brought about to a profession that has long been a divided one.[20] However, the obsession has resulted in a disproportionate emphasis on the practical differences between practitioners, and a lack of content on actual ethical dilemmas and what factors legal practitioners should take into account in their resolution.

There is no question that the regulatory aspects are important. However, I believe that their emphasis in the code threatens to undermine the message to legal practitioners if the approach in this thesis is to succeed. This message is that ethical dilemmas are not the equivalent of resolving the wording and size of a law firm's advertisement on a national road.[21] The distinction between the different legal practitioners has also led to a certain amount of repetition, confusion, and even possibly a negation of the initial principles and constitutional values. For example, the question arises as to whether an explicit provision for one type of legal practitioner means the exclusion of that duty for another type of legal practitioner, where that same duty is not mentioned.[22] This is problematic if one is to ask all legal practitioners to pursue the same task of ensuring justice.

### *8.2.2 Building in discretion into substantive provisions*

In pinning my colours to the mast of the code, I recognise and appreciate commentary that criticises codes in general.[23] However, this is largely because of the way in which codes are

[20] See for a brief discussion of this change.

[21] Code of conduct para 7 refers to publicity factors generally.

[22] This particularly interesting as it relates to the intersection between Part VII of the Code (corporate counsel) and the rest of the code (relating to other practitioners). This part is new in that no code of the legal profession before this one has brought corporate counsel (ie those who are not in private practice) under the authority of a statutory body such as the Legal Practice Council. While this inclusion is laudable, it appears that the broad principles applicable to corporate counsel are not applicable to other practitioners (in the words of the code: 'unless stated otherwise or unless the context indicates otherwise'). This is problematic in that these broad principles appear to directly address the type of discretion and approach argued for in this thesis for *all* legal practitioners. So for example, para 62.3.2 sets out that 'corporate counsel … must give effect to legal and ethical values and requirements, *and treat any gap or deficiency in a law, regulation, standard or code in an ethical and responsible manner*.' Another example is paragraph 63.3.6 which sets out that corporate counsel must 'comply with the letter *and the spirit* of the law'. While one could argue that these requirements are really just emphasising the importance ethics in corporate spaces, it gives one the impression that the converse is applicable to attorneys, advocates and advocates with trust accounts: ie that they need *not* read any gap or deficiency in a law, or they need *not* comply with either the letter or the spirit (if one applies the common law rule of interpretation, *expressio unius est exclusio alterius*). This, I would suggest, was not the intention of the drafters, but it would be helpful to be clearer on this issue.

[23] This is also, in part, because of a belief that the legal profession has used (and continues to use) self-regulation for ulterior purposes. While it is beyond the scope of this thesis, I recognise the vast literature that exists (particularly by socio-legal scholars) on this issue. The gist of their complaint is that the legal profession has used regulation for its own purposes such as preserving the status quo, favouring those with high social status and pursuing self-regulation for self-interest rather than for any so-called public interest. See Kruuse and Genty 2018 *Fordham International Law Journal* 373 at 374 and the footnotes cited therein.

traditionally structured. As mentioned above, codes often take on a hard command-and-control / compliance approach that replicates criminal-law regimes. Further, scholars complain that codes promote the type of formalist thinking that ethicists try to avoid; or worse, they produce instrumentalist thinking by legal practitioners.[24] The most damning criticism of codes (for an approach such as the one suggested in this thesis) is that codes may tempt lawyers to let others do their ethical thinking for them, effectively allowing them to evade responsibility for the actions they take.[25] This complaint usually relates to the idea that the codes replace the legal practitioner's judgement and, over time, their compliance mind-set may actually erode the legal practitioner's capacity for judgement.[26]

The difficulty with matching the code with an Ubuntu-inspired approach is that a code usually restricts 'the range of considerations the decision-maker may take into account when she confronts a particular problem'.[27] The essence of the Ubuntu-inspired approach is to open up, rather than restrict, the range of considerations. The problem, as Simon points out, is that 'the decision maker has no discretion to consider factors that are not specified or to evaluate specified factors in ways other than those prescribed by the rule[s]'.[28] As a result, one may say (in respect of code regulation) that it is no longer apparent what it has to do with ethics or responsibility.[29]

---

[24] So, for example, Feldman suggests: 'It's like bait … You dangle a code in front of lawyers, and they immediately start fishing for loopholes'. Feldman quoted in Johnson 2000 *Journal of Law, Ethics and Public Policy* 45 fn 81. See also Nicolson & Webb *Professional Legal Ethics* 113 where they suggest that codes are likely to encourage 'creative compliance' – namely, post hoc manipulation by the regulated.

[25] Johnson 2000 *Journal of Law, Ethics and Public Policy* 46. Loder suggests (quoting Wasserstrom) that 'institutional justifications for actions are "seductive" because they limit the lawyer's decisionmaking within a structured and "simplified moral world". As a result, 'the rules may provide an escape from an otherwise painful process of justifying moral choices'. See RE Loder 'Tighter rules of professional conduct: Saltwater for thirst?' (1987) 1 *Georgetown Journal of Legal Ethics* 311 at 315-16.

[26] Nicolson & Webb *Professional Legal Ethics* (1999) 112 and Johnson 2000 *Notre Dame Journal of Law, Ethics and Public Policy* 29. Bauman, for example, argues that codes are the antithesis of morality and that 'morality ends where ethical codes begin' (quoted in Nicolson 2005 *Legal Studies* 608). Simon similarly notes that codes 'reduce ethics to a matter of mindless rule application' (Simon *The Practice of Justice* 15). See further SJ Levine 'Taking ethical discretion seriously: Ethical deliberation as ethical obligation' (2003) 37 *Indiana Law Review* 21 at 26.

[27] Simon *The Practice of Justice* 9. Feldman captures the importance of this point by stating that '[o]ften, a truly hard ethical case is formidable because it is unfamiliar. The situation presents the agent with a configuration of ethical demands previously unencountered, perhaps unanticipated. The distinctiveness of the configuration stems from the specifics of the circumstances.' See Feldman 1996 *Southern California Law Review* 933.

[28] Ibid.

[29] Ibid 15. In addition, Zacharias points out that encouraging or focusing lawyers to think about how to act fosters professionalism since it makes 'the lawyer act for ethical or systemic reasons rather than because of the coercive force of potential discipline.' See FC Zacharias 'Specificity in professional responsibility codes: Theory, practice, and the paradigm of prosecutorial ethics' (1993) 69 *Notre Dame Law Review* 223 at 258.

aspects are underdeveloped at this point. The first promising aspect is the code's reference to constitutional values at the start:

> 'Legal practitioners … shall … uphold the Constitution of the Republic and the principles and values enshrined in the Constitution, and without limiting the generality of these principles and values, shall not, in the course of his or her or its practice or business activities, discriminate against any person on any grounds prohibited in the Constitution.'[30]

While there is no explicit reference to Ubuntu, this reference is important as a precursor to a principled-based code (as opposed to a rule-based code) but one that is still capable of enforcement. If legal practitioners are encouraged to act according to principles, this immediately accords with a more nuanced take on context, and suggests that legal practitioners cannot act in a categorical fashion.

The second promising aspect of the code is the introduction of a new section titled: 'Commitment of legal practitioner to an effective court process'.[31] While courts have chastised its legal practitioners in the past for abusing court process, there was no explicit provision on this in the previous codes.[32] The obvious challenge to this provision is that it does not cover abuse outside of the court-directed processes. While the duties in part VII of the code (on corporate counsel) could fill this gap, there is the strange provision that makes such duties likely to be only applicable to corporate counsel, and *not* practitioners in private practice.[33]

The third promising aspect of the SA code is – ironically – the structure in some of its 'mere regulation' provisions, rather than the actual provisions relating to true ethical dilemmas (see discussion of 'mere regulation provisions' in 8.2.2 below). It is helpful to compare two provisions in order to demonstrate this structure. In considering confidentiality, the SA code refers to confidentiality and privilege in the following curt manner:

> 'Legal practitioners … shall … maintain legal professional privilege and confidentiality regarding the affairs of present or former clients or employers, according to law'.[34]

---

[30] Para 3.2 of the Code. This provision effectively codifies statements of the courts regarding the responsibilities of legal practitioners to the Constitution. For eg, see *Kekana v Society of Advocates of South Africa* 1998 (4) SA 649 (SCA); *Vassen v Law Society of the Cape of Good Hope* [1998] 3 All SA 358 (A)*; General Council of the Bar of South Africa v Geach* 2013 (2) SA 52 (SCA) para 87.
[31] Para 60 of the Code.
[32] Ellis et al *The South African Legal Practitioner* 7-23.
[33] See discussion in 8.2.1.
[34] Para 3.6 of the Code.

However, the calculation of a reasonable fee is set out differently:

> 'Counsel shall calculate a reasonable fee by having regard to the following factors, none of which is determinative and all of which are simply guides to a fair calculation:
>
> 29.2.1 the time and labour required;
>
> 29.2.2 the customary charges by counsel of comparable standing for similar services;
>
> 29.2.3 the novelty and difficulty of the issues involved;
>
> 29.2.4 the skill and expertise required to properly address the matter;
>
> 29.2.5 the amount at stake in the matter;
>
> 29.2.6 the importance of the matter to the client.'

In the first instance, confidentiality is seen as a simple case of applying the rule 'according to the law'. However, in the second instance – how to work out a reasonable fee – the provision encourages discretion, refers to possible relevant factors to take into account, and suggests that this type of enquiry is not an exclusive one.

There is no reason then why a provision on confidentiality (or others) could not be structured in discretionary terms, if it is possible to do this with the clause relating to reasonable fees. In this way, the code provision would recognise the importance of context (particularly around general issues raised by Ubuntu: power balance, resolution, competence and interests and specific issues). It would also allow for flexibility which encourages reflective thinking by legal practitioners.[35] Re-drafting the code for important ethical dilemmas in this way would also move the code away from a model of deterrence or sanction, and shift it to a model that recognises the need for responsibility for outcome, and proper deliberation.[36] However, it is important that the code's provisions should not be characterised as 'optional' in the sense that the legal practitioner can 'opt out' of considering the factors set out in it. A provision should prescribe ethical deliberation of each factor. A legal practitioner's failure to show that she has engaged in an articulable and justifiable ethical deliberation reasonable should lead to discipline.[37]

---

[35] M Strassberg 'Taking ethics seriously: beyond positivist jurisprudence in legal ethics' (1995) 80 *Iowa Law Review* 901 at 905.
[36] This is in keeping with Levine's 'deliberative model' approach. See, in general, SJ Levine 'Taking ethical discretion seriously: Ethical deliberation as ethical obligation' (2003) 37 *Indiana Law Review* 21.
[37] Ibid 49.

If we are to be serious about the Ubuntu approach, some of the duties in the current code then need to be amended to provide for a discretionary approach, setting out a number of factors to take into account, depending on the nature of the duty. As I mentioned previously in relation to confidentiality,[38] there may be particular duties that one would want to identify to guide the discretion, in order for legal practitioners to be more acutely aware of the factors impacting on a particular course of action. As an example, one could take legal practitioners' duties in respect of litigation.[39] In the current South African code, there has been a definite shift towards discretion. For example, regarding cross-examination, the latest code has included factors such as the right of dignity of the witness, and the need for legal practitioners to be aware, and guard against those who would 'use the legal practitioner for the infliction of gratuitous embarrassment, insult or annoyance'.[40] There are thus building blocks in the current code which could be used or modified in redrafting the code to promote greater ethical discretion.

However, while a neutral partisanship attitude still predominates lawyers' thinking, the code cannot be a cure-all. For an example of this problem in cross-examination, consider the code's provision on whether a legal practitioner is allowed to attack the character of a witness.[41] One situation where a legal practitioner can do so is where she has 'good grounds', based on a statement by any person (ie the client) which is reliable or true.[42] In a neutral partisanship approach, a legal practitioner could argue that 'good grounds' are deemed to exist on the mere instruction by the client – ie where the client simply instructs counsel to impugn the character of the witness.[43] This is because the neutral partisanship rationale determines that the lawyer acts as a facilitator of the client's autonomy.[44] Given that a client's autonomy is intrinsically valuable, the legal practitioner may reason that she is bound to act in accordance with it.[45] Notwithstanding the fact that this provision is in place in the current code, I gave examples in chapter 6 of situations where legal practitioners were more than willing to act as a mouthpiece

[38] At 6.3.1.
[39] Code of conduct, para 56.
[40] Code of conduct, para 56.2.
[41] Code of conduct, para 56.4.
[42] Ibid.
[43] This would be especially true where a legal practitioner interprets 'reliability' and 'truthfulness' in a subjective, relative sense – interpreting it in accordance to her client's views on the matter.
[44] C Fried 'The lawyer as friend: The moral foundations of the lawyer-client relation' (1976) 85 *The Yale Law Journal* 1060.
[45] Ibid. For a discussion of the importance of client's autonomy in the neutral partisanship approach, see 3.4.3. The irony of this particular code provision, as pointed out by Ellis et al, is that it allows a wider berth for a cross-examiner to impugn a witness than that which is allowed by the current common-law. P Ellis, AT Lamey, L Kilbourn *The South African Legal Practitioner: A Commentary on the Legal Practice Act* (2017) 7-18–7-19.

for their client, and were even prepared to impugn the judiciary without evidence, even if it meant reputational harm or damage to SA's democracy.[46]

### *8.2.3 Widening duties dependent on resolution setting and third parties.*

In thinking about how the code and the Ubuntu approach could be brought more into line with each other, it may be useful to consider two interrelated changes. The first would be to amend the section on 'abuse of court process' to a more generalised 'abuse of process'. This would mean that legal practitioners need to consider the ethics of their tactics, whether inside or outside the courtroom. This would deal with the major issue of power imbalances and the strength of institutions to resolve a matter in accordance with justice. Secondly, the code should include a section on legal practitioners' duties towards third parties. I believe this is necessary given that the approach recognises both outward-looking duties and inward-looking duties, as discussed in the previous chapters. This is in line with a similar suggestion made by Ellis et al.[47] While they do not link their suggestion to an Ubuntu approach, they do suggest that the failure to have anything in the code on a duty to third parties 'is surprising to some extent given that legal practitioners deal on a daily basis with matters in which they represent a client in circumstances where the counterparty, or third party, is unrepresented'.[48] In an Ubuntu approach, the duties towards third parties would not be confined to those parties who are unrepresented, but would cast a wider net over third parties, depending on the factors at play.

In concluding this section, the three ways suggested above are but a few obvious examples of how to make the code support my approach. However, as indicated in chapter 1, the scope of my thesis does not permit, nor was it designed with a view to undertaking, a top-to-bottom redrafting of the code. My primary aim here is to suggest a shift to a more principle-based code formulation, with an emphasis on exercising ethical discretion: in other words, a shift from rules to judgment. But a written code cannot easily impose such a change in its own right. Lawyers need also to be trained to think this way.

## 8.3 EDUCATION

Education that focuses on the development of ethical judgement is key for aspirant practitioners to sustain the role envisaged in this thesis. I believe there are four inter-related areas that legal

[46] See 6.3.1.
[47] Ellis et al *The SA Legal Practitioner* 7-30.
[48] Ibid.

education needs to embrace if the approach is to have a hope of succeeding. These are: (1) a focus on, and working with, constitutional values;[49] (2) an emphasis on the moral development of the student;[50] (3) a shift from surface to deep learning in legal ethics;[51] and (4) a shift from rules to judgement in legal ethics. These key areas are necessary for embedding this approach. It is also necessary to challenge current thinking in legal education, which is said to focus on encouraging 'uncritical, formalistic acceptance of law's underlying values as neutral and objective, and acceptance of the idea that law *is* justice, and moral behavior [is] merely that which is legal'.[52]

As discussed throughout this thesis, the Ubuntu-based approach relies on the fact that legal practitioners are capable of exercising discretion, deliberation and making judgements in different and difficult contexts. It also requires knowledge that the bases of these decisions are grounded in constitutional values interpreted in the way I have argued for throughout this thesis: as transformative, relational and local. This knowledge cannot be presupposed, and so education of a particular kind becomes vital in the implementation of this approach.

