

THE ROLE OF TRANSBOUNDARY DIALOGUE: A RESPONSE TO STEPHEN ELLMANN

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1 Introduction

The novelty of Ellmann's paper derives primarily from the fact that it moves beyond the separation of powers and counter-majoritarian based critiques and analyses that have dominated academic discourse about South African constitutional law. For instance, in the second edition of the *Constitutional law of South Africa*, Woolman and Botha outline the multi-part structure of the fundamental rights analysis. The authors describe interpretation as characterised by a two-fold process: determining the meaning or the scope of a fundamental right followed by a determination of whether the right has been infringed. In most instances, a finding that the right has been limited leads to a third stage: limitations analysis. Under section 36, courts are, quite 'controversially', given the power to decide whether a democratically conceived law's infringement of a fundamental right indeed violates the Constitution or whether, in fact, the infringement of a right can be justified.¹ This controversial judicial power not only dominated scholarly work at the eve of the new legal order in 1994,² but vexed both jurist and academic alike when it came to the issue of the

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¹ S Woolman & H Botha 'Limitations' in S Woolman *et al* (eds) *Constitutional law of South Africa* (2nd Edition, OS, July 2006) Chapter 34.

² See A Sachs *Protecting human rights in a new South Africa* (1990); A Sachs 'A Bill of Rights for South Africa: Areas of agreement and disagreement' (1989) 21 *Columbia Human Rights Law Review* 13; and J Didcott 'Practical workings of a bill of rights' in Van der Westhuizen, (ed) *A bill of rights for South Africa* (1988) .

inclusion of economic, social and cultural rights in the Bill of Rights.³

The essence of Ellmann's argument is that in addition to the power of judicial review provided by the express provisions of the Constitution, the South African Constitutional Court's achievements should be understood in light of the values on which the Constitution is founded. He argues that the judges have an emotional commitment to these values and have enforced the law with those values clearly in mind. In this response, I demonstrate, first, that although perhaps new in the South African context, the discourse Ellmann opens up has featured in other discussions of the relationship between law and emotions, and to a certain extent in analyses of the relationship between law and politics.

Secondly, I demonstrate that while the approach of the Court may and should have been influenced by the emotional commitments of the judges, it has also been influenced by the transnational dialogue in which the Court has been engaged. The 'newness' of the Court has forced it to seek international recognition by relying on progressive foreign decisions.⁴ This 'newness' has also freed the Court to experiment with different pragmatic judicial approaches without being bogged down by precedent and a well-entrenched doctrine of *stare decisis*.

2 The 'old' separation of powers discourse

It is important to preface this response with an elucidation of the 'old' discourse. To use the word 'old' is not to suggest that the discourse has been exhausted. 'Old' is used here metaphorically to distinguish it from emerging 'new' discourses. The 'old' discourse is dominated by scholarly arguments that either justify or oppose judicial invalidation of the decisions of democratically elected branches of government. Proponents of judicial invalidation have concentrated on demonstrating that the courts have acted within the confines of the separation of powers doctrine. The 'old' discourse demonstrated quite clearly that the doctrine of separation of powers does not draw bright lines between the functions and the powers of each organ or branch of government. Sandra Liebenberg reckons that not only did the 'bounded model' of separation of powers fail to reflect the reality

³ See D Davis 'Democracy: Its influence upon the process of constitutional interpretation' (1994) 10 *South African Journal on Human Rights* 103; South African Law Commission *Interim Report on Group and Human Rights*, Project 58, August 1991; South African Law Commission, *Final Report on Group and Human Rights*, Project 58, October 1994; and C Sunstein 'Social and economic rights: Lessons from South Africa' (2001) 11 *Constitutional Forum* 123.

⁴ That said, as the Court builds its base of precedents, reliance on foreign decisions has been on the decline.

of modern political processes but also limited the creative intervention by the judiciary to protect socio-economic rights.⁵ Liebenberg endorses Martha Minow's 'co-operative model' of relations between branches of government:

the focus is less on whether one branch has transgressed its boundaries but rather whether the branches all remain able to participate in the process of mutually defining their boundaries.⁶

In the *First Certification Judgment*, the Constitutional Court conceived the doctrine in this same, less restrictive sense. The Court held that no universal model of separation of powers exists,⁷ and that the principle of checks and balances mandates necessary intrusion of one branch into the terrain of another.⁸

2.1 The 'delicate balance' discourse

Over time, discourse around the doctrine of separation of powers has moved toward an acknowledgement that the liberal version of the doctrine of separation of powers does not mean that the judiciary is not constrained. This recognition moved the debate to the question of the extent of permissible judicial intrusion.⁹ The Constitutional Court in *De Lange v Smuts NO and Others*¹⁰ conceives what it describes as a 'distinctively South African model of separation of powers' as requiring a delicate balancing:

between the need on the one hand, to control government by separating powers and enforcing checks and balances and, on the other hand, avoid diffusing powers so completely that the government is unable to take timely measures in the public interest.¹¹

In November 2005 the School of Law at the University of the Witwatersrand organised a high profile symposium to mark the retirement of Arthur Chaskalson as the Chief Justice of South Africa. The symposium was entitled: 'A delicate balance: The place of the

⁵ S Liebenberg 'The interpretation of socio-economic rights' in S Woolman *et al* (eds) *Constitutional law of South Africa* (2nd Edition, OS, December 2003) Chapter 33.

