

# Judicial education\*

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In South Africa, educating judges is a relatively new concept, although the training of magistrates has been ongoing for several years.

"The truth is simply that no textbook, and no advocate, however competent or conscientious, can teach a judge how to conduct the motion roll in Johannesburg effectively, or how to write judgments that are clear and concise; or how to conduct a trial in a manner which avoids losing control to combative counsel; or how to guide a trial into ventilation of what are the truly relevant areas, without descending into the arena of conflict; or how to encourage a just settlement without creating an impression of bias in any direction; or how to deal with prolix or rude counsel without appearing to be impatient or frustrated or angry; ...Nor is it fair to litigants or to the proper ends of justice simply to leave it to each judge to acquire in his or her own time the necessary insights in the face of a wealth of accumulated experience which can be passed on through properly prepared courses in judicial training and effectively evolved in collective collegial response.

...It is about self-education in collective discourse among colleagues, who all receive as much as they give. It is not about instructions from superiors to inferiors. It is about discovering problems as much as seeking solutions. It is not about prescribing solutions. It is about process and journey. Not about results and destiny."

*Chief Justice I Mahomed, Magaliesburg,  
21 July 1997*

This paper considers the rationale and strategies relating to the implementation of judicial education in South Africa. Section 180(a) of the 1996 Constitution explicitly provides:

'[n]ational legislation may provide for

any matter concerning the administration of justice that is not dealt with in the Constitution, including –

(a) training programmes for judicial officers.'

This would include the training, and continuing legal education of judges, although no such legislation has been enacted. However, since 1996 the Judicial Service Commission has been concerned with the orientation and training of newly appointed judges and continuing education of serving judges. The submissions made by judges to the Truth and Reconciliation Commission endorsed judicial education, similar to that in Canada, America, Australia and other Commonwealth countries, as an important corollary to transformation.<sup>1</sup> The Canadian judicial training experiences which emerged after the Canadian Charter of Rights and Freedoms came into force in April 1982 is particularly instructive for South Africa. It serves as an indication that the complexity of rights adjudication requires continuous judicial education. This would include aspects of the social sciences, which could potentially impact on judgments, for example, statistical analysis and the jargon of the medical or engineering field. In addition Canadian judicial training focuses on the technique of writing judgments for the purpose of ensuring that 'plain' language permeates dicta. In a multilingual country such as ours where English, for a vast majority of people is at best a third language, accessibility of language in written judgments is vitally important.

## Linkage Project

With the assistance of the Commonwealth Judicial Education Institute, Nova Scotia and the Canadian Government, a Canada-South Africa Linkage Project has been established. A committee is currently examining and compiling a report on the education and training of judicial officers in South Africa. The ob-



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jective of this study is to record the current judicial education system noting its strengths and weaknesses, gathering information about comparative models of judicial education and principles which generally underpin it and make recommendations concerning the organisation, governance, implementation and funding of judicial education in South Africa. As part of its consultative process, besides consulting with organisations and members of the legal community and calling for public submissions in this regard, a questionnaire was sent to all judges, magistrates and presiding officers of the Family Court. The questionnaire defined judicial education as

'education and training designed to equip candidates for judicial office, newly appointed judicial officers and judicial officers generally, to discharge their judicial functions more expertly, more efficiently, more perceptively and with a better general understanding of, and sensitivity to, the society in which they work.'

It also essentially deals with three phases of education: pre-appointment, induction and continuing education. The questionnaire tries to elicit responses relating to whether there is support for training, when it would be most feasible to hold training, whether judges and magistrates should receive certain training together, whether training should be voluntary or compulsory, the length of training period, and which body should ultimately bear responsibility for training judicial officers. Once this process is completed the committee's report will be made public. This is expected to materialise in the form of an advisory report submitted to the Minister of Justice around April/May 1999.

\* This is an abridged version of a paper published in the Twenty-fourth Report on the Standing Advisory Commission on Human Rights for 1998-1999 in Northern Ireland.

A training committee consisting of judges, on which both the Chief Justice and President of the Constitutional Court serve, has been established. Under its auspices two orientation programmes and two education programmes have already taken place. Last year, orientation for newly appointed judges entailed using existing judgments to evaluate judgment writing and judges were provided with a bibliography of relevant reading material. The education programme was led by Constitutional Court Justice Johan Kriegler and was well received.<sup>2</sup>

A common problem encountered in other jurisdictions and which may also become evident here is judicial reticence in accepting training from non-judges. In Canada, judicial programmes have proven successful where judges rather than outsiders do the organisation and teaching. Even input from academics is poorly received.

## Reasons

The Chief Justice when addressing the first orientation programme gave consideration to some of the reasons why judicial education has become a prerequisite for an effective independent judiciary. I deal with some of these briefly. First, the changes which law in South Africa has undergone, especially with the transition to a constitutional supremacy, has resulted in initial training received becoming wholly inadequate. Second, by reason of the purposive contextual interpretative approach adopted in constitutional matters, but which also affects almost every other area of law, judges have to keep abreast of changes and techniques which evolve, both in their own jurisdictions and in respect of international trends. Judges are thereby required to shift away from a literal interpretation of laws. Third, judges have their own presuppositions and to be able to identify, assess and review the needs of special groups or sensitive areas of law or the social context in which judgment is being given training would assist. Fourth, through judges getting together and sharing ideas and experiences efficiency and competency is promoted, legitimacy nurtured and independence protected.