First, a concerted effort has to be made in the LLB to explore Ubuntu as a concept and its application in a transformative constitutional democracy. This should be solidified in Practical Legal Training upon entry to the profession itself. Future legal practitioners have to understand the type of reasoning and context that Ubuntu calls for, so that one does not have the situation where a legal practitioner may use discretion in a code, for example, to advantage his or her client unduly. Thus it is necessary to learn about Ubuntu's development; the courts' adjudication, interpretation and use of the term; and its implications for conduct in legal practice. It is especially important that this study is not limited to a single course but pervades the LLB in procedural, substantive and practice courses. For example, a jurisprudence course might give students the opportunity to consider Ubuntu in a philosophical context, where students can compare Ubuntu to other philosophical traditions and the rationale that underlies these traditions. In a clinical legal practice course, students might have to 'practice' Ubuntu in

[49] See J Webb 'Taking values seriously: the democratic intellect and the place of values in the law school curriculum' in M Robertson (ed) *The Ethics Project in Legal Education* (2011) 9.
[50] D Nicolson, D 'Education, education, education: Legal, moral and clinical' (2008) 42 *The Law Teacher* 145 at 145.
[51] For a general overview of surface versus deep learning, see P Ramsden *Learning to Teach in Higher Education* (1992) and J Biggs, J & C Tang *Teaching for Quality Learning at University* 4 ed (2011).
[52] J Newman & D Nicolson 'A tale of two clinics: Similarities and differences in evidence of the clinic effect on the development of law students' ethical and altruistic professional identities' (2016-2017) 35 *Buffalo Public Interest Law Journal* 1 at 19.

consultation exercises and court visits where they need to show sufficient care and concern, not only to the client, but also to the potential translator, court official, opposition and/or presiding officer. Ubuntu should also be covered in substantive courses and procedural courses so that students might analyse its effect on the substance of the law. So, for example, in a course on contract, one might explore its role in the debate between those advocating for a liberal individualist approach to contracts, against those who see the need for more protection of vulnerable contracting parties. Similarly, in a civil procedure or evidence courses, one might consider Ubuntu vis-à-vis the rationale or purposes behind the rules developed in these courses, and think of how one might think differently regarding certain issues.[53]

If this is done, aspirant legal practitioners will have to engage with the underlying values behind particular ethical rules throughout their studies, and deliberate on the resolution of inevitable value conflicts in a way that takes into account the factors identified in this thesis. However, Webb suggests that learning *about* values is not enough: knowing that they *matter* is also necessary.[54] Thus, in addition to exploring Ubuntu as a concept in context, law schools and faculties need to concentrate on the second area mentioned above, that of moral development. This is not possible through a typical logic and reasoning course that explores major and minor premises, inductive and deductive reasoning and so forth. Law students need to consider the nature and make up of *ethical* deliberation. Here, analogies to value-based discretionary enquiries in other parts of the law, such as wrongfulness or negligence enquiries in delict, reasonableness reviews in administrative law and s 36 limitations enquiries in constitutional law are useful, but not sufficient. While these types of enquiries set out the possible structure of the deliberation, law students need to learn about those factors that impact on this deliberation in the ethics context. Thus, students need to explore behavioural psychology, given its ability to flag cognitive biases.[55] Students also need to recognise the structural forces that may be at play in decision-making such as the influence of the market, innovations in technology (and its impact on legal practitioners) and the prevailing legal culture of the legal

[53] For example, one might consider a 'cashless bail' procedure for indigent accused persons. See UC Mokoena & EC Lubaale 'Decolonising prisons in South Africa: The need for effective bail affordability inquiries' (2018) 66 *South African Crime Quarterly* 31 at 36.
[54] J Webb 'Taking values seriously: The democratic intellect and the place of values in the law school curriculum' in M Robertson Robertson, L Corbin, K Tranter and F Bartlett (eds) *The Ethics Project in Legal Education* (2011) 1.
[55] Simon *The Practice of Justice* 206.

profession.[56] In this way, students are alerted to what is physically and emotionally required for moral behaviour.[57]

One way to incorporate aspects of decision-making that are not typically considered 'legal' considerations (in the average LLB curriculum) but key to ethical deliberation, is to make use of any number of pedagogical models for reflective thinking.[58] Models that call for reflective thinking are particularly useful for an approach that demands deliberation regarding aspects such as power imbalances, strength of institutions, resolution setting and so forth. Several commentators have suggested that experiential learning is one of the best ways to promote deliberation.[59] Experiential learning can take a number of forms, from clinical work to role-plays to group-work. Webb suggests that experiential learning is essential if legal education is to 'take values seriously'.[60] Experiential learning is 'the process whereby knowledge is created through the transformation of experience. Knowledge results from the combination of grasping and transforming experience'.[61] In this way, experiential learning can assist law students to effectively 'touch […] all bases' in the process of ethical deliberation, specifically that of 'experiencing, reflecting, thinking and acting'.[62] In this way, the type of factors that are needed in the relational account of Ubuntu are tied into the actual process of learning. The value of experiential learning for legal ethics teaching in particular, is in the reflective observation it requires: students must process their experiences in such a way that they know *what* they are doing and, more importantly, *why* they are doing it.[63] In this way, students cannot hide behind role morality or – if they want to do so – they have to justify the role in the context of the particular factual matrix against the background of the values in the SA legal system. Such

[56] In relation to education, this culture includes what has become known as the 'hidden curriculum' in law schools (and more generally). The idea of a 'hidden curriculum' encompasses the conceptual assumptions and implicit norms and values that underpin the law school's curricula. Theorists suggest that the hidden curriculum implicitly teaches hierarchy, patriarchy and a culture that supports contests and winning at all costs. (see MT O'Brien 'Facing down the gladiators: Addressing law school's hidden adversarial curriculum' (2019) 37 *Monash University Law Review* 43 at 45 and 55). See in general, D Kennedy, *Legal Education and the Reproduction of Hierarchy: A Polemic against the System* (2004). In relation to gender, see L Guinier, M Fine, and J Balin 'Becoming Gentlemen: Women's Experiences at One Ivy League Law School' (1994) 143 *University of Pennsylvania Law Review* 1.

[57] Newman & Nicolson 2016-2017 *Buffalo Public Interest Law Journal* 17.

[58] See the examples given in G Quinot & L Greenbaum 'The contours of pedagogy of law in South Africa' (2015) 26 *Stell LR* 29 at 38, 41, 46-51 and 52-58.

[59] Ibid, Webb in Robertson et al *The Ethics Project* 1 and H Kruuse 'Substantive second-level reasoning and experiential learning in legal ethics' (2012) 23 *Stell Law Review* 280.

[60] Webb in Robertson et al *The Ethics Project* 21.

[61] A Kolb & D Kolb 'Learning styles and learning spaces: Enhancing experiential learning in higher education' (2005) 4 *Academy of Management Learning and Education* 193 at 194.

[62] Ibid.

[63] P Washbourn 'Experiential Learning' (1996) 82 *Liberal Education* 1 at 10.

reasoning makes students acutely aware of their agency in choosing to follow a particular course of conduct. They cannot rely on unquestioned obedience to authority since the reasoning process itself requires that students declare what substantive reasons lie behind their conduct.[64]

The process also allows for Ubuntu-in-practice since the process can (and should) be developed to incorporate a multi-stage role-play. In this way, law students are forced to experience a particular decision-point in an ethical dilemma from different perspectives. For example, if one considers the adapted *Spaulding* example set out in 6.3.1, a law teacher could require law students to consider what they would do as the legal practitioner at the time of the decision, the attorney after the decision, the court when the decision came to light, and a third person/reasonable bystander after the decision.[65] This multi-stage role-play encourages students to understand the concept inherent in Ubuntu that humans are embedded in a community and that their decisions have consequences for that community.[66] In this way, legal practitioners develop empathy and agency at the same time.[67]

The final area that overlaps with, and follows from, all the previous areas, is the need to move the emphasis in legal ethics education from rules to the formation of judgement. This is not to say that rules are not important, but legal education has to move students away from the idea that the beginning and the end of a legal practitioner's ethical obligation is 'obedience to formally laid down norms'.[68] By explicitly providing for discretion in the code in ethical

[64] In this way, it is hoped that legal practitioners' will not make the same mistake as those legal practitioners who used the authority of the law and neutrality as 'an unconscious device for disguising inarticulate considerations.' See J Dugard *Human Rights and the South African Legal Order* (1978) 372. This type of reasoning process also addresses the 'problem of responsibility' raised by Postema in G Postema 'Moral responsibility in professional ethics' (1980) 55 *New York University Law Review* 63 at 74. In this way, students cannot simply rely on responses like 'because I am a lawyer', or 'because the rules explicitly don't forbid it'.

[65] This is just an example of how a learning cycle could be structured. See Kruuse 2012 *Stell Law Review* 295 where I structured a similar experiential learning exercise, using the adapted facts of *Wash St Phys Ins Exch v Fisons Corp* 858 P2d 1054 (Wash 1993) (a decision of the Washington Supreme Court). I relied on Shrag's insights and development of the case study, with his permission, and captured in PG Shrag 'Teaching legal ethics through role playing' (2009) 12 *Legal Ethics* 35.

[66] In similar terms, Nicolson and Webb suggest that ethical dialogue and reflection in a classroom offers the potential for students to combat 'the atomistic, self-centred 'I' of liberal individualism' that dominates current legal ethics discussions. See Nicolson & Webb *Professional Legal Ethics* 288.

[67] I acknowledge that there are those critics who suggest that ethics cannot be taught. According to these critics, a person's moral development takes place early on in life and that no amount of teaching, especially teaching at the tertiary level, is going to have an effect on a student's nature. However, research has shown contrary findings – namely, that education at this level can have a profound influence on the ethical outlook of the learner. See, in general, D Nicolson 'Education, education, education: Legal, moral and clinical' (2008) 42 *The Law Teacher* 145 and the sources cited there.

[68] Nicolson & Webb *Professional Legal Ethics* 278.

dilemmas, this goes some way in signalling to law students how they should think about their future practise of the law.

There are so many aspects that could and should be discussed here for institionalising this approach. But these debates are wider than just what is needed for my approach: they deal with what is needed in legal ethics education generally. Thus, for the sake of completeness, I touch on two important debates, but only attempt to give my tentative views on each. These two debates have occurred across jurisdictions, and underscore the following question: what is the best way to incorporate legal ethics teaching into a law degree? I offer my views here in the light of how these views would enhance my approach, and briefly discuss possible impediments.

*8.3.1. Should legal ethics be compulsory or voluntary?*

There is no explicit 'list' of courses required for a law degree, either by the state or by the regulatory bodies in South Africa.[69] Thus, there is no requirement that a law school offer a compulsory legal ethics course per se.[70] However, in the last decade, the Council for Higher Education in South Africa (the CHE)[71] has developed general standards for legal education in a framework titled 'Higher Educations Qualifications Sub-Framework Qualification Standard for Bachelor of Laws (LLB)'.[72] Given its contents, it would be difficult for a law school to argue that it does not need to teach ethics in a substantive course *and* across courses. In many ways the report supports the type of approach advocated for in this thesis in the educational sphere. Its preamble requires legal practitioners to be aware of the social and economic issues in the country, and it explicitly rejects notions of formalism dominating legal education (and by implication, rule-based learning). It does so through repeated reference to Klare's notion of 'transformative constitutionalism' in the preamble.[73] In addition, one of its purposes is that graduates should have 'a knowledge and appreciation of the values and principles enshrined in

[69] This excludes the requirements for Practical Legal Training which is required after the degree but before admission.
[70] This is the situation in the US, Australia, New Zealand and Canada.
[71] The Council on Higher Education was established by s 4 of the Higher Education Act 101 of 1997 and carries responsibility for quality assurance in higher education in South Africa.
[72] This framework was finalised in May 2015. It is available at https://www.univen.ac.za/docs/Standards_for_Bachelor_of_Laws_%20LLB%20final%20version_20150921.pdf .
[73] CHE *LLB Standards Framework* 28. This does not come as a surprise given that those scholars involved in the drafting of the standards have written on the importance of transformation within legal education. See for example: G Quinot 'Transformative legal education' (2012) 129 *SALJ* 411 and L Greenbaum 'Legal education in South Africa: Harmonising the aspirations of transformative constitutionalism with our education legacy' (2016) 60 *New York Law School Law Review* 463.

the Constitution'. It also states that 'ethics and integrity' must be one of the eight applied competencies in the LLB degree, reflected as follows:

> 'The graduate has knowledge of relevant ethical considerations in law and is able to conduct her/himself ethically and with integrity in her/his relations within the university and beyond, with clients, the courts, other lawyers and members of the public'.[74]

One disappointing aspect of the framework is its failure to reference the notion of 'judgement', or to include language about ethical deliberation. In 2016, Robertson and I argued that this omission made the SA ethics standard inadequate when compared with the elements of current international best practice in the development of legal ethics teaching.[75]

If there is an opportunity then to update these standards, it goes without saying that I believe that (1) legal ethics should be an explicit compulsory aspect of the curriculum; and (2) that the notion of judgement must be included explicitly in the language of the CHE framework document. This would align the educational standards with an approach that requires proactive decision-making, and care and consideration for consequences of these decisions.

*8.3.2 Should legal ethics be a discrete or a pervasive part of the curriculum?*

In the last two decades, a number of legal education reports across jurisdictions have recognised that legal ethics should be taught pervasively (ie across the curriculum, much in the way that I suggest the concept of Ubuntu should be taught, as set out above).[76] The pervasive approach can take on a number of forms. In its most basic form it is the idea that, instead of – or in

[74] CHE *LLB Standards Framework* 9.
[75] M Robertson & H Kruuse 'Legal ethics education in South Africa: Possibilities, challenges and opportunities' (2016) 32 *SAJHR* 344 at 371.
[76] For a discussion of these reports, see N Whitear-Nel 'Legal ethics in the LLB degree' unpublished LLM dissertation UKZN (October 2013). These reports include the Lord Chancellor's Advisory Committee on Legal Education and Conduct *First Report* (April 1996) https://ials.sas.ac.uk/ukcle/78.158.56.101/archive/law/files/downloads/407/165.c7e69e8a.aclec.pdf and K Economides and J Rogers *Preparatory Ethics Training for Future Solicitors* (2008) available at http://www.teachinglegalethics.org/content/economides-rogers-report (England and Wales). See also R Johnstone and S Vignaendra *Learning Outcomes and Curriculum Development in Law: A Report Commissioned by the Australian Universities Teaching Committee* (2003) available at http://cald.anu.edu.au/docs/AUTC_2003_Johnstone-Vignaendra.pdf (Australia) ; Councils of Bar Councils and Law Societies (CCBE) *Recommendations on the Training Outcomes for European Lawyers* available at http://www.ccbe.org/fileadmin/user_upload/NTCdocument/EN_Training_Outcomes1_1196675213.pdf (Europe); W Sullivan, A Colby, J Wegner, L Bond and L Shulman *Educating Lawyers: Preparation for the Profession of Law* (2007) (known as the 'Carnegie Report') available at http://www.carnegiefoundation.org/publications/educating-lawyers-preparation-profession-law (US); and *Federation of Law Societies of Canada Task Force on the Canadian Common Law Degree, Final Report* (October 2009), available at http://www.flsc.ca/en/pdf/CommonLawDegreeReport.pdf.

addition to – a stand-alone ethics course in the LLB, students are introduced to ethical issues in a structured manner throughout the curriculum in all courses.[77] Theorists who support this approach caution that the approach must not be misconstrued as one where you have an 'either / or' attitude ie a pervasive or discrete approach. Instead, most scholars suggest that the pervasive model necessarily includes a capstone module dedicated to legal ethics issues that draws together the ethics work done in the other courses.[78]

This issue was discussed in a reported commissioned by the South African Law Deans' Association in 2016 titled *A Model for a Legal Ethics Curriculum in the South African LLB*.[79] In it, the authors agreed that, in principle, the pervasive approach was the most pedagogically sound method for teaching legal ethics.[80] However, they recognised a number of factors that stood in the way of successful implementation. First, given that many law schools had no course dedicated to legal ethics at all at the time of writing, a pervasive method – as contemplated in other jurisdictions – would be too much too soon in terms of resources, capacity and support. Instead, the authors recommended that, at a minimum, each law school should commit to dedicate a module to legal ethics that builds on some foundation laid in the first year.[81] In suggesting a discrete module, the authors suggested that such module – at a minimum – should be supported by the following support mechanisms:

- Introducing and developing the concept of the legal profession and the ethical dimensions to lawyering to students in their first year.[82]

- Dealing with issues such as general consultation skills and case management in their Legal Practice / Legal Skills course. (The authors suggested that 'a large part of consultation skills [should] be developed to deal with client-centred consultation, rejecting the idea of

[77] DL Rhode 'Ethics by the pervasive method' (1992) 42 *Journal of Legal Education* 31 at 32; M Robertson 'Providing ethics learning throughout the legal curriculum' (2009) 12 *Legal Ethics* 59; and DRF O'Dair 'Ethics by the pervasive method: the case of contract' (1997) 17 *Journal of Legal Studies* 305. See also S Illingworth *Approaches to Ethics in Higher Education: Learning and Teaching Ethics across the Curriculum* (2004).
[78] For example, Nicolson & Webb 287.
[79] On file with the author.
[80] Ibid 22.
[81] Notwithstanding, the authors did encourage those law schools that already had a strong supervision and support structure to pervade the LLB curriculum with legal ethics issues within and across years.
[82] Cunningham, in his feedback to this report, noted scholarship in the area of 'first year introductions' to legal ethics: KB Gerdy 'Clients, empathy and compassion: Introducing first year students to the "heart of lawyering"' (2008) 87 *Nebraska Law Review* 1 and S Rutberg 'Teaching ethics in criminal justice to first year students, or efforts to dislodge the CSI effect' (2012) available at http://works.bepress.com/susan-rutberg/2, accessed on 14 August 2016.

paternalism which often comes about because of the power dynamics in a consultation between lawyer and client').[83]

- Dealing with general issues around law and morality in their jurisprudence course.[84]

While it is important to be realistic about resources and capacity at the university level (as set out above), legal education is fundamental in convincing aspirant legal practitioners to commit to the legal system and its values in the way suggested above.

## 8.4 CONCLUDING REMARKS TO THE THESIS

In this thesis, it has been demonstrated that neutral partisanship has dominated the lawyers' role in South Africa. This has had undesirable consequences for clients, society and legal practitioners themselves, particularly in that the approach has allowed legal practitioners to become ethically disengaged. While alternative models abound, this work has suggested that Simon's ethical discretionary approach is the most suitable approach to adopt. However, this approach, developed from a western/Global North perspective, needs to be contextualised, both theoretically and practically, to meet the needs of South Africa's constitutional democracy and the values that underpin it. I have argued that the context is offered by having recourse to the indigenous value of Ubuntu, and how it could be said to develop the understanding, purpose and execution of the lawyer's contract of mandate with her client. Additionally, I argued that, in order to convince the legal profession to adopt this alternative approach, this would require principle-based adjustments to the code that regulates the legal profession. It would also require commitment to initiatives to inculcate value-based ethics in legal education.