⁶ M Minow *Making all the difference: Inclusion, exclusion and American law* (1990) 361.

⁷ *S v Makwanyane* 1995 3 SA 391 para 108 ('Makwanyane').

⁸ *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*, 1996 1996 4 SA 495 at para 109 ('Certification').

⁹ See P Lenta 'Judicial restraint and overreach' (2004) 20 *South African Journal on Human Rights* 544; D Davis 'Adjudicating the socio-economic rights in the South African Constitution: Towards "deference lite"?' (2006) 22 *South African Journal on Human Rights* 301.

¹⁰ 1998 (3) SA 785 (CC) ('*De Lange*').

¹¹ *De Lange* (n 10 above) para 60.

judiciary in a constitutional democracy'. In the preface to a book containing the edited proceedings of this symposium, the organisers identify the source of the title as Chaskalson CJ's farewell speech at the Constitutional Court.¹² The author(s) of the preface deduce from the farewell speech that one of the challenges that the Constitutional Court faced was executing its mandate of enforcing a supreme Constitution against a history of parliamentary supremacy. The retiring Chief Justice writes: 'There is a delicate balance between the judiciary and the other branches of government' and that maintaining the balance requires the three arms of government to pay attention to their inter-relationship.¹³

What appears in judicial and academic jurisprudence is that the extent of the Court's intrusion is justified by the demand to protect the Constitution and the values upon which South African society is based. In this regard, the Court perceives its role as one of safeguarding the rule of law and the supremacy of the Constitution against infraction by the other branches.¹⁴ Indeed, although the Court has acknowledged and made use of judicial deference,¹⁵ it has been quick to point to the fact that institutional deference would not be exercised where the Court is to determine whether the right to equality (or some other fundamental right) has clearly been infringed.¹⁶ Such principled approaches to constitutional challenges to existing law also provide evidence of the Court's unwavering commitment to the basic law's deep core values. According to Albie Sachs (a retired Justice of the Constitutional Court):

When you see yourself as having a constitutional duty to defend deep core values which are part of emerging world jurisprudence and of evolving constitutional notions in your own country, you become sharply aware of the constitutional connection between the maintenance of judicial independence and the protection of human dignity.¹⁷

The fundamental question that Ellman engages turns on the source of the values which the judiciary feels obligated to uphold. This question

¹² 'A delicate balance: The place of the judiciary in a constitutional democracy'. *Proceedings of a symposium to mark the retirement of Arthur Chaskalson, former Chief Justice of the Republic of South Africa* (2006).

¹³ 'Delicate balance' (n 12 above) vi.

¹⁴ See P Langa 'The separation of powers in the South African Constitution' (2006) 22 *South African Journal on Human Rights* 5.

¹⁵ See *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & Others* 2004 4 SA 490 (CC).

¹⁶ *MEC for Education, KwaZulu-Natal & Ors v Pillay* 2008 1 SA 474 (CC). For a discussion of other Constitutional Court cases that engage the subject of deference see K McLean *Constitutional deference, courts and socio-economic rights in South Africa* (2009) 84 - 88.

¹⁷ A Sachs 'The judicial enforcement of socio-economic rights: The *Grootboom* case' in P Jones and K Stokke (eds) *Democratising development: The politics of socio-economic rights in South Africa* (2005) 131, 139.

has not adequately been addressed in South Africa. According to Ellmann, can we specify the values to which judges should be committed? A simplistic answer – by reference to the Constitution – will not do. As Ackermann J notes the Constitution is not a mere ‘super statute’ but rather ‘a quintessential grundnorm or foundational, generative value system’.¹⁸ The South African Constitution sets out the values upon which the Republic of South Africa is founded in section 1: (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 rule of law; and (d) universal suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.¹⁹

What emerges from Ellmann’s paper is that defining constitutional values is not as simple as it appears. Ellmann alludes to the absence – or easy identification – of objective normative values to which all people can or should adhere. One could simply point Ellmann to the constitutional values outlined above and argue that there they are clearly and distinctly set out. Indeed, Ellmann himself points to their existence. The fundamental question posed by Ellman though is what to make of values so broadly stated:

Human dignity, the achievement of equality and the advancement of human rights and freedoms’ are capacious values; sincere men and women can surely hold, and reasonably hold, many specific understandings of these terms.

Even when there seems to be an objective universal document to which most, if not all, people agree, disagreements may arise during their practical application. Ellmann offers a spate of recent cases in which such disagreements arise.²⁰

As a matter of fact, South African legal scholarship has not adequately and in a philosophical manner engaged the issue of finding sources and defining constitutional values. For instance, although many legal scholars have underscored human dignity as the most important of the values, they still fall short of giving conclusive and decisive definitions of what human dignity entails. Nazeem Goolam, for instance, defines human dignity as ‘a universal human duty, a

¹⁸ LWH Ackermann (Justice Emeritus) ‘Opening remarks on ‘A delicate balance: The place of the judiciary in a constitutional democracy. *Proceedings of a symposium to mark the retirement of Arthur Chaskalson, former Chief Justice of the Republic of South Africa*’ (2006) 8. ‘Delicate balance’ (n 12 above) vi. Section 1.