However, there are a number of obstacles which have to be overcome before the South African judiciary unanimously accepts judicial education, particularly social context training as a necessary adjunct to

being a judge. These, *inter alia*, include a denial of such need, lack of information, fear that judicial independence would be jeopardised by training which could potentially direct how judges should think about particular issues, fear of 'special interest groups', fear of admitting to imperfections, the perception that it would politicise the courts, an expectation of unanimity from minority groups, inability to honestly examine personal values and institutional pressures.<sup>3</sup> In addition, it is perceived that such education is some form of punishment for 'old order judges'. The latter perception would easily be dispelled by all judges being part of the continuous judicial training. In fact a contrary perception could prevail, namely that participation could be perceived as a sign of commitment to the values entrenched in the Constitution.

It has also been proposed that aspiring judges who have ability and potential, but lack experience, undergo vocational training.<sup>4</sup> In this regard there has as yet been no significant progress. Unless some of the obstacles discussed above are addressed any judicial education programme implemented could prove to be counterproductive and divisive. Such training should be geared to include gender, religion, cross-cultural and race sensitivity training and as transformation proceeds issues such as urban-rural divide, sexual orientation, xenophobia, status and class should also be addressed.

It would be remiss to consider judicial education without reference to the lower courts, particularly as the focus on human rights education for judicial officers in the lower courts is imperative. Many more citizens interact with lower courts as opposed to the higher courts, and it is at this level where infringements of rights are most likely to be dealt with.

## Justice College

For many years, Justice College, which is a practice-orientated, functional legal training college, has borne the responsibility of training magistrates, prosecutors and other employees of the Department of Justice. Although it has also provided legal training in a variety of subjects to officials of other government departments, it bears no responsibility for training judges. In terms of regulation 3 of the Regulations for Judicial Officers in the Lower Courts, 1993 (GR 361

of 11 March 1994 published in terms of section 16 of the Magistrates Act 90 of 1993), no person may be appointed as a magistrate unless he or she has, *inter alia*, successfully completed the requisite course at Justice College. For magistrates, especially those seeking promotion, seminars and refresher courses pertaining to the latest developments in law, are compulsory.

A special focus is placed on the impact of the Bill of Rights for both magistrates and prosecutors. With this in mind, special fundamental rights training has been included in the curriculum at Justice College and sourced out to the Institute for Fundamental Rights. This training deals with the impact of the Bill of Rights and case law relating to fundamental rights under the new government. It entails lecture tours across different magisterial districts, distribution of summaries of Constitutional Court cases and examination of the trends and tendencies of the Constitutional Court at lectures.<sup>5</sup>

## NGOs

Also, in conjunction with Justice College, NGOs, and in particular the Law, Race and Gender Research Unit (LRG) at the University of Cape Town, have contributed in varying degrees to the furtherance of magistrates' education. The main focus of LRG is ongoing social context training concerning issues of diversity and, particularly, race and gender. This entails day-long presentation sessions at Justice College and national and regional workshops for magistrates. This has resulted in magistrates themselves being trained as facilitators and diversity trainers. They would then, in partnership with other resource people from academia and NGOs, train other magistrates at workshops and the college. Recently, a concerted effort was made to draw trainers from other areas of expertise, with a trainers workshop being held where social context training was thoroughly explored. LRG also organises monthly sessions at particular magistrates' courts where academics, practitioners and overseas experts address magistrates on special areas such as narcotics, rape, customary law and domestic violence. In addition, training material drawn from 'tried and tested' international sources have been adapted for the South African context.

LRG has made submission to the Department of Justice, regarding future educa-

tional programmes and advised that social context education and race and gender training be included in the training of all court officials in order to arm the courts with the skills needed to respond to the diverse needs of South Africans. This recommendation is equally valid in respect of the training of the judiciary.

It is cautioned that for judicial education, including social context training, to be successful and enjoy widespread support, judicial leaders, rather than politicians or the state, should spearhead it and encourage it. This must, however, be done in a manner which would not result in rules being evolved which would in any way infringe the independence of the judiciary or even be perceived as infringing such independence. Such independence not only protects judges from interference, but also ensures that the public has access to impartial credible forums whose decisions would be accepted.

However, independence does not mean judicial isolation or non-contextual decision-making. What it does mean is that the public has access to informed judges who are educated in respect of the mores and values of those whom they serve, even though they have not been exposed thereto during their own life experiences. Aptly put by Judge John Hlophe,<sup>6</sup>


“we need to appoint judges who are better educated, more broadminded and above all more sensitive to wider sociological issues, values and beliefs in society”.

Transformation in the appointments process has a role to play in ensuring that judges appointed to the bench reflect such sentiments but this in itself, without ongoing judicial education, may prove to be deficient.

### Endnotes

- 1 See generally the submissions to the Truth and Reconciliation Commission repro-

duced in the 1998 115 (1) *South African Law Journal* and also the welcoming address of the Chief Justice at the first orientation course of new judges at 107.

- 2 Information kindly provided telephonically during October 1998 by Ms Georgina Pickett, a Canadian employed by the Canada-South African Linkage project.
- 3 See the discussion by Judge Catherine Fraser, the Chief Justice of Alberta, Canada in an address to the Australian Legal Convention in September 1995 contained in *The Magistrate's Oath: Blueprint for Justice Workbook National Conference: 20-23 May 1998*. LRG Research Unit, UCT 1998.
- 4 1998 *De Rebus* Editorial.
- 5 See generally paras 2.16-2.45 of the Department of Justice *Annual Report 1996/97*.
- 6 “The Role of judges in a Transformed South Africa – Problems, Challenges and Prospects” 1995 *SACJ* 112. 

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