[83] SALDA *A Model for a Legal Ethics Curriculum* 23.
[84] Ibid.

# BIBLIOGRAPHY

## BOOKS


Abel, RL & Lewis, PSC (eds) *Lawyers In Society: Comparative Theories* (1989) University of California Press: Berkeley.

Abel, RL *Politics by Other Means: Law in the Struggle against Apartheid, 1980-1994* (1995) Routledge: New York.

Abel, RL *English Lawyers Between Market and State: The Politics of Professionalism* (2004) Oxford University Press: Oxford.

Abel, RL Hammersley, O, Sommerlad, H, Schultz, U (eds) *Lawyers in 21st-Century Societies Vol. 1: National Reports* (2020) Hart Publishing: Oxford.

Ake, C *Democracy and Development in Africa* (1996) Brookings Institution: Washington DC.

Ackermann, L *Human Dignity: Lodestar for Equality in South Africa* (2012) Juta: Cape Town.

Andrews, P and Ellman, S *The Post-Apartheid Constitution: Perspectives on South Africa's Basic Law* (2001) Ohio University Press: Athens, US.

Anleu, SLR *Law and Social Change* (2000) Sage: London.

Applbaum, AI *Ethics for Adversaries: The Morality of Roles in Public and Professional Life* (1999) Princeton University Press: Princeton.

Arendt, H *Eichmann in Jerusalem: The Banality of Evil* (2006) Penguin: New York.

Ariely, D *The (Honest) Truth about Dishonesty: How we Lie to Everyone – Especially Ourselves* (2012) Harper Collins: New York.

Ayres, I & Braithwaite, J *Responsive Regulation: Transcending the Deregulation Debate* (1992) Oxford University Press: USA.

Barnard, J & van Wyk, J (ed) *De Serie Legenda: Developments in Commercial Law* vol II (2019) LexisNexis: South Africa.

Basner, M *Am I an African? The Political Memoirs of HM Basner* (1993) Witwatersrand University Press: Johannesburg.

Bauman, Z *Postmodern Ethics* (1983) Wiley-Blackwell: London.

Baxter, L *Administrative Law* (1984) Juta: Cape Town.

Berat, L (ed) *Thompson's History of South Africa* 4 ed (2014) Yale University Press: New Haven.

Beyleveld, D & Brownsword, R *Human Dignity in Bioethics and Biolaw* (2004) Oxford University Press: Oxford.

Bhengu, MJ *Ubuntu: The Global Philosophy for Humankind* (2006) Lotsha Publications: Cape Town.

Biggs, J & Tang, C *Teaching for Quality Learning at University* 4 ed (2011) Open University Press: Milton Keynes.

Bilchitz, D, Metz T; & Oyowe, A *Jurisprudence in an African Context* (2017) Oxford University Press: Cape Town.

Bohannan, P *Justice and Judgment among the Tiv* (1957) Oxford University Press: London.

Bozzoli, B (ed) *Class, Community and Conflict: South African Perspectives* (1987) Raven Press: Johannesburg.

Broun, KS *Black Lawyers, White Courts: The Soul of South African Law* (2000) Ohio University Press: Ohio.

Brownsword, R, Hird, NJ & Howells, G (eds) *Good Faith in Contract: Concept and Context* (1999) Ashgate: Aldershot.

Bruinsma, F and Nelken, D (eds*) Explorations of Legal Culture: a Special Issue of Recht der Werkelijkheid* (2007) Reed Business BV: Gravenhage.

Bulmer, M (ed) *Essays on the History of British Sociological Research* (1985) Cambridge University Press: Cambridge.

Carlin, JE *Lawyers' Ethics: A Survey of the New York City Bar* (1966) Russell Sage Foundation: New York.

Carothers,T (ed) *Promoting the Rule of Law Abroad: In Search of Knowledge* (2006) Carnegie Endowment for International Peace: Washington DC.

Chanock, M *The Making of South African Legal Culture 1902-1936: Fear, Favour and Prejudice* (2001) Cambridge University Press: Cambridge.

Clingman, S *Bram Fischer: Afrikaner-Revolutionary* (1998) Hart Publishing: Oxford.

Cole, D *The Torture Memos: Rationalizing the Unthinkable* (2009) New Press: New York.

Coetzee, & Roux, APJ *The African Philosophy Reader* 2 ed (2003) Routledge: London

Coquillette, DR *Lawyers and Fundamental Moral Responsibility* (1995) Anderson Publishing Company: Cincinnati.

Corder, H (ed) *Essays on Law and Social Practice in South Africa* (1998) Juta: Cape Town.

Cornell, D & Muvangua, N *Ubuntu and the Law: African Ideals and Postapartheid Jurisprudence* (2012) Fordham University Press: New York.

Cornell, D (ed) *Law and Revolution in South Africa: Ubuntu, Dignity and the Struggle for Constitutional Transformation* (2014) Fordham University Press: New York.

Cowen, DV & Visser D *The University of Cape Town Law Faculty: A History 1859-2004* (2004) Siber Ink: Cape Town.

Coleman, JL & Shapiro, S (eds) *The Oxford Handbook of Jurisprudence and Philosophy of Law* (2002) Oxford University Press: Oxford.

Coing, H & Horn, N (eds) *Europ isches Rechtsdenken in Geschichte und Gegenwart. Bd. II : Festschrift f r Helmut Coing zum 70* Beck: Munchen.

Corder, H *Judges at Work* (1984) Juta: Cape Town.

Corder, H (ed) *Essays on Law and Social Practice* (1988) Juta: Kenwyn.

Cover, R *Justice Accused: Antislavery and the Judicial Process* (1975) Yale University Press: New Haven.

Cranston, R (ed) *Legal Ethics and Professional Responsibility* (1995) Clarendon University Press: Oxford.

Crookston, E, Killoren, D, & Trerise, J (eds) *Ethics in Politics: The Rights and Obligations of Individual Political Agents* (2017) Routledge: New York.

Dare, T *The Counsel of Rogues? A Defence of the Standard Conception of the Lawyers Role* (2009) Ashgate: Farnham.

Davis, D *Democracy and Deliberation: Transformation and the South African Legal Order* (1999) Juta: Cape Town.

Davis, D & le Roux, M *Precedent and Possibility: The (ab)use of Law in South Africa* (2009) Juta: Cape Town.

Davis, D; Richter, A and Saunders, C *Inquiry into the Existence of Global Values* (2015) Hart Publishing: United Kingdom.

De Wet, JC & van Wyk, AH *De Wet en Yeats Die Suid-Afrikaanse Kontraktereg en Handelsreg* 4 ed (1978) Butterworths: Durban.

Diedrich, F (ed) *Ubuntu, Good Faith and Equity: Flexible Legal Principles in Developing a Contemporary Jurisprudence* (2011) Juta: Cape Town.

Donlan, SP & Mair, J (eds) *Comparative Law Mixes, Movements, and Metaphors* (2020) Routledge: London.

Du Bois, F (ed) *Wille's Principles of South African Law* 9 ed (2007) Juta: Cape Town.

Dugard, J *Human Rights and the South African Legal Rights Order* (1978) Princeton University: Princeton.

Du Plessis, L *Die Professionele Gedrag van die Juris* (1982) Butterworths-Heinemann: United States.

Düwell, M, Braarvig, J, Brownsword, R, Mieth, D (eds) *Cambridge Handbook on Human Dignity* (2014) Cambridge University Press: Cambridge.

Dworkin, R *Law's Empire* (1986) Harvard University Press: Cambridge, Massachusetts.

Dyzenhaus, D *Hard Cases in Wicked Legal Systems: South African Law in the Perspective of Legal Philosophy* (1991) Clarendon Press: New York.

Dyzenhaus, D *Truth, Reconciliation and the Apartheid Legal Order* (1998) Juta: Cape Town.

Economides, K *Ethical Challenges to Legal Education and Conduct* (1998) Hart Publishing: United Kingdom.

Ellis, P, Lamey, AT & Kilbourn, L *The South African Legal Practitioner: A Commentary on the Legal Practice Act* (2017) LexisNexis: Durban.

Ellman, S *In a Time of Trouble: Law and Liberty in South Africa's State of Emergency* (1992) Clarendon Press: New York.

Feldman, D (ed) *Law in Politics, Politics in Law* (2014) Hart Publishing: United Kingdom.

Flack, HE & Pellegrino, EE (eds) *African-American Perspectives on Biomedical Ethics* (1992) Georgetown University Press: Washington, DC.

Flanagan, O *Varieties of Moral Personality: Ethics and Psychological Realism* (1991) Harvard University Press: New Haven.

Forsyth, C *In Danger for their Talents – A Study of the Appellate Division of the Supreme Court of South Africa 1950-1980* (1985) Juta: Cape Town.

Frankel, PH *Pretoria's Praetorians: Civil-Military Relations in South Africa* (1984) Cambridge University Press: Cambridge.

Freedman, M *Lawyer's Ethics in an Adversary System* (1975) Bobbs-Merrill: New York.

Freeman, M & Smith, A *Understanding Legal Ethics* 5 ed (2016) Carolina Academic Press: Durham.

Gandhi, MK (transl M Desai) *An Autobiography: The Story of my Experiments with Truth* (1957) Navajivan Publishing House: Ahmedabad.

Gawalt, GW (ed) *The New High Priests: Lawyers in Post-Civil War America* (1984) Greenwood Press: New York.

Gilligan, C *In a Different Voice: Psychological Theory and Women's Development* (1982) Harvard University Press: Cambridge, Massachusetts.

Gold, A & Miller, P (eds) *Philosophical Foundations of Fiduciary Law* (2014) Oxford University Press: Oxford.

Goldman, AH *The Moral Foundations of Professional Ethics* (1980) Rowman and Littlefield: Totowa.

Goodin, RE *Political Theory and Public Policy* (1982) University of Chicago Press: Chicago.

Gyekye, K *An Essay on African Philosophical Thought: The Akan Conceptual Scheme* (1987) Cambridge University Press: Cambridge.

Gyekye, K *Tradition and Modernity: Philosophical Reflections on the African Experience* (1997) Oxford University Prss: New York.

Haggard, R *The Days of My Life: An Autobiography* (1926) Longmans, Green & Go: London.

Hahlo, HR & Kahn, E *The Union of South Africa: The Development of its Laws and Constitution* (1960) Juta: Cape Town.

Hahlo, HR & Kahn, E *The South African Legal System and its Background* (1968) Juta: Cape Town.

Hart, HLA *The Concept of Law* (1994) Clarendon Press: Oxford.

Haysom, N & Plasket, C (eds) *Developments in Emergency Law* (1989) Centre for Applied Legal Studies, University of the Witwatersrand: Johannesburg.

Heinz, JP & Laumann, EO *Chicago Lawyers: The Social Structure of the Bar* (1982) Russell Sage Foundation: New York.

Herbstein, D *White Lies: Canon Collins and the Secret War against Apartheid* (2004) HRSC Press: Cape Town.

Halliday, S and Schmidt, P *Conducting Law and Society Research: Reflections on Methods and Practices* (2009) Cambridge University Press: New York.

Hazard, GC and Hodes, WW *The Law of Lawyering: A Handbook on the Rules of Professional Conduct* (2001) Harcourt Brace Jovanovich: New York.

Himonga, C & Nhlapo, T (eds) *African Customary Law* (2014) Oxford University Press: Cape Town.

Hinman, LM *Ethics: A Pluralistic Approach to Moral Theory* 4 ed (2008) Clarke-Baxter: Wandsworth.

Holder, J, O'Cinneide, C, & Freeman M (eds) *Current Legal Problems* (2004) Oxford University Press: Oxford.

Hosten, WJ *Introduction to South African Law and Legal Theory* (1977) Butterworth: Durban.

Hountondji, P (translated by H Evans & J Ree) *African Philosophy: Myth and Reality* 2 ed (1996) Indiana University Press: Bloomington & Indianapolis.

Hutchinson, AC *Legal Ethics and Professional Responsibility* (1999) Irwin Law: Toronto.

Hutchinson, AC *Fighting Fair: Legal Ethics for an Adversarial Age* (2015) Cambridge University Press: New York.

Hutchison, D & Pretorius, C (eds) *The Law of Contract in South Africa* 3 ed (2017) Oxford University Press, Southern Africa.

Illingworth, S *Approaches to Ethics in Higher Education: Learning and Teaching Ethics across the Curriculum* (2004) Leeds University: Leeds.

Livingstone, S and Morison, J (eds) *Law, Society and Change* (1990) Ashgate *Publishing: London.*

Jack, J and Jack, DC *Moral Vision and Professional Decisions: The Changing Values of Women and Men Lawyers* (1989) Cambridge University Press: New York.

Jain, S and Narayan, J (eds) *Basic Structure Constitutionalism: Revisiting Kesavananda Bharati* (2011) Eastern Book Company: India.

Joffe, J *The Rivonia Story (Mayibuye History and Literature Series)* (1995) Mayibuye Books: Cape Town.

Johnson, D Pete, S & du Plessis, M *Jurisprudence: A South African Perspective* (2001) Butterworths: Durban

Kahn, E (ed) *Fiat Iustitia: Essay in Memory of Oliver Deneys Schreiner* (1983) Juta: Cape Town.

Kane-Berman, J *The Silent Revolution* (1991) South African Institute of Race Relations: Johannesburg.

Kennedy, D *A Critique of Adjudication: Fin de siècle* (1997) Harvard University Press: Harvard.

Kentridge QC, S *Free Country: Selected Lectures and Talks* (2012) Hart Publishing Press: London.

Kerr, AJ *The Law of Agency* 4 ed (2006) LexisNexis Butterworths: Durban.

Klug, H & Merry, S (eds) *The New Legal Realism Vol II: Studying Law Globally* (2016) Cambridge University Press: Cambridge.

Kischel, U & Kirchner. C (eds) *Ideologie und Weltanschauung im Recht* (2012) Mohr Siebeck: Tübingen.

Kotze, J *Biographical Memoirs and Reminiscences Vol 1* (1934) Maskew Miller: Cape Town.

Kronman, A *The Lost Lawyer: Failing Ideals of the Legal Profession* (1993) Harvard University Press: Cambridge, Massachusetts.

LaFollette, H (ed) *International Encyclopaedia of Ethics* (2013) Wiley-Blackwell, Hoboken, NJ.

Lewis, EAL *Legal Ethics: A Guide to Professional Conduct for South African Attorneys* (1982) Juta: Cape Town.

Levin, LC and Mather, L (eds) *Lawyers in Practice: Ethical Decision Making in Context* (2012) University of Chicago Press: Chicago.

Llewellyn, KL *The Bramble Bush: On our Law and its Study* (1960) Dobbs Ferry Oceana Publications: New York.

López, G *Rebellious lawyering: One Chicano's Vision of Progressive Law Practice* (1992) Harper Collins: Canada.

Luban, D *Lawyers and Justice: An Ethical Study* (1988) Princeton University Press: Princeton.

Luban, D *Legal Ethics and Human Dignity* (2007) Cambridge University Press: Cambridge.

MacKinnon, C *Feminism Unmodified: Discourses on Life and Law* (1987) Harvard University Press: Cambridge, Mass.

MacKinnon, C *Toward a Feminist Theory of the State* (1989) Harvard University Press: Cambridge, Mass.

MacMillan, WM *Complex South Africa* (1030) Faber & Faber: London.

MacMillan, HPMM *Law and Other Things* (1937) Cambridge University Press: Cambridge.

Markovits, D *A Modern Legal Ethics: Adversary Advocacy in a Democratic Age* (2008) Princeton University Press: Princeton.

Mather, L, McEwen, C and Maiman, R *Divorce Lawyers at Work: Varieties of Professionalism in Practice* (2001) Oxford University Press: Oxford.

Mathews, AS *Law, Order and Liberty in South Africa* (1971) University of California Press: Berkeley.

Mbigi, L & Maree, J *Ubuntu: The Spirit of African Transformation Management* (1995) Knowledge Resources: Randburg.

McLean, B and Elkind, P *The Smartest Guys in the Room: The Amazing Rise and Scandalous Fall of Enron'* (2003) Penguin Group: New York.

McQueen, R & Pue, W (ed) *Misplaced Traditions: British Lawyers, Colonial People* (1999) Federation Press: Annandale.

Meierhenrich, J *The Legacies of Law: Long-Run Consequences of Legal Development in South Africa, 1652-2000* (2008) Cambridge University Press: Cambridge.

Mellinkoff, D *The Conscience of a Lawyer* (1973) West Publishing: St Paul, Minnesota.

Midgley, JR *Lawyers' Professional Liability* (1992) Juta: Cape Town.

Moliterno, JE & Paton PE *Global Issues in Legal Ethics* 2 ed (2014) West Publishing: St Paul, Minnesota.

Moliterno, J *The American Legal Profession in Crisis: Resistance and Responses to Change* (2013) Oxford University Press: New York.

Mőnnig, HO *The Pedi* (1967) Van Schaik: Pretoria.

Murove, MF (ed) *African Ethics: An Anthology of Comparative and Applied Ethics* (2009) University of KwaZulu Natal Press: Durban.