¹⁹ See for instance *CUSA v Tao Ying Metal Industries*, 2009 1 BCLR 1 (CC); *Wary Holding Ltd v Stalwo (Pty) Ltd*, [2008] ZACC 12; *Independent Newspaper (Pty) Ltd v Minister of Intelligence Services* 2008 8 BCLR 771 (CC).

universal human responsibility'.²¹ Goolam then refers to human dignity as an ethic of community consistent with non-western traditions of obligations and responsibilities.²² Liebenberg, for instance, goes to great length to elaborate the importance of the value of human dignity from the perspective of the realisation of socio-economic rights.²³ In spite of this, Liebenberg advises the courts 'to determine how much must be provided, to whom, at what pace and in what order of priority'.²⁴ Indeed, parts of Liebenberg's article provide evidence of how controversial definitions of values can be because of the varying conceptions of not only what they mean but their importance in different contexts. For example, Liebenberg explores the indeterminacy of the value of human dignity and its potential to promote individualised needs at the expense of redistributive demands.²⁵

Defining constitutional values is not an easy task. Ellmann's appraisal of some of the deeper factors that complicate the determination of such definitions runs as follows:

[i]n 15 years, South Africa's Constitutional Court – and the judges of the Supreme Court of Appeal and the High Courts – have traversed most of the history of US constitutional law, a history that took us two centuries to compile, and have marked out new ground of their own.

He describes the achievements as miraculous: the decisions range from an early finding of the unconstitutionality of the death penalty; expansions of freedom of speech; engagement with the Executive's handling of foreign relations; novel approaches to administrative justice; the recognition of equal rights under law for blacks and whites, gays and straights, men and women; the provision of rights of public participation in legislative processes; and the development of socio-economic rights.

The big question for me is whether Ellmann's paper gives a sufficient explanation for and adequately describes the factors that explain this miraculous achievement. Why did it take the US Supreme Court fifty years to overrule *Plessy v Ferguson*, yet after less than two

²¹ N Goolam 'Human dignity – Our supreme constitutional value' (2001) 4 *Potchefstroom Electronic Law Journal* 43, 46.

²² Goolam (n 21 above) 47 and 48.

²³ S Liebenberg 'The value of human dignity in interpreting socio-economic rights' (2005) 21 *South African Journal on Human Rights* 1.

²⁴ Liebenberg (n 23 above) 3.

²⁵ Liebenberg (n 23 above) 5 - 6. Liebenberg engages a range of different responses to the meaning of 'human dignity': D Davis 'Equality: The majesty of Legoland jurisprudence' (1999) 116 *South African Law Journal* 398; S Cowen 'Can "dignity" guide South Africa's equality jurisprudence' (2001) 17 *South African Journal on Human Rights* 34; and C Albertyn & B Goldbatt 'Facing the challenge of transformation: Difficulties in the development of an indigenous jurisprudence of equality' (1998) 14 *South African Journal on Human Rights* 248.

years into the new constitutional dispensation the South African Constitutional Court was deciding *Harksen v Lane No and Others*.²⁶ Indeed, *Brown v Board of Education's* overruling of *Plessy* was not immediately understood: its impact was only to be felt later. The decision was initially only used in education cases and only applied to other areas to dismantle racial discrimination after some time. In contrast, *Harksen's* impact was immediate. The reasoning in *Harksen*, a seemingly private law case, was applied in the 1998 case of *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others*²⁷ The same reasoning was followed in *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs & Others*. Ackermann J held: '[I]n dealing with the equality challenge I shall follow the approach laid down by this Court in various judgments as summarised in *Harksen v Lane No and Others ...*'.²⁸

The most intriguing line of argument made by Ellmann to explain the miraculous achievements is in relation to the role of emotion and empathy in judging. This argument is made at an especially propitious moment: a moment of significant change in the personnel on the Constitutional Court, questions about the true meaning of the notion of rule of law, the role of the law in giving political direction, and the intermittent violence making its presence felt at the time of writing.

3 The 'new' discourse: Technical, emotional or political adjudication?

Ellmann's ideal judge is one who is emotionally attached to the values he or she seeks to interpret and enforce:

we simply would not feel confident that a judge who shared none of our values could apply those soundly. How would this judge know what really mattered to us, if none of it mattered to him?

Ellmann goes to great length and adduces neurological evidence to prove that as human beings we do not make decisions in an unemotional manner. He argues that logic alone does not produce coherent decisions for human minds. In his opinion, the word 'embrace' in the statement that constitutional judges should embrace the values of the constitution is not entirely metaphorical. Instead, it means to be emotionally attached. And, moreover, this emotional component is critical to the analysis and the disposition of the matter.

²⁶ 1998 1 SA 300 (CC).

²⁷ 1999 1 SA 6 (CC) ('NCGLE').

²⁸ NCGLE (n 27 above) 32 [footnote omitted].

Although seemingly new in the South African context, the relationship between law and emotions, from which Ellmann's arguments appear founded, has for some time now been the subject of legal discourse.²⁹ This discourse, directed by legal philosophy, psychology and neurology, has battled with the argument founded in Western philosophy to the effect that emotion and reason were antithetical to one another.³⁰ According to Petty, the long-standing dichotomy between emotions and rationality in law stand in a marked contrast to the growing conviction in other disciplines that emotions and rationality are inextricably and usefully linked.³¹ Nussbaum argues a system of law cannot be understood without some reference to emotions: the emotions indicate what is important to those the law should protect.³² Petty has gone as far as alluding to the legal community's naivety and simplistic understanding as one of the reasons for the increasing disparity between the ways in which the legal community and scholars in related fields talk about the role of emotions in decision making.³³

The legal community's simplistic understanding looks at emotions as merely non-cognitive passively experienced mental states.³⁴ This simplistic understanding of emotions could explain the legal community's rejection of emotions as prejudicial, sometimes at the expense of virtually important emotions.³⁵ Recent scholarly work however shows that sometimes emotion may be useful and aid the making of rational decisions. In their argument synthesising article, Huang and Anderson refer to what they describe as 'positive emotions' that improve aspects of decision-making.³⁶

Looking at South Africa, it is important to point to the fact that some of the questions raised and answered by Ellmann mirror issues discussed in Karl Klare's seminal article 'Legal culture and transformative constitutionalism'.³⁷ Klare's discussion is premised on what he describes as 'transformative constitutionalism': a phrase inspired by Etienne Mureinik's own metaphor in describing the new legal order as a 'bridge' from authoritarianism to 'a culture of

²⁹ See A Bandes (ed) *The passions of law* (2000); A Blumenthal 'Does mood influence moral judgment? An empirical test with legal and policy implications' (2005) 29 *Law & Psychology Review* 1; M Nussbaum *Hiding from humanity: Disgust, shame and the law* (2004).

³⁰ E Petty 'The emotional juror' (2007) 76 *Fordam Law Review* 1609, 1609.

³¹ Petty (n 30 above) at 1612. See also H Huang and J Anderson 'A psychology of emotional legal decision making: Revulsion and saving face in legal theory and practice' (2006) 90 *Minnesota Law Review* 1045.

³² Nussbaum 'Hiding' (n 29 above), at 5 - 6.

³³ Petty (n 30 above) 1613.

³⁴ Petty (n 30 above) 1614.

³⁵ As above.

³⁶ Huang & Anderson 'A psychology' (n 31 above) 1067.

³⁷ (1998) 14 *South African Journal on Human Rights* 146.

justification'.³⁸ Klare takes this Mureinik's bridge metaphor a step further. Klare describes 'transformative constitutionalism' as a long term project committed to transforming a country's social and political institutions. He writes: 'an enterprise of inducing large-scale social change through nonviolent political processes grounded in law.'³⁹ For Klare, 'the traditional, bright-line framing of the law/politics dilemma in adjudication is simplistic.'⁴⁰ In this regard, clearly highlighting the role of emotion, Klare illustrates the inevitability of value judgments in this form of adjudication:

In short, the judge's personal/political values and sensibilities *cannot* be excluded from interpretive processes or adjudication. Not because judges are weak and give in to political temptation, but because the exclusion called by the traditional rule-of-law ideal is quite simply impossible.⁴¹

Klare argues further that: 'it would be foolish to deny that the judicial process, especially in the field of constitutional adjudication, calls for value judgments in which extra-legal considerations may loom large'.⁴² Again: the question that animates my reply to Professor Ellmann inquires into the source and the nature of the emotions that have guided South African judges. As a matter of fact, emotions guiding adjudication could also be grounded in negativity and regression. Additionally, non-uniformity of emotions among judges can cause sharp disagreements of the kind on display in both 'turf' and 'doctrinal' battles between the Constitutional Court and the Supreme Court of Appeal.

On the face of it, one's political backgrounds and values may appear to have no bearing on one's emotional commitments. As a matter of fact, however, a person's political beliefs may be so strong that they translate into an emotional commitment to protect values that reflect and enhance such beliefs.

What has produced coherent adjudication and a situation of rarely divided judgments from the Constitutional Court is the fact that the judges share the same political orientation and appear committed to the same values. This uniformity could be explained by the backgrounds of the different judges and their lives before coming to

³⁸ See E Mureinik 'A bridge to where? Introduction to the Interim Bill of Rights' (1994) 10 *South African Journal on Human Rights* 31.

³⁹ Klare (n 37 above) 150.

⁴⁰ Klare (n 37 above) 160.

⁴¹ Klare (n 37 above) 163.

⁴² See *Makwanyane* (n 7 above) para 207 (Kriegler J). Klare also quoted Justice Mokgoro's dicta, at paras 302 - 4, to the effect that the interpretative task frequently involves making constitutional choices by balancing competing fundamental rights and freedoms and that such balancing can only be done by reference to a system of values extraneous to the text itself.

the bench. A quick examination of the members the Constitutional Court shows that it has been dominated by persons who were intricately involved in and made immense sacrifices to sustain the struggle against apartheid. Indeed, as alluded to by Theunis Roux, all the judges of the Constitutional Court have been either former African National Congress (ANC) people or sympathetic to ANC's social transformation policies.⁴³ In this regard, Roux asserts that far from being a weakness, this fact has contributed to the Court's independence. The connection with the ANC and other liberation movements gave the Chaskalson Court the ability to say 'no' to the executive and not fear reprisal on the grounds that the judges had a different political belief set.⁴⁴

Ellmann shows that the majority of the judges knew what mattered to South Africans and that such 'emotional intelligence' made it easy for them to embrace the values to which most South Africans are committed. An examination of some original and current judges of the Court reveals that the majority have in the past pursued not only a legal, but also political career, sometimes mixing the two. This legally and politically engaged bench has imposed its approach on lower courts – the Supreme Court of Appeal and High Court – that may not have shared its political and emotional predispositions. The question of moment, one that hovers over Ellmann's paper, is whether the Constitutional Court will 'stay the course' as the composition of its bench changes. (At the time of writing, all of the original Constitutional Court judges had retired.)