Mousourakis, G *The Historical and Institutional Context of Roman Law* (2003) Ashgate: Hampshire.

Mugler, J *Measuring Justice: Quantitative Accountability and the National Prosecuting Authority in South Africa* (2019) Cambridge University Press: UK.

Murray, C *Black Mountain: Land, Class & Power in the Eastern Orange Free State* (1992) Edinburgh University Press: Edinburgh.

Murray, C and O'Regan, K (eds) *No Place to Rest: Forced Removals and the Law in South Africa* (1990) Oxford University Press: Cape Town.

Murungi, J *An Introduction to African Legal Philosophy* (2013) Lexington Books: USA.

Mutwa, VC *Indaba My Children* (1998) Grove Press: New York.

Nedelsky, J *Law's Relations: A Relational Theory of Self, Autonomy, and Law* (2011) Oxford University Press: New York.

Ngcukaitobi, T *The Land is Ours: Black Lawyers and the Birth of Constitutionalism in South Africa* (2018) Penguin Books: Cape Town.

Nicholson, D & Webb, J *Professional Legal Ethics: Critical Interrogations* (1999) Oxford University Press: Oxford.

Nicolson, RN (ed) *Persons in Community: African Ethics in Global Culture* (2008) University of KwaZulu-Natal Press: Durban.

Nussbaum, M *Love's Knowledge: Essays on Philosophy and Literature* (1990) Oxford University Press: New York.

Okafo, N *Reconstructing Law and Justice in a Postcolony* 2 ed (2009) Ashgate: Surrey.

Pannick, D *Advocates* (1992) Oxford University Press: Oxford.

Parker, C and Evans, A *Inside Lawyers' Ethics* 2 ed (2014) Cambridge University Press: Melbourne.

Parker, S and Sampford, C (eds) *Legal Ethics and Legal Practice – Contemporary Issues* (1995) Clarendon University Press: Oxford.

Praeg, L and Magadla, S (ed) *Ubuntu: Curating the Archive* (2014) University of Kwazulu-Natal Press: Pietermaritzburg.

Praeg, L *A Report on Ubuntu* (2014) University of KwaZulu-Natal Press: Pietermaritzburg.

Preston, N *Understanding Ethics* 3 ed (2007) Federation Press: Annandale.

Rachels, J *The Elements of Moral Philosophy* 4 ed (1986) McGraw-Hill: New York.

P Ramsden *Learning to Teach in Higher Education* (1992) Routledge: London.

Rautenbach, C & Bekker, JC (eds) *Introduction to Legal Pluralism* 4 ed (2014) LexisNexis: Durban.

Raz, J *The Authority of Law: Essays on Law and Morality* (1986) Oxford University Press: New York.

Rhode, D *Justice and Gender: Sex, Discrimination and the Law* (1989) Yale University Press: New Haven.

Rhode, D *In the Interests of Justice: Reforming the Legal Profession* (2000) Oxford University Press: New York.

Rhode, D (ed) *Ethics in Practice: Lawyers' Roles, Responsibilities and Regulation* (2000) Oxford University Press: Oxford.

Rhode, D and Luban, D *Legal Ethics* 3 ed (2001) Foundation Press: New York.

Robertson, L Corbin, K Tranter and F Bartlett (eds) *The Ethics Project in Legal Education* (2011) Routledge: Abingdon.

Robertson, G *The Tyrannicide Brief: The Story of the Man Who Sent Charles I to the Scaffold* (2005) Vintage Books: London.

Roederer, C & Moellendorf, D *Jurisprudence* (2004) Juta: Cape Town.

Rogers, O *Lawyers in Turmoil: The Johannesburg Conspiracy of 1895* (2020) Stormberg Publishers: Cape Town.

Rycroft, A *Race and the Law in South Africa* (1987) Juta: Cape Town.

Sachs, A *Justice in South Africa* (1973) University of California Press: Berkley, USA.

Schapera, I *A Handbook of Tswana Law and Custom* 2 ed (1955) James Currey Ltd: Oxford, UK.

Schmitt, R *Beyond Separateness: The Social Nature of Human Beings – Their Autonomy, Knowledge and Power* (1995) Boulder: Westerview.

Selznick, P *The Communitarian Persuasion* (2002) Woodrow Wilson Center Press: Washington DC.

Shaffer, TL *On Being a Christian and a Lawyer* (1981) Bringham University Press: Utah.

Shutte, A *Philosophy for Africa* (1993) UCT Press: Cape Town.

Shutte, A *Ubuntu: An Ethic for a New South Africa* (2001) Cluster Publications: Pietermaritzburg.

Simons, HW, Morreale, J, and Gronbeck, BE *Persuasion in Society* (2001) Sage Publications: Thousand Oaks.

Simon, WH *The Practice of Justice: A Theory of Lawyers' Ethics* (1988) Harvard University Press: Harvard.

JH Soga *The Ama-Xosa: Life and Customs* (1931) Lovedale Press: South Africa.

Spiller, P *A History of the District and Supreme Courts of Natal: 1846-1910* (1986) Butterworths: Durban.

Spitz, R & Chaskalson, M *The Politics of Transition: A Hidden History of South Africa's Negotiated Settlement* (2000) Cambridge: Cambridge University Press.

Stacey, H and Lavarch, M (eds) *Beyond the Adversarial System* (1999) Federation Press: Sydney.

Tamanaha, B *A Realistic Theory of Law* (2017) Cambridge University Press: Cambridge.

Thompson, LT *The Unification of South Africa 1902-1910* (1960) Oxford University Press: New York.

Tranter, K, Bartlett, K, Corbin, L, Mortensen, R & Robertson, M (eds) *Reaffirming Legal Ethics* (2010) Routledge: London.

Tutu, D (with Adams, D) *God has a Dream: A Vision of Hope for our Time* (2004) Doubleday: New York.

Tuori, K *Ancient Roman Lawyers and Modern Legal Ideals: Studies on the Impact of Contemporary Concerns in the Interpretation of Ancient Roman Legal History* (2007) Vittorio Klostermann: Frankfurt.

Twining, WL (ed) *Legal Theory and Common Law* (1986) Blackwell: Oxford.

Unger, R *The Critical Legal Studies Movement* (1986) Verso: London.

Van Blerk, A *Judge and be Judged: Rights and the Rule of Law* (1988) Juta: Cape Town.

Van Jaarsveld, SR & Coetzee, WR *Arbeidsreg* (1977) Lex Patria: Johannesburg.

Van der Riet, F *Favoured by Fortune* (self-published and undated): Eastern Cape Division of the High Court Library.

Van der Walt, J *Law and Sacrifice: Towards a Post-Apartheid Theory of Law* (2005) Birkbeck Law Press: London.

Van Zyl, GB *The Theory of the Judicial Practice of South Africa* Vol 1 (1921) Juta: Cape Town.

Von Bogdandy, A, Ferrer Mac-Gregor, E, Moralez Antoniazzi, M, Piovesan, F (eds) *Transformative Constitutionalism in Latin America* (2017) Oxford University Press: Oxford.

Walker, EA *Lord de Villiers and his Times 1842-1914* (1925) Constable & Co: London.

Walker, EA *WP Schreiner: A South African* (1937) Oxford University Press: London.

Watermeyer, EB *Lectures on the Cape of Good Hope, under the Government of the Dutch East India Company* (1857) Saul Solomon & Co: Cape Town.

Watson, A *Contract of Mandate in Roman Law* (1961) Oxford University Press: London.

Wendel, WB *Fidelity to Law* (2010) Princeton University Press: Oxford.

Wendel, WB *Ethics and Law: An Introduction* (2014) Cambridge University Press: Cambridge.

Whalen-Bridge, H (ed) *The Role of Lawyers in Access to Justice: Asian and Comparative Perspectives* (2021) Cambridge University Press: Cambridge *(forthcoming).*

Wolgast, E *Ethics of an Artificial Person: Lost Responsibility in Professions and Organizations* (1992) Stanford University Press: Stanford.

Woolman, S & Bishop, M (eds) *Constitutional Law of South Africa* 2 ed (2013) Juta: Cape Town.

Wright, RA (ed) *African Philosophy: An Introduction* 3 ed (1984) University Press of America: Lanham.

Zeffertt, DT and Paizes, AP *The South African Law of Evidence* 2 ed (2009) LexisNexis, Butterworths: Durban.

Zimmerman, R and Visser, D (eds) *Southern Cross: Civil Law and Common Law in South Africa* (1996) Juta: Cape Town.

**JOURNAL ARTICLES**


Abel, RL 'Taking Professionalism Seriously' (1989) 1 *Annual Survey of American Law* 41.

Abrams, K 'Feminist lawyering and legal method' (1991) 16 *Law & Social Inquiry* 373

Ackermann, LWC 'Submission to the Truth and Reconciliation Commission re: the role of the judiciary' (1998) 115 *SALJ* 52.

Albertyn, C and Davis, D 'Legal realism, transformation, and the legacy of Dugard' (2010) 26 *SAJHR* 189.

Alfieri, A 'Disabled clients, disabling lawyers' (1992) 43 *Hastings Law Journal* 769.

Alleggretti, J 'Rights, roles and relationships: The wisdom of Solomon and the ethics of lawyers' (1992) 25 *Creighton Law Review* 1119.

Altman, J 'Book review: Modern litigators and lawyer-statesmen: *The Lost Lawyer. By* Anthony T Kronman' (1994) 103 *Yale Law Journal* 1031.

Arjona, C 'Amorality explained. Analysing the reasons that explain the standard conception of legal ethics' 2013 *Ramon Llull Journal of Applied Ethics* 51.

Assim, UM & Kabagambe, AD '"Jumping the queue", waiting lists and other myths: perceptions and practice around housing demand and allocation in South Africa' (2014) 15 *ESR Review* 13.

Atkinson, R 'Beyond the new morality for lawyers' (1992) 51 *Maryland Law Review* 853.

Atkinson, R 'Neutral partisan lawyering and international human rights violators' (1993) 17 *Fordham International Law Journal* 531.

Atkinson, R 'How the butler was made to do it: The perverted professionalism of the Remains of the Day' (1995) 105 *Yale Law Journal* 177.

Atkinson, R 'Lawyering in law's republic: William Simon's *The Practice of Justice*: A Theory of Lawyers' Ethics' (1999) 85 *Virginia Law Review* 1505.

Atkinson, R 'A skeptical answer to Edmundson's contextualism: What we know we lawyers know' (2002) 30 *Florida State Law Review* 25.

Ayers, AB 'What if legal ethics can't be reduced to a maxim?' (2013) 26 *Georgetown Journal of Legal Ethics* 1.

Bagust, J 'The legal profession and the business of law' (2013) 35 *Sydney Law Review* 27.

Beattie, J 'Scales of justice: Defense counsel and the English criminal trial in the eighteenth and nineteenth centuries' (1991) 9 *Law and History Review* 221.

Beinart, B 'Roman law in a modern uncodified romanistic system' 1971 *Acta Juridica* 131

Bekker, T 'The re-emergence of *ubuntu*: a critical analysis' (2006) 21 *SAPL* 333.

Bennett, T 'Ubuntu: An African equity' (2011) 14 *PELJ* 30.

Benson, IT 'Do "values" mean anything at all? Implications for law, education and society' (2008) 33 *JJS* 1.

Bertelsmann, E 'Die rol van en beperkings op die regbank om sociale vrede in Suid-Afrika te bevorder' (2012) 15 *PELJ* 2.

Bewaji, JAI and Ramose, MB 'The Bewaji, Van Binsbergen and Ramose debate on *Ubuntu*' (2003) 22 *South African Journal of Philosophy* 378.

Beyleveld, D & Brownsword, R 'Human dignity, human rights, and human genetics' (1998) 61 *Modern Law Review* 661.

Bhana, D 'The role of judicial method in the relinquishing of constitutional rights through contract' (2008) 24 *SAJHR* 300.

Bhana, D & Pieterse, M 'Towards a reconciliation of contract law and constitutional values' (2005) 122 *SALJ* 865.

Bilchitz, D 'Should religious associations be allowed to discriminate?' (2011) 27 *SAJHR* 219.

Blasi, GL 'What lawyers know: Lawyering expertise, cognitive science, and the functions of theory' (1995) 45 *Journal of Legal Education* 313.

Blum, K 'Portia today: No need for "drag"' 1990 (April) *Consultus* 12.

Bobbert, MCJ 'Die verhouding tussen 'n klient, sy regsverteenwoordigers en derde partye' (2001) 26 *JJS* 1.

Bohannan, P 'The differing realms of the law' 1965 *American Anthropologist* 33.

Bohler-Muller, N 'Beyond legal metanarratives: The interrelationship between storytelling, ubuntu and care' (2007) 18 *Stell Law Rev* 133.

Bohler-Muller, N 'Some thoughts on the *ubuntu* jurisprudence of the Constitutional Court' (2007) 28 *Obiter* 590.

Bohler-Muller, N 'The story of an African value: Ten years after *Makwanyane'* (2005) 20 *SAPL* 268.

Botha, GC 'Sir John Andries Truter, LLD, 1763-1845, Chief Justice of the Cape of Good Hope' (1918) 35 *SALJ* 135.

Boon, A, Flood, J, & Webb, J 'Postmodern Professions? The fragmentation of legal education and the legal profession' (2005) 32 *Journal of Law and Society* 473.

Boonzaaier, L 'Rereading *Botha v Rich NO*' (2020) 137 *SALJ* 1.

Bracher, P 'The slow rise of women in the legal profession 2020 (Sept) *De Rebus* 14.

Braithwaite, JB 'Rules and principles: A theory of legal certainty' (2002) 27 *Australian Journal of Legal Philosophy* 47.

Braithwaite, J 'The essence of responsive regulation' (2011) 44 *UBC Law Review* 475.

Bundy, S & Elhauge, E 'Do lawyers improve the adversary system? A general theory of litigation advice and its regulation' (1991) 79 *California Law Review* 315.

Cameron, E 'Legal chauvinism, executive-mindedness and justice – L C Steyn's impact on South African law' (1982) 99 *SALJ* 38.

Cameron, E 'Lawyers, language and politics – In memory of JC de Wet and WA Joubert' (1993) 110 *SALJ* 51.

Carle, S '*Professional Legal Ethics: Critical Interrogations* Book Review' (2003) 17 *Georgetown Journal of Legal Ethics* 165.

Carle, S 'Power as a factor in lawyers' ethical deliberation' (2006) 35 *Hofstra Law Review* 115.

Carle, S 'Structure and integrity' (2008) 93 *Cornell Law Review* 1311.

Chanock, M 'Law, state and culture: Thinking about customary law after apartheid' 1991 *Acta Juridica* 53.

Chaskalson, A 'From wickedness to equality: The moral transformation of South African law' (2003) 1 *Icon* 590.

Christians, CG 'Ubuntu and communitarianism in media ethics' (2004) 25 *Ecquid Novi* 235.

Christodoulidis, E '"End of History" jurisprudence: Dworkin in South Africa' 2004 *Acta Juridica* 64.

Church, J 'The question of ethics revisited' (2006) 47 *Codicillus* 19.

Church, J & Church, J 'The constitutional imperative and harmonisation in a multicultural society: A South African perspective on the development of indigenous law' (2008) 14 *Fundamina* 1.

Claassens, A & Budlender, G 'Transformative constitutionalism and customary law' (2013) 6 *CCR* 75.

Clark, K 'The legacy of Watergate for legal ethics instruction' (2001) 51 *Hastings Law Journal* 673.

Cochran Jr, RF 'Enlightenment liberalism, lawyers, and the future of lawyer-client relations' (2011) 33 *Campbell Law Review* 685.

Cockrell, A 'Rainbow jurisprudence' (1996) 12 *SAJHR* 1.

Corder, H 'Towards a South African Constitution' (1994) 57 *Modern Law Review* 491.

Corder, H and Hoexter, C 'Lawfare in South Africa and its effects on the judiciary' (2017) 10 *African Journal of Legal Studies* 105.

Cornell, D 'Bridging the span toward justice: Laurie Ackermann and the ongoing architectonic of dignity jurisprudence' 2008 *Acta Juridica* 18.

Cornell, D 'A call for a nuanced constitutional jurisprudence: Ubuntu, dignity and reconciliation' (2004) 19 *SAPL* 666.

Cornell, D 'Is there a difference that makes a difference between Ubuntu and dignity' (2010) 25 *SAPL* 382.

Cornell, D & Van Marle, K 'Exploring *ubuntu*: tentative reflections' (2005) 5 *AHRLJ* 195.

Cotterrell, R 'Why jurisprudence is not legal philosophy' (2014) 5 *Jurisprudence* 41.

Cowen, S 'Can "dignity" guide South Africa's equality jurisprudence?' (2001) 17 *SAJHR* 34.

Coyle, S 'Legality and the liberal order' (2013) 76 *The Modern Law Review* 401.

Cramton, R & Knowles, L 'Professional secrecy and its exceptions: Spaulding v Zimmerman revisited' (1998) 83 *Minnesota Law Review* 63.

Cramton, R 'Lawyer disclosure to prevent death or bodily injury: A new look at Spaulding v Zimmerman' (1999)16 *Journal of the Institute for the Study of Legal Ethics* 163.

Cramton, R 'Furthering justice by improving the adversary system and making lawyers more accountable' (2002) 70 *Fordham Law Review* 1599.

Cramton, R 'Enron and the Corporate Lawyer: A Primer on Legal and Ethical Issues' (2002) 58 *Business Lawyer* 143.