Former Chief Justice, Arthur Chaskalson's role in the struggle against the injustices of the apartheid regime is well documented. A quick perusal of his profile – as summarised on the Constitutional Court's website – shows that during Chaskalson's career at the Bar, he appeared as counsel on behalf of members of the liberation movements in several major political trials between 1960 and 1994. He indeed featured as counsel in the Rivonia Trial in 1963/1964 at which Nelson Mandela and other leaders of the African National Congress were convicted and sentenced to life imprisonment.⁴⁵ The profile lists a number of human rights advocacy activities which Chaskalson has been involved in, including: (i) being a founder member of the Legal Resources Centre (LRC), a non-profit organisation formed in 1978 to pursue justice and human rights in South Africa; (ii) Member of the board of the Centre for Applied Legal

⁴³ T Roux 'Principle and pragmatism on the Constitutional Court of South Africa' (2009) 7 *International Journal of Constitutional Law* 106.

⁴⁴ Roux (n 43 above).

⁴⁵ See Constitutional Court website at the following link <http://www.constitutionalcourt.org.za/site/judges/justicearthurchaskalson/index1.html>. See also C Bamberger 'Introduction of Chief Justice Arthur Chaskalson' (2009) 24 *Maryland Journal of International Law* 19.

Studies from 1979 to 1994; (iii) Member of the National Council of Lawyers for Human Rights (1980-1991); and (iv) Vice Chairman of the International Legal Aid Division of the International Bar Association (1983-1993). Chaskalson has won a number of awards arising from his work and commitment to the protection of human rights. Just reward for an advocate perceived by the apartheid government as ‘the political lawyer’ and thus unsuitable for the bench.⁴⁶

At the LRC, Chaskalson litigated a number of cases in which people were brutalised and framed by the apartheid police and faced the prospect of the death penalty. With this background, and when the opportunity presented itself to decide the constitutionality of the death penalty in *Makwanyane*, Chaskalson CJ was the most qualified justice to write the lead judgment: one cannot rule out his being emotively or even empathetically attached to the case and the petitioners. The lead judgment reflects a man who knows the nuances of the criminal justice system and its history of manifest injustice. In this case, Chaskalson CJ demonstrates that he is not a mere technician, but appreciates the impact of such social factors as race and poverty on the outcomes of criminal judicial processes:

It cannot be gainsaid that poverty, race and chance play roles in the outcome of capital cases and in the final decision as to who should live and who should die.⁴⁷

A judge who could perhaps be used to prove beyond doubt Ellmann’s views on the role of emotion and empathy in judging is Albie Sachs (now retired from the Constitutional Court). Like Chaskalson, Sachs was not only a founding member of the Constitutional Court but also at the centre of the struggle against apartheid. Sachs was himself a direct victim of the apartheid system, having been detained without trial a couple of times and physically disabled as a result of an attempted assassination. Another thing that makes Sachs special is his political background: he was an ardent member of and active participant in decision-making of the ANC. During the Judicial Service Commission interview for a place on the Constitutional Court, Sachs was asked about his political affiliation and how this history would influence his decisions as a judge. His answer demonstrates that a political background may well be viewed as an asset rather than a liability:

I might say that I do not think that it is a disadvantage to the court to have a member who has had political experience and I say this with the confidence ... The test is not whether or not you are being politically

⁴⁶ G Bizos ‘General Remarks’ at ‘A delicate balance: A symposium to mark the retirement of Arthur Chaskalson, former Chief Justice of the Republic of South Africa’ (n 12 above).

⁴⁷ *Makwanyane* (n 7 above) para 51.

active and involved, the test is do you have the independence and the credibility as a thinker and as a person to work well. And the feeling there is that if you are going to have somebody who is going to act as a brake on Parliament, a brake on the executive, it is better to have people, at least some of the Judges who know the mechanisms and the working and the thought processes to be able to be most effective in that respect. It is not enough just to be honourable and clever, you are working in society and you are relating to other institutions of Government and a good Constitutional Court functions well within that context. And I think that from that point of view a little bit of experience in the world outside of the courts will not be at all damaging to the court and I will be happy to contribute that.⁴⁸

Ellmann's arguments augment Sachs' views. Ellmann states that technical skill alone is not enough: the judge must be committed to the values society wishes to promote. To Ellmann, the connection between skill and emotion explains why the framers of the South African Constitution created the Constitutional Court and staffed it with judges who shared a passionate rejection of the values of apartheid. Sachs is an epitome of such a judge. In his own words, he describes how he has cried twice after judgment has been delivered: in *Hoffman v South African Airways*⁴⁹ and *Minister of Health and Others v Treatment Action Campaign*.⁵⁰ Sachs' explanation of why he cried shows both a high level of commitment to the constitutional values and sense of empathy to victims of violations: 'The tears had come because of an overwhelming sense of pride at being a member of a court that protected fundamental values and secured dignity for all human beings.'⁵¹ According to Sachs J, this response was stirred by his seeing in Court persons with T-shirts reading 'HIV Positive' and the cheers that followed the delivery of the judgments.