Criddle, EJ & Fox-Decent, E 'Keeping the promise of public fiduciary theory: A reply to Leib and Galoob' (2016-2017) 126 *Yale Law Journal Forum* 192.

Croucamp, PA & Malan, L 'The theory of systemic patronage and state capture: the liberal democratic project and its regime contenders' (2018) 10 *African Journal of Public Affairs* 86.

Cumming, S & Eagly, I 'A critical reflection on law and organizing' (2001) 48 *UCLA Law Review* 443.

Danat, B, Hoffman, K and Kermish, N 'Obstacles to the study of lawyer–client interactions: The biography of failure' (1980) 14 *Law and Society Review* 905.

Dare, T 'Virtue ethics and legal ethics' (1998) 28 *Victoria University of Wellington Law Review* 141.

Dare, T 'Mere-zeal, hyper-zeal and the ethical obligations of lawyers' legal ethics' (2004) 7 *Legal Ethics* 24.

Davis, D 'How many positivist legal philosophers can be made to dance on the head of a pin: A reply to Professor Fagan' (2012) 129 *SALJ* 59.

Davis, D 'Is the South African Constitution an obstacle to a democratic post-colonial state?' (2018) 34 *SAJHR* 359.

Davis, D and Corder, H 'A long march: Administrative law in the Appellate Division' (1988) 4 *SAJHR* 281.

Davis, D & Klare, K 'Transformative constitutionalism and the common and customary law' (2010) 26 *SAJHR* 403.

Davis, JP 'Legal, morality, duality' 2014 *Utah Law Review* 55.

Davis, JP 'Legal dualism, legal ethics, and fidelity to law' 2016 *Journal of the Professional Lawyer* 1.

De Villiers, M 'Women in the legal profession' (1918) 35 *SALJ* 289.

Dinerstein, R, Ellmann, S, Gunning, I and Shalleck, A 'Connection, capacity and morality in lawyer–client relationships: Dialogues and commentary' (2004) 10 *Clinical Law Review* 755.

Diver, CS 'The optimal precision of administrative rules' (1984) 93 *Yale Law Journal* 65.

Dolovich, S 'Ethical lawyering and the problem of integrity' (2002) 70 *Fordham Law Review* 1629.

Domanski, A 'Fundamental principles of law and justice in the opening title of Johannes Voet's *Commentarius ad Pandectas*' (2013) 19 *Fundamina* 251.

Du Bois, F & Visser, D 'The influence of foreign law in South Africa' (2003) 13 *Transnational Law and Contemporary Problems* 593.

Du Plessis, LM 'The ideal legal practitioner (from an academic angle)' 1981 (Sept) *De Rebus* 424.

Du Plessis, J 'Giving practical effect to good faith in the law of contract' (2018) 29 *Stell LR* 379.

Du Plessis, H 'Pluralism, uBuntu and the use of open norms in the South African common law of contract' (2019) 22 *PELJ* 1.

Du Plessis, H 'Harmonising legal values and uBuntu: The quest for social justice in the South African common law of contract (2019) 22 *PELJ* 1.

Du Plessis, P 'Good faith and equity in the law of contract in the civilian tradition' (2002) 65 *THRHR* 397.

Dugard, J 'The judicial process, positivism and civil liberty' (1971) 88 *SALJ* 181.

Dugard, J 'Should judges resign? – A reply to Professor Wacks' (1984) 101 *SALJ* 286.

Dworkin, R 'The model of rules' (1967) 35 *University of Chicago Law Review* 25.

Eberle, EJ 'Three foundations of legal ethics: Autonomy, community, and morality' (1993-4) 7 *Georgetown Journal of Legal Ethics* 89.

Edmundson, W 'Contextualist answers to skepticism, and what a lawyer cannot know' (2001) 30 *Florida State University Law Review* 1.

Ellmann, S 'Lawyers and clients' (1987) 34 *UCLA Law Review* 717.

Ellman, S 'Client-centeredness multiplied: Individual autonomy and collective mobilization in public interest lawyers' representation of groups' (1992) 78 *Virginia Law Review* 1103.

English, R 'Ubuntu: The quest for an indigenous jurisprudence' (1996) 12 *SAJHR* 641.

Erasmus, HJ 'The beginnings of a mixed system or, advocates at the Cape during the early nineteenth century: 1828-1850' (2015) 21 *Fundamina* 219.

Evans, A and Forgasz, H 'Framing lawyers' choices: Factor analysis of a psychological scale to self-assess lawyers' ethical preferences' (2013) 16 *Legal Ethics* 135.

Fagan, A 'The secondary role of the spirit, purport and objects of the Bill of Rights in the common law's development' (2010) 127 *SALJ* 611.

Farrow, TCW 'Sustainable professionalism' (2008) 46 *Osgoode Hall Law Journal* 51.

Farrow, TCW 'The good, the right, and the lawyer' (2012) 15 *Legal Ethics* 141.

Feldman, D 'Human dignity as a legal value – part 1' 1999 *Public Law* 682.

Feldman, HL 'Codes and virtues: Can good lawyers be good ethical deliberators?' (1996) 69 *Southern California Law Review* 885.

Finkelstein, R 'The adversarial system and the search for truth' (2011) 37 *Monash University Law Review* 135.

Fisher, KR 'The higher calling: regulation of lawyers post-Enron' (2004) 37 *University of Michigan Journal for Law Reform* 1144.

Foldi, A 'Traces of the dualist interpretation of good faith in the *ius commune* until the end of the sixteenth century' (2014) 20 *Fundamina* 312.

Forsyth, C 'The sleep of reason: Security cases before the Appellate Division' (1988) 105 *SALJ* 679.

Fortney, SS 'Promoting public protection through an attorney integrity system: Lessons from Australian experience with proactive regulation of lawyers' (2015) 23 *Professional Lawyer* 16.

Foster, CR 'Critical Race Lawyering: Foreword' (2005) 73 *Fordham Law Review* 2027.

Frankel, ME 'The search for truth: An umpireal view' (1975) 123 *University of Pennsylvania Law Review* 1031.

Fredman, S 'Reimagining power relations: Hierarchies of disadvantage and affirmative action' 2017 *Acta Juridica* 124.

Freedman, M 'Perjury: The Lawyer's Trilemma' (1975) 1 *Litigation* 26.

Freedman, M 'Personal responsibility in a professional system' (1978) 27 *Catholic University Law Review* 191.

Freedman, M 'Our constitutionalised adversary system' (1998) 1 *Chapman Law Review* 57.

Freedman, M 'A critique of philosophizing about lawyers' ethics' (2012) 25 *Georgetown Journal of Legal Ethics* 91.

Frenkel, D 'Ethics: Beyond the rules – Questions and possible responses' (1998) 67 *Fordham Law Review* 875.

Fried, C 'The lawyer as friend: The moral foundations of the lawyer-client relation' (1976) 85 *The Yale Law Journal* 1060.

Friedman, C 'The history of the division of the South African legal profession' 1990 (Feb) *De Rebus* 136.

Friedman, M 'Relational autonomy and individuality' (2013) 63 *University of Toronto Law Journal* 327.

Froneman, JC 'Legal reasoning and legal culture: our "vision" of law' (2005) 16 *Stell LR* 3.

Frug, MJ 'Introduction: The proposed revisions of the code of professional responsibility: Solving the crisis of professionalism, or legitimating the status quo?' (1980-81) 26 *Villanova Law Review* 1121.

Fuller, LL & Randall, JD 'Professional responsibility: Report of the joint conference' (1958) 44 *American Bar Association Journal* 1159.

Fuller, L 'Positivism and fidelity to law – A reply to Professor Hart' (1958) 71 *Harvard Law Review* 630.

Gade, C 'The historical development of the written discourses on ubuntu' (2011) *South African Journal of Philosophy* 303.

Galanter, M 'Why the haves come out ahead: Speculations on the limits of legal change' (1974) 9 *Law & Society Review* 95.

Galanter, M 'Access to justice in a world of expanding social capability' (2010) 37 *Fordham Urban Law Journal* 115.

Gathogo, J 'African philosophy as expressed in the concepts of hospitality and ubuntu' (2008) 130 *Journal of Theology for Southern Africa* 39.

Gauntlett, J 'The rule of law and an independent legal profession: A South African perspective' 2010 (Dec) *Advocate* 55.

Gerdy, KB 'Clients, empathy and compassion: Introducing first year students to the "heart of lawyering"' (2008) 87 *Nebraska Law Review* 1.

Gillers, S 'Can a good lawyer be a bad person?' (1986) 84 *Michigan Law Review* 1011.

Girvin, SD 'The establishment of the Supreme Court of the Cape of Good Hope and its history under the Chief Justiceship of Sir John Wylde: I' (1992) 109 *SALJ* 293.

Girvin, SD 'The establishment of the Supreme Court of the Cape of Good Hope and its history under the Chief Justiceship of Sir John Wylde: II' (1992) 109 *SALJ* 652.

Gordfarb, P 'A theory-practice spiral: The ethics of feminism and clinical education' (1991) 75 *Minnesota Law Review* 1599.

Gordon, RW 'The independence of lawyers' (1988) 68 *Boston University Law Review* 1.

Gordon, RW 'Corporate law practice as a public calling' (1990) 49 *Maryland Law Review* 255.

Gordon, RW 'Historicism in legal scholarship' (1980-81) 90 *Yale Law Journal* 1017.

Gordon, RW 'Critical legal histories' (1984) 36 *Stanford Law Review* 57.

Gordon, RW 'A new role for lawyers? The corporate counselor after Enron' (2003) 35 *Connecticut Law Review* 1185.

Gordon, RW 'The citizen lawyer – A brief informal history of a myth with some basis in reality' (2009) 50 *William & Mary Law Review* 1169.

Gordon, RW 'The radical conservatism of *The Practice of Justice*' (1999) 51 *Stanford Law Review* 919.

Gravett, WH 'Why Pericles should learn to fix a leaky pipe – Why trial advocacy should become part of the LLB curriculum (part 1)' (2018) 21 *PELJ* 1.

Green, B 'The religious lawyering critique' (2005-2006) 21 *Journal of Law and Religion* 283.

Green, B 'Professional independence: Overrated or undervalued?' (2013) 46 *Akron Law Review* 599.

Greenbaum, L 'Current issues in legal education: A comparative review' (2012) 23 *Stell LR* 16.

Greenbaum, L 'Legal education in South Africa: Harmonising the aspirations of transformative constitutionalism with our education legacy' (2016) 60 *New York Law School Law Review* 463.

Grzymala-Busse, A 'Beyond clientelism: incumbent state capture and state formations' (2008) 41 *Comparative Political Studies* 638.

Guinier, L, Fine, M & Balin J, 'Becoming Gentlemen: Women's Experiences at One Ivy League Law School' (1994) 143 *University of Pennsylvania Law Review* 1.

Hailbronner, M 'Transformative constitutionalism: Not only in the Global South' (2017) 65 *American Journal of Comparative Law* 527.

Hall, K and Holmes. V 'The power of rationalisation to influence lawyers' decisions to act unethically' (2008) 11 *Legal Ethics* 137.

Harris, AP 'Essentialism in feminist legal theory' (1990) 42 *Stanford Law Review* 581.

Harms, L 'Demystification of the inquisitorial system' (2011) 14 *PELJ* 240.

Hart, HLA 'Positivism and the separation of law and morals' (1958) 71 *Harvard Law Review* 593.

Hawthorne, L 'The end of bona fides' (2003) 15 *South African Mercantile Law Journal* 271.

Hawthorne, L 'Justice Albie Sachs's contribution to the law of contract: Recognition of relational contract theory' 2010 *SAPL* 80.

Haysom, N and Plasket, C 'The war against law: Judicial activism and the Appellate Division' (1988) 4 *SAJHR* 303.

Hazard, G 'An historical perspective on the attorney-client privilege' (1978) 66 *California Law Review* 1061.

Hazard, GC Jr 'The future of legal ethics' (1991) 100 *Yale Law Journal* 1239.

Hegland, K 'Moral dilemmas in teaching trial advocacy' (1982) 32 *Journal of Legal Education* 69.

Hersch, J 'Reviewed work(s): *Hard Cases in Wicked Legal Systems South African Law in the Perspective of Legal Philosophy* by David Dyzenhaus; *In a Time of Trouble. Law and Liberty in South Africa's State of Emergency* by Stephen Ellman' (1993) 19 *Journal of Southern African Studies* 536.

Himonga, C, Taylor, M & Pope, A 'Reflections on judicial views of ubuntu' (2013) 16 *PELJ* 372.

Hodgson, TF 'The mysteriously appearing and disappearing doctrine of separation of powers: Towards a distinctly South African doctrine for a more radical transformative Constitution' (2018) 34 *SAJHR* 57.

Hoeflich, MH 'Ethics and the root of all evil in nineteenth century American law practice' (2017) 7 *St Mary's Journal on Legal Malpractice & Ethics* 160.

Hoffmann, N and Metz, T 'What can the capabilities approach learn from an Ubuntu ethic? A relational approach to development theory' (2017) 97 *World Development* 153.

Hurter, E 'Seeking truth or seeking justice: Reflections on the changing face of the adversarial process in civil litigation' 2007 *TSAR* 240.

Hutchinson, A 'Calgary and everything after: A postmodern re-vision of lawyering' (1995) 33 *Alberta Law Review* 768.

Hutchinson, A 'Legal ethics for a fragmented society: Between professional and personal' (1997) 5 *International Journal of the Legal Profession* 175.

Hutchinson, A 'Taking it personally: Legal ethics and client selection' (1998) 1 *Legal Ethics* 168.

Hutchison, A 'Good faith in contract: A uniquely South African perspective' (2019) 1 *The Journal of Commonwealth Law* 1.

Hutchison, D 'From bona fides to Ubuntu: The quest for fairness in the South African law of contract' 2019 *Acta Juridica* 99.

Idensohn, K 'The nature and scope of employees' fiduciary duties' (2012) 33 *Industrial Law Journal* 1539.

Ipp, D 'Reform to the adversarial process in civil litigation (part I)' (1995) 69 *Australian Law Journal* 705.

Johnson, VR 'The virtues and limits of codes in legal ethics' (2000) 14 *Notre Dame Journal of Law, Ethics and Public Policy* 25.

Joubert, DJ 'Die kontraktuele verhouding tussen professionele man en klient' 1970 *Acta Juridica* 9.

Keevy, I 'The Constitutional court and Ubuntu's "inseparable trinity"' (2009) 34 *JJS* 61.

Keevy, I 'Ubuntu versus the core values of the South African Constitution' (2009) 34 *JJS* 19.

Kennedy, D 'Form and substance in private law adjudication' (1976) 89 *Harvard Law Review* 1685.

Kennedy, D 'Legal education and the production of hierarchy' (1982) 32 *Journal of Legal Education* 591.

Kennedy, D and Klare, KE 'A bibliography of critical legal studies' (1984) 94 *Yale Law Journal* 461.

Kennedy, D 'The responsibility of lawyers for the justice of their causes' (1987) 18 *Texas Tech Law Review* (1987) 1157.

Khunou, F & Mogomotsi, K 'Law and traditional justice system in South Africa: A hybrid of historical and constitutional discourse' (2013) 1 *Journal of Global Peace and Conflict* 49.

Kirkland, K 'Ethics in large law firms: The principle of pragmatism' (2005) *University of Memphis Law Review* 631.

Kitchin, SB 'The lawyer's place in the Commonwealth' (1927) 44 *SALJ* 140.

Klaaren, J 'Current demographics in large corporate law firms in South Africa' (2014) 7 *African Journal of Legal Studies* 584.

Klare, K 'Transformative constitutionalism and legal culture' (1998) 14 *SAJHR* 146.

Kolb, A & Kolb, D 'Learning styles and learning spaces: Enhancing experiential learning in higher education' (2005) 4 *Academy of Management Learning and Education* 193.

Koniak, S 'When the hurlyburly's done: The Bar's struggle with the SEC' (2003) 103 *Columbia Law Review* 1236.

Kroeze, IJ 'Doing things with values II: The case of Ubuntu' (2002) 13 *Stell LR* 252.

Kronman, AT 'Living in the law' (1987) 54 *The University of Chicago Law Review* 834.

Kruse, K 'Fortress in the sand: The plural values of client-centered representation' (2003) 12 *Clinical Law Review* 369.

Kruse, K 'Lawyers, justice and the challenge of moral pluralism' (2005) 90 *Minnesota Law Review* 389.

Kruse, K 'The human dignity of clients' (2008) 93 *Cornell Law Review* 1343.

Kruse, K 'Beyond cardboard clients in legal ethics' (2010) 23 *Georgetown Journal of Legal Ethics* 23.

Kruse, K 'Client-centred answers to legal ethics questions' (2010) 13 *Legal Ethics* 186.

Kruse, K 'The jurisprudential turn in legal ethics' (2011) 53 *Arizona Law Review* 493.

Kruse, K 'Engaged client-centered representation and the moral foundations of the lawyer-client relationship' (2011) 39 *Hofstra Law Review* 577.

Kruse, K 'Professional role and professional judgment: Theory and practice in legal ethics' (2011) 9 *University of St Thomas Law Journal* 250.

Kruuse, H 'Substantive second-level reasoning and experiential learning in legal ethics' (2012) 23 *Stell LR* 280.

Kruuse, H & Genty, P 'The state's role in the regulation and provision of legal services in South African and the United States: Supporting, nudging or interfering?' (2018) 42 *Fordham International Law Journal* 373.