Sachs J also represented another unique aspect of South Africa's Constitutional Court: some judges had served as architects of the new legal order and the values upon which it is premised. Sachs was present at the adoption of the Freedom Charter, a document which later became the blue print for the 1994 and 1996 constitutions. Within the ANC, Sachs was at the forefront of advocacy for the adoption a Bill of Rights, which some members had dismissed as a 'Bill of Whites'.⁵² His scholarly writings are proof of this sustained commitment.⁵³ Space and time does not allow for a review of all Sach's judgments. A short review, however, shows that the reasoning

⁴⁸ Sachs' response to interview questions at the Judicial Service Commission, available at <http://www.constitutionalcourt.org.za/site/judges/transcripts/albertlouissachs.html>.

⁴⁹ 2001 1 SA 1 (CC).

⁵⁰ 2002 5 SA 721 (CC).

⁵¹ Sachs 'Judicial enforcement' (n 17 above) 152 - 3.

⁵² See Sachs interview with JSC (n 48 above).

⁵³ See Sachs 'Protecting' (n 2 above); and Sachs 'A Bill of Rights' (n 2 above).

in his judgments has in the main been directed not by black letter law but rather by what he conceptualises as an ideal society shaped by the values to which he is committed and worked to bring into existence. In *Minister of Home Affairs v Fourie*,⁵⁴ in which Sachs wrote the lead judgment, for instance, he could have simply, and in a technical manner, referred to sexual orientation as a ground upon which discrimination is constitutionally prohibited. He, however, goes to great length to ground his reasoning on what he describes as the different family formations which have to be accepted in an evolving South Africa. This is in addition to realising what he describes as '[a] democratic, universalistic, caring and aspirationally egalitarian society which embraces everyone and accepts people for who they are'.⁵⁵

In terms of the political struggle, Justice Zak Yacoob's background is similar in many respects to that of Sachs J and Chaskalson CJ. The influence of empathy on Yacoob's judgements in such cases as *Njongi v Member of Executive Council, Department of Welfare, Eastern Cape*⁵⁶ is discussed in detail by Ellmann. As with his learned brothers above, one could trace Yacoob's approach on the bench back through his career. As legal counsel, Yacoob was involved a number of criminal trials of anti-apartheid activists. He represented the famous 'Durban Six' who occupied the British Consulate in Durban in a 1984 protest against apartheid and unjust laws.⁵⁷ Although he denies being a politician, he acknowledges his involvement in politics and his goal of achieving democracy in South Africa.⁵⁸ Yacoob was also a member of a panel of experts advising the Constitutional Assembly in the drafting of the Constitution and served as a commissioner in the first post apartheid Independent Electoral Commission.

Justice Yacoob's profile on the Constitutional Court website has a portion entitled 'politics'. It lists a number of political activities in which he has been engaged: member of the executive of the Natal Indian Congress; member of the executive committee of the Durban Detainees' Support Committee and member of the executive committee of the Durban Housing Action Committee. Membership of the Housing Committee could explain the sense of empathy that one sees at the opening of Justice Yacoob's judgment in *Grootboom*. To him, the case was a reminder of the intolerable conditions under

⁵⁴ 2006 1 SA 524 (CC) ('Fourie').

⁵⁵ *Fourie* (n 54 above) para 60.

⁵⁶ 2008 6 BCLR 571 (CC).

⁵⁷ See Yacoob's profile at <http://www.constitutionalcourt.org.za/site/judges/justicezakYacoob/index1.html>.

⁵⁸ Interview with the Judicial Service Commission available at <http://www.constitutionalcourt.org.za/site/judges/transcripts/yacoob.html>.

which many people lived, of which the petitioners were a fraction.⁵⁹ Yacoob also lucidly illustrates the historical origins of the problem of housing in the country, sketching the political design of the apartheid housing policy.⁶⁰

3.1 Emotional adjudication and impartiality

Although Ellmann acknowledges the role of emotion, he is also apprehensive about its potential to compromise impartiality in judging. He partly bases his conclusion on human nature:

People become committed to particular ideas, and it becomes impossible to persuade them to depart from those commitments. Equally commonly, people become overwhelmed by emotions – hate, love, fear, all of the normal range – and as a result they make judgements that are unreasonable.⁶¹

To his question, how can judges avoid into this falling peril? Ellmann's answer is simply 'fight fire with fire' by another emotion, empathy, which would make them feel a connection to every litigant. In my opinion, I think Ellmann has overstated the impact of emotion on human judgment.

As indicated by Jeremy Blumenthal, traditionally, discussions of the role of emotions in the law have framed emotions as a counterpoint to rational thought because of the belief that as a corruptive force, emotions distort logical reasoning.⁶² While one agrees that emotion is an unconscious process with the ability to hijack human faculties, human capacity to control emotion, although potentially idiosyncratic, is generally varied. Emotions can be contained and a professional will not allow emotion to cloud reason. Even when guided by emotion, a professional will at least find reasons to justify the conclusions made. In this regard, one may want to borrow from Blumenthal's distinction and contrast of emotions and mood:

[E]motions – anger, fear – tend to be more stable, focused, and attributable to a particular source; moods tend to be more transient, diffuse, and less attributable to particular sources (anxiety, elation, depression). Generally speaking, moods, not emotions are more likely to influence reasoning ...⁶³

⁵⁹ *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 2 (*Grootboom*).

⁶⁰ *Grootboom* (n 59 above) para 6.

⁶¹ *Grootboom* (n 59 above) 6.

⁶² Blumenthal (n 29 above) 2.

⁶³ Blumenthal (n 29 above) 3.

The argument here is that judges may be emotionally attached to values, but still remain legally rational and unmoved by mood. For example, the judges had compassion for the plaintiff in *Soobramoney* and yet they could not give him what he demanded. The closing words of Justice Sachs are illuminating in this regard: 'If resources were co-extensive with compassion, I have no doubt as to what my decision would have been.'⁶⁴ Indeed, even in those cases where the outcome appears to have been influenced by empathy, the Court's decision-making process retains all the hallmarks of rationality. For example, in *Nyathi v Member of Executive Council*,⁶⁵ the Court was partly influenced by the fact that in spite of legally being entitled to compensation for damage arising from negligence of medical personnel, the applicant could not afford to pay for medical care to cater for his deteriorating health. The following statement from Madala J is evidence of empathy on the part of Court:

The circumstances of this case show the potential that section 3 has for the limitation of the right to dignity. The applicant was made to wait for an extremely long time for money required to pay The state was made fully aware of this very desperate situation but provided no relief.⁶⁶

In spite of such empathy, the Court still founded its decision on the fact that section 3 of the State Liability Act results in discrimination arising from the differential treatment between private judgement debtors and the state.⁶⁷ The Court also found, under section 36, that the restriction was not reasonable and justifiable in a free and democratic society based on equality and human dignity.⁶⁸ The Court held, quite reasonably, that not all attachment would disrupt government services.⁶⁹

It is also important to note that most judges, although committed to a specific value or set of values, will be conscious of other competing values. Indeed, the approach of the South African courts suggests that they are conscious of the need to weigh competing values and strike an appropriate balance.⁷⁰ Such awareness should force even a 'passionate' judge to give audience to all parties and allow the parties to frame their arguments in terms of values that they reckon should guide the court's decision.

⁶⁴ *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 1 SA 765 para 59.

⁶⁵ [2008] ZACC 8.

⁶⁶ *Nyathi* (n 65 above) para 45.

⁶⁷ *Nyathi* (n 65 above) para 47.

⁶⁸ *Nyathi* (n 65 above) para 50.

⁶⁹ *Nyathi* (n 65 above) para 51.

⁷⁰ See C Mbazira 'Enforcement of socio-economic rights in South Africa: Strengthening the reasonableness approach' (2008) 26 *Nordic Journal of Human Rights* 131.

3.2 Beyond emotions

It should be noted that in addition to the emotional commitment of the judges, another reason that could explain the Constitutional Court's achievements is the 'newness' of the Court. In a 1999 paper,⁷¹ Iain Currie sets up Ronald Dworkin⁷² Hercules as a strawman in explaining how we should best understand how newness of a court could affect its performance. Currie – like Cass Sunstein – is sympathetic to a 'new' Constitutional Court's unwillingness to offer thick theories that explain the basis for all its decisions. Unlike Dworkin's Hercules – who has the luxury of time for 'in depth research and reflection on a decision that more pressed courts do not have'⁷³ – the Constitutional Court does not have infinite amounts of time. Currie rejects a Dworkian model that holds that judges should, to the fullest extent possible, emulate Hercules even though

[Hercules] works so much more quickly (and has so much more time available) that he can explore avenues and ideas [real judges] cannot; he can pursue, not just one or two evident lines in expanding the range of cases he studies but all the lines there are.⁷⁴

As it so happens, although the roll of the Constitutional Court has been growing every year, this Court has had a relatively light caseload. According to Roux, this light load has allowed the Court to pay great attention to the rhetorical construction of its judgments and to foreign authority.⁷⁵ In my opinion, however the newness and the light load of the Court has also allowed it to build its jurisprudence without necessarily being constrained by precedents. Such precedents could have bound the judges and prevented them from making decisions based on their beliefs and value commitments. In addition, the absence of precedents has allowed the Court to easily engage in a constitutional dialogue with foreign courts and to be guided by foreign authorities that strengthen the emotional commitment of the judges to certain values. As powerful as emotional commitment to values may be, the role that approaches and judgments from foreign jurisdictions have played in shaping South African constitutional law jurisprudence should not be underestimated. Like trade in goods and services, globalisation has spurred and moved constitutional dialogue beyond the borders, in what has been described either as 'transjudicial dialogue', 'judicial

⁷¹ I Currie 'Judicious avoidance' (1999) 15 *South African Journal on Human Rights* 138.

⁷² R Dworkin *Laws' empire* (1986).

⁷³ Currie (n 71 above) 143.

⁷⁴ Dworkin as quoted by Currie (n 73 above) 143.

⁷⁵ Roux (n 43 above) 23.

comity',⁷⁶ or as 'transnational constitutional dialogue'.⁷⁷ One Canadian scholar has described this process as "'globalawzation" – globalisation of law'.⁷⁸ This trend has changed the traditional perception that domestic commentaries, constitutions and case-law themselves are the sole bases for analysis and interpretation of domestic constitutions.⁷⁹ This new phenomenon has been described as one of the most remarkable legal phenomena of our times.⁸⁰ It is increasingly being used by scholars to unravel the approaches of both domestic constitutional courts and international tribunals.⁸¹

It should be noted, however, that reliance on foreign judicial approaches is not an entirely new phenomena. During colonial times, the colonised states received and relied on their colonial masters' legal systems and judicial approaches in their entirety. What, however, distinguishes the old from the current approach is the move away from the process of one-way transmission to a process of dialogue.⁸² The current dialogue 'takes place at a horizontal level without a clear-cut division between those that "export" and those that "import" opinions or legal positions'.⁸³

The South African Constitutional Court has become a part of this trade - an exporter and importer of constitutional jurisprudence. A lot could explain South Africa's vigorous participation in the transnational dialogue. Foremost is its Constitution: it requires the courts, in interpreting the Bill of Rights, to follow international law and consider foreign law.⁸⁴ For example, the Constitution requires a court to prefer any reasonable interpretation of legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.⁸⁵ The Court has, with some hesitation, given effect to these provisions.⁸⁶ Indeed, some judges of the Constitutional Court have proclaimed their 'constitutional duty to defend deep core values *which are part of emerging world jurisprudence*'.⁸⁷

⁷⁶ MR Ferrese 'When national actors become transnational: Transjudicial dialogue between democracy and constitutionalism (2009) 9(1) *Global Jurist* 1, 2.