Kruuse, H '*Ex parte Mdyogolo*: Character and carelessness' (2018) 135 *SALJ* 249.

Landman, S 'The rise of the contentious spirit: Adversary procedure in eighteenth century England' (1989-1990) 75 *Cornell Law Review* 496.

Langa, P 'Transformative constitutionalism' (2006) 17 *Stell LR* 351.

Lawry, RP 'The central moral tradition of lawyering' (1990) 19 *Hofstra Law Review* 311.

Lehman, W 'The pursuit of a client's interests' (1979) 77 *Michigan Law Review* 1078.

Le Roux, W 'Conscience against the law: Mahatma Gandhi, Nelson Mandela and Bram Fischer as practising lawyers during the struggle' (2001) 42 *Codicillus* 20.

Le Roux, W 'The Bader Ginsburg controversy and the Americanization of post-apartheid legal culture' (2014) 59 *American Studies* 519.

Lessig, L 'Reading the constitution in cyberspace' (1996) 45 *Emory Law Journal* 869.

Levine, SJ 'Taking ethical discretion seriously: Ethical deliberation as ethical obligation' (2003) 37 *Indiana Law Review* 21.

Levine, SJ & Pearce, RG 'Rethinking the legal reform agenda: Will raising the standards for bar admission promote or undermine democracy, human rights, and rule of law' (2009) 77 *Fordham Law Review* 1635.

Levine, SJ 'The law and the "spirit of the law" in legal ethics' 2015 *Journal of the Professional Lawyer* 1.

Levinson, S 'Identifying the Jewish lawyer: Reflections on the construction of professional identity' (1993) 14 *Cardozo Law Review* 1577.

Leib, EJ & Galoob, SR 'Fiduciary political theory: A critique' (2016) 125 *Yale Law Journal* 1820.

Loder, RE 'Tighter rules of professional conduct: Saltwater for thirst?' (1987) 1 *Georgetown Journal of Legal Ethics* 311.

Louw, AM 'Yet another call for a greater role for good faith in the South African law of contract: Can we we banish the law of the jungle, while avoiding the elephant in the room?' (2013) 16 *PELJ* 44.

Lowry, W 'James Boswell, Scots Advocate and English Barrister, 1740-1795' (1950) 2 *Stanford Law Review* 471.

Luban, D 'Paternalism and the legal profession' 1981 *Wisconsin Law Review* 454.

Luban, D 'The Lysistratian prerogative: A response to Stephen Pepper' (1986) 11 *American Bar Foundation Research Journal* 637.

Luban, D 'The noblesse oblige tradition in the practice of law' (1988) 41 *Vanderbilt Law Review* 717.

Luban, D 'Partisanship, betrayal and autonomy in the lawyer-client relationship: A reply to Stephen Ellman' (1990) 90 *Columbia Law Review* 1004.

Luban, D 'Are criminal defenders different?' (1993) 91 *Michigan Law Review* 1729.

Luban, D 'Rediscovering Fuller's legal ethics' (1998) 11 *Georgetown Journal of Legal Ethics* 801.

Luban, D 'Reason and passion in legal ethics' (1999) 51 *Stanford Law Review* 873.

Luban, D and Millemann, M 'Good judgment: Ethics teaching in dark times' (1995-1996) 9 *Georgetown Journal of Legal Ethics* 31.

Luban, D 'Epistemology and moral education' (1983) 33 *Journal of Legal Education* 636.

Luban, D 'How must a lawyer be? A response to Woolley and Wendel' (2010) 23 *Georgetown Journal of Legal Ethics* 1101.

Luban, D 'Misplaced fidelity' (2012) 90 *Texas Law Review* 673.

Luban, D and Wendel, WB 'Philosophical legal ethics: An affectionate history' (2017) 30 *Georgetown Journal of Legal Ethics* 337.

Luban, D 'Fiduciary legal ethics, zeal and moral activism' (2020) 33 *Georgetown Journal of Legal Ethics* 275.

MacQuoid-Mason, D 'Book review: Ethics and the attorneys' profession: Fact or fiction? Some perspectives from the consumer's viewpoint' 1983 *Acta Juridica* 213.

Madala, T 'Rule under apartheid and the fledgling democracy in post-apartheid South Africa: the role of the judiciary' (2001) 26 *North Carolina Journal of International Law and Commercial Regulation* 743.

Madlingozi, T 'The Constitutional Court, court watchers and the commons: A reply to Professor Michelman on constitutional dialogue, "interpretive charity" and the citizenry as *sangomas*' (2008) 1 *CCR* 63.

Mahao, NL 'Can African juridical principles redeem and legitimise contemporary human rights jurisprudence?' (2016) XLIX *CILSA* 455.

Maisel, P 'Expanding and sustaining clinical legal education in developing countries: what we can learn from South Africa' (2007) 30 *Fordham International Law Journal* 374.

Maluleke, T 'The misuse of "ubuntu"' (1999) 53 *Challenge* 1.

Manyathi-Jele, N 'Can ethics be taught?' 2014 (Jan/Feb) *De Rebus* 42.

Markovits, D 'What are lawyers for' (2014) 47 *Akron Law Review* 135.

Matolino, B 'Universalism and African philosophy' (2015) 34 *South African Journal of Philosophy* 433.

Matolino, B, & Kwindingwi, W 'The end of ubuntu' (2013) 32 *South African Journal of Philosophy* 197.

Mbembe, A 'African modes of self-writing' (2002) 14 *Public Culture* 239.

McAnearney, T 'The steady erosion of ethics' 2008 (May) *Without Prejudice* 38.

McConnachie, C 'Human dignity, "unfair discrimination" and guidance' (2014) 34 *Oxford Journal of Legal Studies* 609.

McMorrow, JA & Scheuer, LM 'The moral responsibility of the corporate lawyer' (2011) 60 *Catholic University Law Review* 275.

Mendez, CR 'Deflating Autonomy' (2014) 66 *South Carolina Law Review* 401.

Menkel-Meadow, C 'Narrowing the gap by narrowing the field: What's missing from the MacCrate Report – of skills, legal science and being a human being' (1994) 69 *Washington Law Review* 593.

Menkel-Meadow, C 'The trouble with the adversary system in a postmodern, multicultural world' (1996) 38 *William and Mary Law Review* 5.

Mendel-Meadow, C 'Telling stories in law school: Using case studies and stories to teach legal ethics' (2000) 69 *Fordham Law Review* 787.

Menkel-Meadow, C 'Portia in a different voice: Speculations on a women's lawyering process' (1985) 39 *Berkeley Women's Law Journal* 589.

Metz, T 'Ubuntu as a moral theory and human rights in South Africa' (2011) 11 *African Human Rights Journal* 532.

Metz, T 'Reconciliation as the aim of a criminal trial: *Ubuntu's* implications for sentencing' (2019) 9 *CCR* 113.

Metz, T & Gaie, JBR 'The African ethic of *Ubuntu/botho:* Implications for research on morality' (2010) 39 *Journal of Moral Education* 273.

Metz, T 'Just the beginning for Ubuntu: Reply to Matolino and Kwindingwi' (2014) 33 *South African Journal of Philosophy* 65.

Miller, C 'Ordeal by innocence: Why there should be a wrongful incarceration/execution exception to attorney-client confidentiality' (2007-2008) 102 *Northwest Law Review Colloquy* 39.

Mnyongani, F 'Whose morality? Towards a legal profession with an ethical content that is African' (2009) 24 *SAPL* 121.

Mnoyngani, F 'De-linking ubuntu: Towards a unique African jurisprudence?' (2010) 31 *Obiter* 134.

Mnyongani, F 'Duties of a lawyer in a multicultural society: a customary law perspective?' (2012) 23 *Stell LR* 352.

Modiri, J 'Transformation, tension and transgression: Reflections on the culture and ideology of South African legal education' (2013) 24 *Stell LR* 455.

Mokoena, UC & Lubaale, EC 'Decolonising prisons in South Africa: The need for effective bail affordability inquiries' (2018) 66 *South African Crime Quarterly* 31.

Mokgoro, Y '*Ubuntu* and the Law in South Africa' (1998) 1 *PELJ* 1.

Mokgoro, Y & Woolman, S 'Where dignity ends and uBuntu begins: An amplification of, as well as an identification of a tension in, Drucilla Cornell's thoughts' (2010) 25 *SAPL* 400.

Moore, DA and Loewenstein, G 'Self-Interest, automaticity, and the psychology of conflict of interest' (2004) 17 *Social Justice Research* 189.

Moore, NJ 'The complexities of lawyer ethics code drafting: The contributions of Professor Fred Zacharias' (2011) 48 *San Diego Law Review* 335.

Moorhead, R & Hinchly, V 'Professional minimalism? The ethical consciousness of commercial lawyers' (2015) 42 *Journal of Law and Society* 387.

Mortazavi, M 'Institutional independence: Lawyers and the administrative state' (2019) 87 *Fordham Law Review* 1937.

Moseneke, D 'The fourth Bram Fischer memorial lecture: Transformative adjudication' (2002) 18 *SAJHR* 309.

Mowatt, JG and Schembri, C 'Aspects of the contractual and delictual liability of a mediator' (1996) 113 *SALJ* 672.

Mureinik, E 'Security and integrity' 1987 *Acta Juridica* 197.

Mureinik, E 'A bridge to where? Introducing the Interim Bill of Rights' (1994) 10 *SAJHR* 31.

Narvaez, D, Getz, I, Rest, JR & Thoma, SJ 'Individual moral judgment and cultural ideologies' (1999) 35 *Developmental Psychology* 478.

Narvaez, D and Hill, HL 'The relation of multicultural experiences to moral judgment and mindsets' (2010) 3 *Journal of Diversity in Higher Education* 43.

Naude, T & Koep, C 'Factors relevant to the assessment of the unfairness or unreasonableness of contract terms: Some guidance from the German law on standard contract terms' (2015) 26 *Stell LR* 85.

Ndima, D 'The resurrection of the indigenous value system in post-apartheid African law; South Africa's constitutional and legislative framework revisited' (2014) 29 *SAPL* 294.

Newman, J & Nicolson, D 'A tale of two clinics: Similarities and differences in evidence of the clinic effect on the development of law students' ethical and altruistic professional identities' (2016-2017) 35 *Buffalo Public Interest Law Journal* 1.

Ngcukaitobi, T 'The forgotten origins of public interest litigation in South Africa' (2016) April *Advocate* 34.

Nicolson, D 'Making lawyers moral? Ethical codes and moral character' (2005) 25 *Legal Studies* 601.

Nicolson, D 'Education, education, education: Legal, moral and clinical' (2008) 42 *The Law Teacher* 145.

Nörr, D 'Reflections on faith, friendship, mandate' (1990-1992) xxv-xxvii *The Irish Jurist* 302.

O'Brien, MT 'Facing down the gladiators: Addressing law school's hidden adversarial curriculum' (2019) 37 *Monash University Law Review* 44.

O'Dair, DRF 'Ethics by the pervasive method: the case of contract' (1997) 17 *Journal of Legal Studies* 305.

Oliveira de Sousa, F 'A realistic theory of law' (2018) 9 *Jurisprudence* 438.

O'Regan, C 'The three Rs of the Constitution: Responsibility, respect and rights' 2004 *Acta Juridica* 86.

Owens, DG 'Problems in assessing punitive damages against manufacturers of defective products' (1982) 49 *University of Chicago Law Review* 1.

Oyowe, A 'Strange bedfellows: Rethinking *Ubuntu* and human rights in South Africa' (2013) 13 *African Human Rights Law Journal* 103.

Parker, C 'Forum: Philosophical legal ethics: Ethics, morals and jurisprudence' (2010) 13 *Legal Ethics* 165.

Patterson, PR 'Legal ethics and the lawyer's duty of loyalty' (1980) 29 *Emory Law Journal* 909.

Pearce, RG 'Redressing inequality in the market for justice: Why access to lawyers will never solve the problem and why rethinking the role of judges will help' (2004) 73 *Fordham Law Review* 969.

Pearce, RG 'The legal profession as a blue state: reflections on public philosophy, jurisprudence, and legal ethics' (2006) 75 *Fordham Law Review* 1339.

Pepper, S 'The lawyer's amoral ethical role: A defense, a problem, and some possibilities' (1986) 4 *American Bar Foundation Research Journal* 613.

Pepper, S 'A rejoinder to Professors Kaufman and Luban' 1986 *American Bar Foundation Research Journal* 657.

Pepper, S 'Lawyers' ethics in the gap between law and justice' (1999) 40 *Texas Law Review* 181.

Pepper, S 'Integrating morality and law in legal practice: A reply to Professor Simon' (2010) 23 *Georgetown Journal of Legal Ethics* 1011.

Pepper, S 'Three dichotomies in lawyers' ethics (with particular attention to the corporation as client)' (2016) 28 *Georgetown Journal of Legal Ethics* 1069.

Perlman, AM 'A behavioral theory of legal ethics' (2015) 90 *Indiana Law Journal* 1639.

Posel, D 'The meaning of apartheid before 1948: Conflicting interests and forces within the Afrikaner Nationalist Alliance' (1987) 14 *Journal of Southern African Studies* 123.

Postema, G 'Moral responsibility in professional ethics' (1980) 55 *New York University Law Review* 63.

Pont, D 'Die opleiding van die juris in Suid-Afrika' 1961 *Acta Juridica* 58.

Praeg, L 'An answer to the question: What is Ubuntu' (2008) 27 *South African Journal of Philosophy* 367.

Price, DA 'Taking rights cynically: A review of critical legal studies' (1989) 48 *Cambridge Law Journal* 271.

Prud'homme, T 'The need for responsibility within the adversarial system' (1990/1) *Gonzaga Law Review* 443.

Pruitt, LR 'No black names on the letterhead? Efficient discrimination and the South African legal profession' (2002) 23 *Michigan Journal of International Law* 545.

G Quinot 'Transformative legal education' (2012) 129 *SALJ* 411.

Quinot, G & Greenbaum L 'The contours of pedagogy of law in South Africa' (2015) 26 *Stell LR* 29.

Radloff, G 'Professional ethics' 1996 (Oct) *De Rebus* 524.

Ramose, B 'Towards a post-conquest of South Africa: Beyond the Constitution of 1996' (2018) 34 *SAJHR* 326.

Ramose, MB 'An African perspective on justice and race' (2001) 3 *Polylog: Forum for Intercultural Philosophy* (2001) 1

Rathbone, E 'Mandela's prosecutor' (2013) 89 *Virginia Quarterly Review* 158.

Rhode, D 'Ethical perspectives on legal practice' (1985) 37 *Stanford Law Review* 589.

Rhode, D 'The delivery of legal services by non-lawyers' (1990) 4 *Georgetown Journal of Legal Ethics* 209.

Rhode, D 'An adversarial exchange on adversarial ethics' (1991) 41 *Journal of Legal Education* 29.

Rhode, D 'Ethics by the pervasive method' (1992) 42 *Journal of Legal Education* 31.

Rhode, D 'Gender and professional roles' (1994) 63 *Fordham Law Review* 39.

Rhode, D 'Professionalism in perspective: Alternative approaches to non-lawyer practice' (1996) 22 *New York University Review of Law & Social Change* 701.

Rhode, D 'Keynote: Law, lawyers, and the pursuit of justice' (2002) 70 *Fordham Law Review* 1543.

Rhode, D and Woolley, A 'Comparative perspectives on lawyer regulation: An agenda for reform in the United States and Canada' (2011-2012) 80 *Fordham Law Review* 2761.

Rhode, D 'International legal ethics: The evolution of a field' (2018) 42 *Fordham Law Review* 219.

Robbennolt, JK and Sternlight, JR 'Behavioral legal ethics' (2013) 45 *Arizona State Law Journal* 1107.

Robertson, M 'Providing ethics learning throughout the legal curriculum' (2009) 12 *Legal Ethics* 59.

Robertson, M & Kruuse, H 'Legal ethics education in South Africa: Possibilities, challenges and opportunities' (2016) 32 *SAJHR* 344.

Rochvarg, A 'Enron, Watergate and the regulation of the legal profession' (2003) 43 *Washburn Law Journal* 61.

Rogers, S 'The ethics of advocacy' (1899) 15 *Law Quarterly Review* 2.

Rood, L 'Fight my case' 1991 (Dec) *De Rebus* 897.

Rossouw, GJ 'Why professional ethics in the legal profession' 1998 *TSAR* 56.

Rostain, T 'Waking up from uneasy dreams: Professional context, discretionary judgment, and *The Practice of Justice*' (1999) 51 *Stanford Law Review* 955.

Rotunda, RD 'The notice of withdrawal and the new model rules of professional conduct: Blowing the whistle and waving the red flag' (1984) 63 *Oregan Law Review* 455.

Roux, T 'The Constitutional Court's 2018 term: Lawfare or window on the struggle for democratic social transformation?' (2020) *CCR* 1.

Rycroft, A 'Settlement and the law' (2013) 130 *SALJ* 187.

Rycroft, A 'What should the consequences be of an unreasonable refusal to participate in ADR?' (2014) 131 *SALJ* 778.

Salyzyn, A 'Positivist legal ethics theory and the law governing lawyers: A few puzzles worth solving' (2014) 42 *Hofstra Law Review* 55.

Sampson, DH 'The attorney's mandate' (1971) *De Rebus* 145.

Sandelands, LE 'What is so practical about theory? Lewin revisited' (1990) 20 *Journal of the Theory of Behaviour* 235.

Sargent, MA 'Lawyers in the moral maze' (2004) 49 *Villanova Law Review* 867.

Sarkin, J & Fourie, N 'The contingency fees bill: Opening the doors of justice or Pandora's Box?' (1997) 12 *SAPL* 214.

Scott, JC 'The evidence of experience' (1991) 17 *Critical Inquiry* 773.

Schaefer, P 'Harming business clients with zealous advocacy: Rethinking the attorney advisor's touchstone' (2011) 38 *Florida University State Review* 253.

Shaffer, T 'The irony of lawyers' justice in America' (2002) 70 *Fordham Law Review* 1857.

Schlag, P 'Formalism and realism in ruins (mapping the logics of collapse)' (2009) 95 *Iowa Law Review* 195.

Schneyer, T 'A tale of four systems: Reflections on how law influences the ethical infrastructure of law firms' (1998) 39 *South Texas Law Review* 245.

Schneyer, T 'The promise and problematics of legal ethics from the lawyer's point of view' (2004) 16 *Yale Journal of the Law & Humanities* 45.

Schneyer, T 'Professionalism as pathology: The ABA's latest policy debate on nonlawyer ownership of law practice entities' (2012) 40 *Fordham Urban Law Journal* 75.

Scott, JW 'The evidence of experience' (1991) 17 *Critical Enquiry* 773.

Sedutla, M 'LLB summit: Legal education in crisis?' 2013 (July) *De Rebus* 113.

Shrag, PG 'Teaching legal ethics through role playing' (2009) 12 *Legal Ethics* 35.

Simmonds, NE 'Kramer's high noon' (2011) 56 *American Journal of Jurisprudence* 135.

Simon, WH 'The ideology of advocacy: procedural justice and professional ethics' (1978) 36-7 *Wisconsin Law Review* 29.

Simon, WH 'Ethical discretion in lawyering' (1987-1988) 101 *Harvard Law Review* 1083.

Simon, WH 'Introduction: The post-Enron identity crisis of the business lawyer' (2005) 74 *Fordham Law Review* 947.

Simon, WH 'The Kay Scholer affair: The lawyer's duty of candor and the bar's temptations of evasion and apology' (1998) 23 *Law and Social Inquiry* 243.

Simon, WH '"Thinking like a lawyer" about ethical questions' (1998) 27 *Hofstra Law Review* 1 at 9.

Simon, WH 'The legal and the ethical in legal ethics: A brief rejoinder to comments on *The Practice of Justice*' (1999) 51 *Stanford Law Review* 991.

Simon, WH 'After confidentiality: Rethinking the professional responsibilities of the business lawyer' (2006) 75 *Fordham Law Review* 1453.

Simon, WH 'The past, present, and future of legal ethics: Three comments for David Luban' (2008) 93 *Cornell Law Review* 1365.

Simon, WH 'Role differentiation and lawyers' ethics: A critique of some academic perspectives' (2010) 23 *Georgetown Journal of Legal Ethics* 987.

Simon, WH 'Legal ethics should be primarily a matter of principles, not rules' (2010) 13 *Legal Ethics* 200.

Simon, WH 'Attorney-client confidentiality: A critical analysis' (2017) 30 *Georgetown Journal of Legal Ethics* 447.

Slabbert, M 'The requirement of being a "fit and proper" person for the legal profession' (2011) 14 *PELJ* 209.

Smith, T 'Zealous advocates: Historical foundations of the adversarial criminal defence lawyer' (2012) 2 *Law, Crime and History* 1.

Snyman, CR 'The accusatorial and inquisitorial approaches to criminal procedure: Some points of comparison between the South African and continental systems' (1975) 8 *CILSA* 100.

Snyman-Van Deventer, E & Swanepoel, CF 'Teaching the theory and skills of legal ethics to South African LLB students' (2017) 38 *Obiter* 127.

Spaulding, NW 'Professional independence in the Office of the Attorney General' (2007) 60 *Stanford Law Review* 1931.

Spiller, S 'The transplantation of English legal traditions into the colony of Natal (1846-1910)' (1990) 6 *Australian Journal of Law and Society* 130.

Stoler, AL 'In cold blood: Hierarchies of credibility and the politics of colonial narratives' (1992) 37 *Representations* 151.

Strachan. J 'The Legal Services Charter – the devil's in the detail' (2006) 6 *Without Prejudice* 4.

Strassberg, M 'Taking ethics seriously: beyond positivist jurisprudence in legal ethics' (1995) 80 *Iowa Law Review* 901.

Tanovich, DM 'Law's ambition and the reconstruction of role morality in Canada' (2005) 28 *Dalhousie Law Journal* 268.

Taylor, DFP 'Defining ubuntu for business ethics – a deontological approach' (2014) 33 *South African Journal of Philosophy* 331.

Thomas, PJ 'Harmonising the law in a multilingual environment with different legal systems: Lessons to be drawn from the legal history of South Africa' (2008) 14 *Fundamina* 133.

Thompson, LM 'Constitutionalism in the South African Republics' 1954 *Butterworths South African Law Review* 57.

Thompson, S 'Beadica 231 CC: An end to the trilogy?' (2020) 137 *SALJ* 641.

Thunder, D 'Can a good person be a lawyer?' (2006) 20 *Notre Dame Journal of Law, Ethics and Public Policy* 313.

Thurman, SD 'Limits to the adversary system: Interests that outweigh confidentiality' (1980) 5 *Journal of the Legal Profession* 5.

Tranter, K & Corbin, L 'Lawyers, clients and friends: A case study of the vexed nature of friendship and lawyering' (2008) 11 *Legal Ethics* 67.

Tremblay, P 'Practiced moral activism' (1995) 8 *St Thomas Law Review* 9.

Tsang, J 'Moral rationalization and the integration of situational factors and psychological processes in immoral behavior' (2002) 6 *Review of General Psychology* 25.

Tschaepe, M 'A humanist ethic of *Ubuntu:* Understanding moral obligation and community' (2013) 21 *Essays in the Philosophy of Humanism* 47.

Tur, RHS 'Confidentiality and accountability' (1992) 1 *Griffith Law Review* 73.

Tur, R '*Professional Legal Ethics: Critical Interrogations* by Donald Nicolson and Julian Webb' (2001) 4 *Legal Ethics* 66.

Tushnet, M 'Critical legal studies and constitutional law: An essay in deconstruction' (1984) 36 *Stanford* Law *Review* 623.

Underwood, RH 'Adversary ethics: More dirty tricks' (1982) 6 *American Journal of Trial Advocacy* 265

Van Binsbergen, W 'Ubuntu and the globalisation of Southern African thought and society' (2001) 15 *Quest – An African Journal of Philosophy* 53.

Van der Bergh, R 'A rule must arise from the law as it is – and it is not cast in stone' (2014) 20 *Fundamina* 965.

Van der Merwe, P 'Chief Justice hails new constitutional and African values' 1997 (Feb) *De Rebus* 78.

Van der Walt, A 'Legal history, legal culture and transformation in a constitutional democracy' (2006) 12 *Fundamina* 1.

Van Marle, K 'Transformative constitutionalism as/and critique' (2009) 20 *Stell LR* 286.

Van Niekerk, A & Nortje, N 'Phronesis and an ethics of responsibility' (2013) 6 *South African Journal of Bioethics and Law* 28.

Van Niekerk, GJ 'A common law for Southern Africa? Roman law or indigenous African law?' (1998) 31 *CILSA* 159.

Vaughan, S & Oakley, E '"Gorilla exceptions" and the ethically apathetic corporate lawyer' (2016) 19 *Legal Ethics* 50.

Van Zyl IV, CH & Visser J 'Legal ethics, rules of conduct and the moral compass – Considerations from a law student's perspective' (2016) 19 *PELJ* 1.

Veitch, S 'Ronald Dworkin and the power of ideas' 2004 *Acta Juridica* 44.

Vice, S 'Dignity and equality in *Barnard*' (2015) 7 *CCR* 135.

Vischer, RK 'How do lawyers serve human dignity' (2011) 9 *University of St Thomas Law Journal* 222.

Visser, D 'Cultural forces in the making of mixed legal systems' (2003) 78 *Tulane Law Review* 41.

Visser, W 'The production of literature on the "red peril" and "total onslaught" in twentieth-century South Africa' (2004) 49 *Historia* 105.

Wacks, R 'Judges and injustice' (1984) 101 *SALJ* 266.

Wacks, R 'Judging judges: A brief rejoinder to Professor Dugard' (1984) 101 *SALJ* 295.

Wacks, R 'Injustice in robes: Iniquity and judicial accountability' (2009) 22 *Ratio Juris* 129.

Wald, E 'Lawyers and corporate scandals' (2004) 7 *Legal Ethics* 54.

Wallis, M 'Commercial certainty and constitutionalism: Are they compatible?' (2016) 133 *SALJ* 545.

Weinreb, LL 'The adversary process is not an end in itself' (1999) 2 *Journal of the Institute for the Study of Legal Ethics* 59.

Wagner, K & Brett, C 'I heard it through the grapevine: The difference between legal professional privilege and confidentiality' 2016 (Sept) *De Rebus* 22.

Washbourn, P 'Experiential learning' (1996) 82 *Liberal Education* 1.

Wasserman, D 'Should a good lawyer do the right thing? David Luban on the morality of adversary representation' (1990) 49 *Maryland Law Review* 392.

Wasserstrom, R 'Lawyers as professionals: Some moral issues' (1975) 5 *Human Rights* 1.

Webb, J 'Being a lawyer/Being a human being' (2002) 5 *Legal Ethics* 130.

Webb, D 'A review of T Dare, *The Counsel of Rogues? A Defence of the Standard Conception of the Lawyer's Role*' (2009) 12 *Legal Ethics* 249.

Weeks, S 'The traditional courts bill: Controversy around process, substance and implications' (2011) 35 *SA Crime Law Quarterly* 3.

West, R 'The zealous advocacy of justice in a less than ideal legal world' (1999) 51 *Stanford Law Review* 973.

Webb, D 'Bounded autonomy and bounded zeal' (2009) 28 *University of Queensland Law Journal* 273.

Webb, D 'A review of T Dare, The Counsel of Rogues? A Defence of the Standard Conception of the Lawyer's Role' (2009) 12 *Legal Ethics* 249.

Wendel, WB 'Public values and professional responsibility' (1999) 75 *Notre Dame Law Review* 1.

Wendel, WB 'Professional roles and moral agency' (2001) 89 *Georgetown Law Journal* 667.

Wendel, WB 'Value pluralism in legal ethics' *Washington University Law Quarterly* 78 (2001) 116.

Wendel, WB 'Civil obedience' (2004) 104 *Columbia Law Review* 363.

Wendel, WB 'Legal ethics and the separation of law and morals' (2005) 91 *Cornell Law Review* 67.

Wendel, WB 'Professionalism as interpretation' (2005) 99 *Northwestern University Law Review* 1167.

Wendel, WB 'Razian authority and its implications for legal ethics' (2010) 13 *Legal Ethics* 191.

Wendel, WB 'Three conceptions of roles' (2011) 48 *San Diego Law Review* 547.

Wendel, WB 'Legal ethics is about the law, not morality or justice: A reply to critics' (2012) 90 *Texas Law Review* 727.

Wendel, WB 'In search of core values' (2014) 16 *Legal Ethics* 350.

Wendel, WB 'The limits of positivist legal ethics: A brief history, a critique and a return to foundations' (2017) 30 *Canadian Journal of Law & Jurisprudence* 443.

Wendel, WB 'Autonomy isn't everything: Some cautionary notes on *McCoy v Louisiana*' (2018) 9 *St Mary's Journal on Legal Malpractice and Ethics* 92

Wendel, WB 'The rule of law and legal-process reasons in attorney advising' (2019) 97 *Boston Law Review* 107.

White, L 'Between Glucksman and Foucault: Historicizing rumour and gossip' (1994) 20 *Social Dynamics* 75.

Whitear Nel, N & Freedman, W 'A historical review of the development of the post-apartheid South African LLB degree – with particular reference to legal ethics' (2015) 21 *Fundamina* 234.

Wildenboer, L 'The origins of the division of the legal profession in South Africa: A brief overview' (2010) 16 *Fundamina* 199.

Wildenboer, L 'For a few dollars more: Overcharging and misconduct in the legal profession of the Zuid-Afrikaansche Republiek' (2011) 2 *De Jure* 339.

Wilkins, DB 'Legal realism for lawyers (1990) 104 *Harvard Law Review* 468.

Wilkins, DB 'Who should regulate lawyers?' (1992) 105 *Harvard Law Review* 799.

Wilkins, DB 'Race, ethics, and the first amendment: Should a black lawyer represent the Ku Klux Klan' (1995) 63 *George Washington Law Review* 1030.

Williams, J 'Deconstructing gender' (1989) 87 *Michigan Law Review* 797.

Williams, J & Klusner, J 'The traditional courts bill: A women's perspective' (2013) 29 *SAJHR* 276

Woolley, A 'Integrity in zealousness: Comparing the standard conceptions of the Canadian and American lawyer' (1996) 1 *Canadian Journal of Law and Jurisprudence* 61.

Woolley, A and Wendel, B 'Legal and moral character' (2010) 23 *Georgetown Journal of Legal Ethics* 1065.

Woolley, A 'The problem of disagreement in legal ethics theory' (2013) 26 *Canadian Journal of Law and Jurisprudence* 181.

Woolley, A 'Context, meaning and morality in the life of a lawyer' (2014) 17 *Legal Ethics* 1.

Woolley, A 'The lawyer as advisor and the practice of the rule of law' (2014) 47 *UBC Law Review* 743.

Woolley, A 'The lawyer as fiduciary: Defining private law duties in public law relations' (2015) 65 *University of Toronto Law Journal* 285.

Woolley, A 'Is Positivist legal ethics an oxymoron' (2019) 32 *Georgetown Journal of Legal Ethics* 77.

Woolman, S 'South Africa's aspirational Constitution and our problems of collective action' (2016) 32 *SAJHR* 156.

Zacharias, FC 'Specificity in professional responsibility codes: Theory, practice, and the paradigm of prosecutorial ethics' (1993) 69 *Notre Dame Law Review* 223.

Zacharias, FC 'The purpose of lawyer discipline' (2003) 45 *William & Mary Law Review* 675.

Zacharias, FC and Green, BA 'Reconceptualizing advocacy ethics' (2005) 74 *George Washington Law Review* 1.

Zipursky, BC 'Legal positivism and the good lawyer: A commentary of W Bradley Wendel's Lawyers and Fidelity to Law' (2011) 24 *Georgetown Journal of Legal Ethics* 1165.

Zitzke, E 'The history and politics of contemporary common-law purism' (2017) 23 *Fundamina* 185.

Zitzke, E 'A decolonial critique of private law and human rights' (2018) 34 *SAJHR* 492.

**ROMAN & ROMAN-DUTCH AUTHORITIES**

Digest. *The Digest of Justinian* translated by T Mommsen, P Krueger & A Watson (1985), University of Pennsylvania Press: Philadelphia. Cited as D.

Gaius. *The Commentaries of Gaius and the Rules of Ulpian* translated with notes by JT Abdy & B Walker 3 ed (1885) Cambridge University Press: Cambridge. Cited as Gaius.

Voet, J *Commentarius ad Pandectas* translation by P Gane, sub nom *The Selective Voet* (1957) Butterworths: Durban. Cited as Voet.

Pothier, RJ *Pothier's Treatise on the Contract of Mandate (Traite du Contrat de Mandat)* translated from the Dupin edition by BG Rogers and BX de Wet (1979) Lex Patria: Johannesburg.

**THESES**

Du Plessis, HG *The Harmonisation of Good Faith and Ubuntu in the South African Common Law of Contract* (unpublished LLD thesis, Unisa University, 2017).

Furman, K *Exploring the Possibility of an Ubuntu-based Political Philosophy* (unpublished MA thesis, Rhodes University, 2012).

Gerber, GA *An appraisal of the offence of 'fronting' in the context of broad-based black economic empowerment (B-BBEE) in South Africa* (unpublished LLM thesis, University of Johannesburg, 2017).

Prinsloo, A *Prolegomena to Ubuntu and other Future South African Philosophy* (unpublished MA thesis, Rhodes University, 2013).

Sutherland, R *A Defence of the Standard Conception of Adversary Advocacy* (unpublished MA research report, University of the Witwatersrand, 2016).

Van Niekerk, J *Ubuntu and moral value* (unpublished PhD thesis, University of the Witwatersrand, 2013).

Whitear-Nel, N *Legal ethics in the LLB degree* (unpublished LLM thesis, University of Kwazulu-Natal, 2013).

## SOUTH AFRICAN POLICY AND COMMISSION DOCUMENTS


Council of Higher Education *Higher Education Qualifications Sub-Framework Qualification Standard for Bachelor of Laws (LLB)* May 2015.

Hoexter, Mr Justice GG *Commission of Inquiry into the Structure and Functioning of the Courts* Vols 1 & 2 (1983).

South African Law Commission *Report 93 on Speculative and Contingency Fees* (1996).

South African Law Reform Commission *Report on Legislation Administered by Departments of Cooperative Governance and Traditional Affairs, Project 25: Statutory Law Revision* (2015)

South African Law Reform Commission *Discussion Paper 148: Alternative Dispute Resolution in Family Matters Project 100D* (2019).

South African Law Deans' Association *A Model Curriculum for Legal Ethics in the South African LLB* (2016).