⁷⁷ C Vicki 'Constitutional dialogue and human dignity: States and transnational constitutional dialogue' (2004) 65 *Montana Law Review* 15.

⁷⁸ A Dodek 'Canada as constitutional exporter: The rise of the "Canadian Model" of constitutionalism' (2007) 36 *Supreme Court Law Review* 310, 311.

⁷⁹ C Moon 'Comparative constitutional analysis: Should the United States Supreme Court join the dialogue' (2003) 12 *Journal of Law & Policy* 229.

⁸⁰ Ferrese (n 76 above) 2.

⁸¹ See Vicki 'Constitutional' (n 77 above); Moon 'Comparative' (n 79 above); and Ferrese (n 76 above)

⁸² Moon (n 79 above) 244, fn 115.

⁸³ Ferrese (n 76 above) 5.

⁸⁴ Section 39(1)(b) and (c).

⁸⁵ Section 233.

⁸⁶ See *Makwanyane* (n 7 above) para 37.

⁸⁷ Sachs (n 17 above) [Emphasis supplied].

At the same time, however, the Court is alive to the dangers of a uncritical reliance on foreign decisions. As indicated by Ackermann J in *Fose v Minister Safety and Security*,⁸⁸ 'histories of the various constitutional dispensations are not the same'.⁸⁹ Hence, although the judge made detailed reference to United States' jurisprudence on the subject of damages as a constitutional remedy, he reminded himself of the fact that the law of delict differed in various legal systems. In the United States, it is divided along federal and state lines.⁹⁰ The Constitutional Court has also indicated awareness that South African law, especially with respect to the protection of human rights, could have evolved in ways which supersede foreign and international law. Hence, in *Fourie*, Sachs J rejected arguments based on Article 16 of the Universal Declaration of Human Rights that he believed undermined human rights. It had been argued that international law forbade same-sex marriages on the ground that the UDHR guaranteed the right to marry to only men and women and only protected the 'family'. Sachs reasoned that as conditions of humanity evolve, so do concepts of rights and that it would be strange to use principles of international human rights law to take away a guaranteed right: '[t]his would be more so when the right concerned was openly, expressly and consciously adopted by the Constitutional Assembly'.⁹¹

Other than the provisions of the Constitution and their reception, South African involvement in the dialogue could be given a philosophical justification. Dodek justifies South Africa's reliance on Canadian jurisprudence on the basis of Canada's foreign policy on apartheid: 'South Africans perceive Canada as having been a leader in the fight against apartheid ... [which has] created a milieu ... that is receptive to Canadian ideas, institutions and experts'.⁹² Dodek's argument, however, does not explain reliance on approaches from countries that did not play any visible role in the fight against apartheid such as Germany, Namibia, Hungary and Trinidad and Tobago.⁹³

Ferrese's 'newcomer' based explanation is somewhat more compelling: 'For newcomers, constitutional dialogue has much greater marginal utility because of their need for legitimation internally as well as internationally'.⁹⁴ Indeed, the Court in *Makwanyane* leans towards this explanation:

⁸⁸ 1997 (7) BCLR 851 (CC).

⁸⁹ *Fose* (n 88 above) para 24.

⁹⁰ As above.

⁹¹ *Fourie* (n 54 above) para 104.

⁹² Dodek (n 78 above) 324.

⁹³ Moon (n 78 above) 239.

⁹⁴ Ferrese (n 76 above) 20.

Comparative 'bill of rights' jurisprudence will no doubt be of importance, particularly in the early stages of the transition when there is no developed indigenous jurisprudence in this branch of the law on which to draw.⁹⁵

Indeed, as the Court matured and built its own jurisprudence over 15 years, reliance on foreign decisions decreased. One could also argue, in a way which reinforces Ellmann's thesis, that the Court's ongoing reliance on foreign jurisprudence is an indicator of values shared across borders.

4 Conclusion

Ellmann's paper introduces a new dimension in constitutional law discourse in South Africa: an examination of the contribution of the psychological factors, emotion in particular, on the approach(es) the judges have adopted.

An examination of the professional backgrounds of some former judges of the Constitution Court has largely proved Ellmann contentions about the emotional commitment of the judges of this Court. Nonetheless, a critical reading of Ellmann's paper must be guided by recent findings in psychology and neurology in the context of trying to understand the relationship between law and emotion. I would further contend that in addition to the emotional commitment of the judges, the quick development of South Africa's constitutional law could be attributed to the involvement of the Constitutional Court in an emerging transnational constitutional law dialogue. This engagement flows from the 'newness' of a Court that seeks international legitimacy and the absence a large body of domestic precedents upon which it can draw.

⁹⁵ *Makwanyane* (n 7 above) para 37.