*Truth and Reconciliation Committee Final Report* Vols 1-5 (1998) available at https://www.justice.gov.za/trc/report/.

## TABLE OF CASES

*Corruption Watch NPC v President of the Republic of South Africa* 2018 (2) SACR 442 (CC)
*Crossley v The National Commissioner of the South African Police Services* [2004] 3 All SA 436 (T)

**D**

*De Lacy & another v South African Post Office* 2011 (9) BCLR 905 (CC)
*De Lange v Presiding Bishop of the Methodist Church* 2016 (2) SA 1 (CC)
*Democratic Alliance v President of the RSA & others; Economic Freedom Fighters v State Attorney & others* [2019] 1 All SA 681 (GP)
*Dikoko v Mokhatla* 2006 (6) SA 235 (CC)
*Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development & others* 2009 (4) SA 222 (CC)
*Dudgeon v United Kingdom* (1982) 4 EHRR 149
*Du Plessis v De Klerk* 1996 (3) SA 850 (CC)
*Du Plooy v Minister of Correctional Services* [2004] 3 All SA 613 (T)

**E**

*Eerste Nasionale Bank van Suidelike Afrika v Saayman* 1997 (4) SA 302 (SCA)
*Erasmus v William* [2016] ZAECGHC 116
*Esau v Esau* [2018] 4 All SA 551 (WCC)
*Esorfranki Pipelines (Pty) Ltd & another v Mopani District Municipality & others* [2014] 2 All SA 493 (SCA).
*Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC)
*Executive Council of the Western Cape Legislature & Others v President of the Republic of South Africa & Others* 1995 10 BCLR 1289 (CC)

**F**

*Ferreira v Levin NO & others; Vryenhoek & others v Powell NO & others* 1996 (1) SA 984 (CC)
*Fine v Society of Advocates of SA* (*Witwatersrand Division*) 1983 (4) SA 488 (A)
*Francis v East London Board of Executors* 1935 EDL 405
*Freedom under Law v National Director of Public Prosecutions & others* 2014 (1) SA 254 (GNP)
*Furman v Georgia* 408 US 238 (1972)

**G**

*Geldenhuys & others v Orthotouch Limited; In re: Highveld Syndication Investors v Orthotouch Ltd* [2016] ZAGPJHC 233
*Glaxo Wellcome (Pty) Ltd & others v D. Terblanche & others* [2000] ZACAC 2
*Goodricke & Son v Auto Protection Insurance Co* 1968 (1) SA 717 (A)
*General Council of the Bar of South Africa v Geach & others, Pillay & others v Pretoria Society of Advocates & another, Bezuidenhout v Pretoria Society of Advocates* 2013 (2) SA 52 (SCA)
*General Council of the Bar of South Africa v Jiba & others* 2017 (2) SA 122 (GP)

**H**

*Habitat Council v City of Cape Town & others* [2018] ZAWCHC 36
*Harding & another v Maclear* [2016] ZAWCHC 172
*Helen Suzman Foundation v President of the Republic of South Africa & others; Glenister v President of the Republic of South Africa & others* 2015 (2) SA 1 (CC)
*Hewetson v Law Society of the Free State* 2020 (5) SA 86 (SCA)
*Highveld Syndication Investors v Orthotouch Ltd* [2016] ZAGPJHC 233
*Honey & Blanckenberg v Law* 1966 (2) SA 43 (R)
*Hudson v Hudson* 1927 AD 259

**I**

*Imbumba Association for the Aged v MEC for Social Development Eastern Cape* [2020] ZAECGHC 112.
*Incorp Law Society v de Jong* 1904 TS 283
*Incorporated Law Society v Wookey* 1912 AD 623
*Incorporated Law Society v Zimmerman* 1907 TS 637

**J**

*Jacobellis v Ohio* 378 US 184
*Jaftha v Schoeman, Van Rooyen v Stoltz* 2005 (2) SA 140 (CC)
*Jasat v Natal Law Society* 2000 (3) SA 44 (SCA)
*Jeebhai v Minister of Home Affairs* 2009 (5) SA 54 (SCA)
*John v Rees* [1970] 1 Ch 345.
*Jordan & another v Farber* [2009] ZANCHC 81

**K**

*K v Regional Magistrate NO* 1996 (1) SACR 434 (E)
*Kara v Sutherland* [1996] Civ LD 547 (BCSC)
*Keetso and 211 others v CTP Ltd* [2011] ZALCJHB 48
*Kekana v Society of Advocates of South Africa* 1998 (4) SA 649 (SCA)
*Kennedy v Broun* 1863 13 CB (NS) 677
*Knight v Findlay* 1934 NPD 185
*Koyabe v Minister of Home Affairs (Lawyers for Human Rights as Amicus Curiae)* 2010 (4) SA 327 (CC)
*KwaZulu-Natal Law Society v Moodley & another* [2014] ZAKZPHC 37
*Kwa-Zulu Natal v Pillay* 2008 (1) SA 474 (CC)

**L**

*Law Society of the Cape of Good Hope v Budricks* 2003 (2) SA 11 (SCA)
*Law Society of the Cape of Good Hope v Peter* 2009 (2) SA 18 (SCA).
*Law Society of the Cape of Good Hope v Randell* [2015] 4 All SA 173 (ECG)
*Law Society of the Northern Provinces v Mamatho* 2003 (6) SA 467 (SCA)
*Law Society of the Transvaal v Machaka* 1998 (4) SA 413 (T)

*Legal Practice Council v Tlalang* (unreported judgment) (case number 68910/2018) North Gauteng High Court
*Lekeur v Santam Insurance Co Ltd* 1969 (3) SA 1 (C)
*Luhlwini Mchunu Community v Hancock & others* [2020] ZALCC 2

**M**

*Mackay v Legal Aid Board* 2003 (1) SA 271 (SE)
*Magena v Law Society* 1910 TPD 309
*Magidiwana v President of the Republic of South Africa* [2014] 1 All SA 76 (GNP)
*Malan & another v Law Society, Northern Provinces* 2009 (1) SA 216 (SCA).
*Malotsa & others v S* [2020] ZALMPPHC 32
*Mansingh v President of the Republic of South Africa* 2012 (3) SA 192 (GNP)
*Masethla v President of the Republic of South Africa* 2008 (1) SA 566 (CC)
*Mashishi v Mdlala & others* [2018] 7 BLLR 693 (LC)
*Mavundulu Community v The Minister of Agriculture, Rural Development & Land Reform & others* (LCC125/2008) LCC (PMB) (unreported case)
*Mayelane v Ngwenyama* 2013 (4) SA 415 (CC)
*MB v NB* 2010 (3) SA 220 (GSJ)
*Mbita Consulting Services CC v Passenger Rail Agency of South Africa (Pty) Ltd t/a PRASA Real Estate Solutions* [2019] ZAGPJHC 385
*Mcdonald Inc & another v Rudolph & another* 1997 (4) SA 252 (T)
*MEC for Economic Affairs, Environment & Tourism, Eastern Cape v Kruizenga* 2010 (4) SA 122 (SCA)
*MEC for Education: Kwazulu-Natal v Pillay* 2008 (1) SA 474 (CC)
*Mfengwana v Road Accident* 2017 (5) SA 445 (ECG)
*Mills & Ahlers Ingelyf v Van Aswegan H J* 1986 (1) PH F14 (O)
*Minister of Finance v Van Heerden* 2004 (6) SA 121 (CC)
*Minister of Justice v Ntuli* 1997 (3) SA 772 (CC)
*Minister of Safety & Security v G4S International UK Ltd: In re G4S International UK Ltd v SA Airways (Pty) Ltd* [2012] JOL 28815 (GSJ)
*Minister of Rural Development and Land Reform v Normandiem Farms (Pty) Ltd & others, Mathibane & others v Normadien Farms (Pty) Ltd & others* 2019 (1) SA 154 (SCA)
*Mlungwana & others v S & another* 2019 (1) BCLR 88 (CC)
*Moela & another v Habib & another* [2020] ZAGPJHC 69
*Mofokeng v Road Accident Fund* [2012] ZAGPJHC 150
*Mohamed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd* 2018 (2) SA 314 (SCA)
*Mohamed & others v President of the Republic of South Africa & others* 2020 (5) SA 553 (GP)
*Mort v Henry Shields-Chiat* 2001 (1) SA 404 (C)
*Moyo v Minister of Justice and Constitutional Development & others; Sonti v Minister of Justice and Correctional Services & others* [2018] 3 All SA 342 (SCA)
*Mtshabe v Law Society of the Cape of Good Hope* 2014 (5) SA 376 (ECM)

**N**

*Napier v Barkhuizen* 2006 (4) SA 1 (SCA)
*National Union of Metalworkers of SA v Wainwright NO* (2015) 36 *ILJ* 2097 (LC)
*Ncongwane v Tarcia NO & others* [2012] ZAGPPHC 32
*Nelson Mandela Foundation Trust & another v Afriforum NPC & others* [2019] ZAEQC 2
*New Jersey v Sugar* (1980) 417 AD 474 (NJ S Ct)
*Njonji v MEC, Department of Welfare, Eastern Cape* 2008 (4) SA 237 (CC)
*NM & others v Smith & others* 2007 (5) SA 250 (CC)
*Nyathi v Member of the Executive Council for the Department of Health Gauteng & another* 2008 (5) SA 94 (CC)

**O**

*OFS v Livanos* 1987 (3) SA 283 (W)

**P**

*Passenger Rail Agency of South Africa v Swifambo Rail Agency (Pty) Ltd* 2017 (6) SA 223 (GJ)
*Peel & others v Hamon J&C Engineering (Pty) Ltd & others* 2013 (2) SA 331 (GSJ)
*Petropulos & another v Dias* 2020 (5) SA 63 (SCA)
*Pharmaceutical Society of South Africa v Tshabala-Msimang NNO, New Clicks South Africa (Pty) Ltd v Minister of Health* 2005 (3) SA 238 (SCA)
*Pienaar and Versfeld v Incorp Law Society* 1902 TS 11
*Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC)
*Prince v Minister of Justice and Constitutional Development; Rubin v National Director of Public Prosecutions (NDPP); Acton v NDPP* 2017 (4) SA 299 (WCC)
*Prokureursorde van Transvaal v Kleynhans* 1995 (1) SA 839 (T)

**Q**

*Queen v O'Connell* (1844) 7 Ir LR 261
*Qwelane v SAHRC & others* 2020 (2) SA 124 (SCA)

**R**

*R v Paine* (1792) 22 State Trials 412
*R v Baartman* 1960 (3) SA 535 (A)
*R v Matonsi* 1958 (2) SA 450 (A)
*RAF v Shabangu & another* 2004 (2) All SA 356 (SCA)
*Ras v Liquor Licensing Board, Are No 11, Kimberley* 1966 (2) SA 232 (C)
*Regina v Toten* (1993) 16 CRR (2d) 49 (Ontario Court of Appeal)
*Resnick v Government of Republic of South Africa* 2014 (2) SA 337 (WCC)
*Ridehalgh v Horsefield* 1994 3 WLR 462 (CA)
*Richtersveld Community & others v Alexkor Ltd & another* [2001] ZALCC 34
*Robinson v Van Hulsteyn, Feltham and Ford* 1925 AD 12
*Ronald Bobroff & Partners Inc v De La Guerre; South African Association of Personal Injury Lawyers v Minister of Justice and Constitutional Development* 2014 (3) SA 134 (CC)
*Rondel v Worsley* [1967] 3 All ER 993 (HL)

**S**

*Saleh v Nebel* 2015 ONSC 3680
*Salem Party Club & others v Salem Community & others* 2018 (3) SA 1 (CC)
*Schlesin v Incorporated Law Society* 1909 TS 363
*Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma* [2021] ZACC 2.
*Shibi v Sithole & others* 2005 (1) SA 580 (CC)
*S v Jordan & others (Sex Workers Education and Advocacy Task Force & others as Amici Curiae)* 2002 (6) SA 642 (CC)
*S v J* [2010] ZASCA 139
*S v Makwanyane* 1995 (3) SA 391 (CC)
*S v Mamabolo* 2001 (3) SA 409 (CC)
*S v Mandela* 2001 (1) SACR 156 (C)
*S v Mothlanyi* [2019] ZAGPJHC 246
*S v Safatsa* 1988 (1) SA 868 (A)
*S v Safatsa and Thint (Pty) Ltd v NDPP; Zuma v NDPP* 2008 (2) SACR 421 (CC).
*S v Sebofi* 2015 (2) SACR 179 (GJ)
*S v Sibiya* 2010 1 SACR 284 (GNP)
*S v Van Niekerk* 1972 (3) SA 711 (A)
*S v Zuma & another, Thales South Africa (Pty) Ltd v KwaZulu-Natal Director of Public Prosecutions & others* 2020 (2) BCLR 153 (KZD)
*S v Zuma* 1995 4 BCLR 401
*State v Macumber,* 582 P.2d 162 (Ariz. 1978)
*State Information Technology Agency SOC Lted v Gijima Holdings (Pty) Ltd* 2018 (2) 23 (CC)
*Savage v Sisters of The Holy Cross, Cape Province* 2015 (6) SA 1 (WCC*)*
*Scholtz v The State* 2018 (2) SACR 526 (SCA)
*Shannon v Masilonyana Local Municipality* [2017] ZAFSHC 149
*Silent Pond Investments CC v Woolworths (Pty) Ltd & another* 2011 (6) SA 343 (D)
*Shoprite Checkers (Pty) Ltd v Bumpers Schwarmas CC & others* 2002 (6) SA 202 (C)
*Sibanyoni v du Toit-Smuts and Mathews Phosa Attorneys & others* [2016] ZAGPPHC 163
*Solomon v Magistrate, Pretoria* 1950 (3) SA 603 (T)
*Sonti v Minister of Justice and Correctional Services* 2018 (2) SACR 313 (SCA)
*Soobramoney v Minister of Health, Kwa-Zulu Natal* 1998 (1) SA 765 (CC)
*South African Airways Soc v BDFM Publishers (Pty) Ltd & others* 2016 (2) SA 561 (GJ)
*South African Association of Personal Injury Lawyers (SAAPIL) v Minister of Justice and Constitutional Development* 2013 (2) SA 583 (GNP)
*South African Defence and Aid Fund v Minister of Justice* 1967 (1) SA 263 (A)
*South African Human Rights Commission v President of the Republic of South Africa* 2005 (1) SA 580 (CC)
*South African Forestry Co Ltd v York Timbers Ltd* [2004] 4 All SA 168 (SCA)
*South African Police Service v Solidarity obo Barnard* 2014 (6) SA 123 (CC)
*SAPS v Solidarity obo Barnard (Popcru as Amicus Curiae)* 2014 (6) SA 123 (CC)

*South African Transport and Allied Workers Union & another v Garvas & others* 2013 (1) SA 83 (CC)
*Spaulding v Zimmerman* 116 N W 2d 704 (Minn. 1962)
*ST v CT* 2018 (5) SA 479 (SCA)

**T**

*Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development* 2014 (2) SA 168 (CC)
*The Citizen 1978 (Pty) Ltd v McBride (Johnstone, Amici Curiae)* 2011 (4) SA 191 (CC)
*Thint (Pty) Ltd v National Director of Public Prosecutions; Zuma v National Director of Public Prosecutions* 2009 (1) SA 1 (CC)
*Three Rivers District Council & Others v Bank of England (No 6)* [2005] 1 AC 610.
*Thulo v Road Accident Fund* 2011 (5) SA 446 (GSJ)
*Thukwane v Law Society of the Northern Provinces* 2014 (5) SA 513 (GP)
*Tongoane & others v National Minister for Agriculture and Land Affairs & others* 2010 (6) SA 214 (CC)
*Town Council of Barberton v Ocean Accident and Guarantee Corporation Ltd* 1945 TPD 309
*Transvaal Law Society v Basner* (TPD) Pretoria, 11 November 1952, unreported.
*Tshabalala-Msimang v Makhanya* 2008 (6) SA 102 (W)

**U**

*Ulde v Minister of Home Affairs & another* 2009 (8) BCLR 840 (SCA)
*United Democratic Movement v President of the RSA* 2002 (11) BCLR 1179 (CC)

**V**

*Van der Berg v General Council of the Bar of South Africa* [2007] 2 All SA 499 (SCA)
*Van der Spuy v Pillans* 1875 Buch 133
*Vassen v Law Society of the Cape of Good Hope* [1998] 3 All SA 358 (A)
*Viking Pony Africa Pumps (Pty) Ltd t/a Tricom Africa v Hidro-Tech Systems (Pty) Ltd & another* 2011 (1) SA 327 (CC)

**W**

*W v H* 2017 (1) SA 196 (WCC)
*Wash St Phys Ins Exch v Fisons Corp* 858 P2d 1054 (Wash 1993)
*Waste Products Utilisation (Pty) Ltd v Wilkes* 2003 (2) SA 515 (W)
*Webb v Botha* 1980 (3) SA 666 (N)
*Western Assurance Co v Caldwell's Trustee* 1918 AD 262
*Wishart & others v Blieden NO & others* 2013 (6) SA 59 (KZP)
*Wishart & others v Blieden NO & others* [2014] 4 All SA 334 (SCA)
*Women's Legal Centre Trust v President of the Republic of South Africa, Faro v Bignham NO, Esau v Esau* [2018] 4 All SA 551 (WCC)
*Woodlands Dairy (Pty) Ltd & another v Competition Commission* [2009] ZACT 69